OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD OF REVIEW
AND
JUDICIAL COUNCIL

HOLDINGS
OPINIONS
REVIEWS

VOL. 2

1949

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v. 2

Judge Advocate General's Corps

BOARD OF REVIEW

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1949

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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.

MAR 3 1949

CSJAGI - CM 335000

UNITED STATES	)	FIFTH ARMY
	)	
v.	)	Trial by G.C.M., convened at Fitzsimons General Hospital, Denver 8, Colorado, 26 November 1948. Bad Conduct Discharge.
	)	
Private First Class BOBBY CELLNER (RA 18290565), 9953 Technical Service Unit, Surgeon General's Office, Patients Detachment, Fitzsimons General Hospital, Denver, Colorado.	)	

HOLDING by the BOARD OF REVIEW
JONES, ALFRED and ACKROYD
Officers of the Judge Advocate General's Corps

---

1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private First Class Bobby Cellner, 9953 Technical Service Unit-Surgeon General's Office, Patients Detachment, Fitzsimons General Hospital, Denver, Colorado, did, at Fitzsimons General Hospital, Denver, Colorado, on or about 21 October 1948, willfully and wrongfully obliterate a public record, to wit: WD AGO Form 24A, Service Record; in Section 3-Prior Service, Total Service for Longevity Pay at Date of this Enlistment or Induction, under Years, did obliterate "none" and insert "2"; under Months, did obliterate "none" and insert "4"; under Organization, Arm or Service With Which Last Served, did insert "18 Sept 43" and "18 Dec 45"; under Grade at Time of Last Discharge, did insert "S/1c"; under Reason for Last Discharge, did insert "under age"; under Total Service Since Last Discharge by Purchase, under Years, did insert "2"; under Months, did insert "4"; under Days, did insert "0"; in Section 9-Remarks-Administrative, did obliterate

remark, "Pay gr title Tec 5 converted to Pfc", to read "Pay gr title Tec Sgt converted to S/1c"; in Section 12-Appointments, Promotions, or Reductions, under Grade or Rating, did obliterate "T/5" by changing it to "T/Sgt".

The accused pleaded not guilty to, and was found guilty of, the charge and specification and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for a period of one year. The reviewing authority approved the sentence, remitted the entire period of confinement, mitigated the dishonorable discharge to a Bad Conduct Discharge, and forwarded the record of trial for action pursuant to Article of War 50e.

3. Evidence

Sergeant Riegraf testified that it was her duty to see that records were complete and correct at the time men were to be discharged from the Fitzsimons General Hospital. The sergeant stated that she saw the accused on 20 October 1948 when he came to her and presented his records which he had obtained from the Service Record Section. She prepared the work sheet from the service record of the accused, which was among the records he brought to her, put the service record in the record jacket, placed a seal on the back of it and gave it to the accused to take to the Chief of the Medical Service Board to get the WD AGO Form 40 and the disposition slip. The sergeant next saw the service record on the following morning, the 21st of October 1948 (R. 7), at which time she compared the service record with the work sheet which she had prepared from the service record on the previous day and discovered that parts of the service record had been obliterated and altered (R. 8). Prosecution Exhibit #2 was identified as the service record of accused (R. 8) and the witness pointed out and identified page by page thereon many alterations and obliterations which were discovered as a result of comparison between the service record on 21 October 1948 and the work sheet made from the service record on 20 October 1948. This witness further stated that she did not see the accused make the changes in the service record (R. 9).

Major Rexrode testified that on 21 October 1948 Sergeant Riegraf brought the accused's service record to him and directed his attention to changes that had been made therein, whereupon he sent for the accused. Page 12 of the record reflects the following direct examination of Major Rexrode with respect to his conversation with the accused:

"Q. Did you question him?
"A. I did.

"Q. In your own words, describe the conversation?
"A. I asked him if he did not realize it was quite a serious offense to change official records. He said he just did not think, or words to that effect.

"Q. Did you ask him if he had changed his records?
"A. No, I did not.

"Q. You merely asked him why he had changed them?
"A. Yes, I did ask him why he changed them. He said the Adjutant General had the correct information.

"Q. Did you see the changes?
"A. I did.

"Q. What action did you take then?
"A. I informed him that he would not be separated as was planned, and he should return to his ward and not leave the post."

4. Discussion

Since the evidence contained in the record of trial apart from the replies of the accused to Major Rexrode's questions fails to support a strong inference of guilt, it becomes necessary to determine whether the replies to these questions, which replies we consider to be in the nature of a confession, were properly admitted in evidence.(CM 318851, Stacy, 68 BR 53, 59). The voluntary character of a confession is the fundamental and ultimate test of its admissibility (par 114a, MCM 1928). In CM 328351, Johnson, 77 BR 59, 61, the Board of Review said:

"When a confession is obtained by questioning of the accused by his military superior its admissibility must be established by competent evidence in the record:

(a) That it was of a spontaneous character (CM 255162, Lucero, 35 BR 47; CM 233611, Eckman, 20 BR 29; CM 224549, Sykes, 14 BR 159; CM 288872, Clark, 1 BR (POA 89); or

(b) That the accused, at all times throughout such questioning, substantially understood his rights as set out by AW 24 (CM 320252, Rodriguez (1947); CM 318851, Stacy (1947); CM 234561, Nelson, 21 BR 55; CM 237255, Chesson, 23 BR 317; CM 242082, Reid, 26 BR 391; CM 254423, Gonzalez, 35 BR 248)."

In the instant case, the record of trial is silent as to whether the accused was aware of his rights under Article of War 24 prior to being interrogated by Major Bexrode. Since the accused's confession was obtained as a result of this interrogation, it cannot be considered as having been made spontaneously. Consequently, the accused's incriminatory replies amounting to an admission of guilt were improperly received in evidence. Under the circumstances of the case, the error thereby caused must be held to have been prejudicial to the substantial rights of the accused.

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

_____, J.A.G.C.

SICK IN HOSPITAL
_____, J.A.G.C.

_____, J.A.G.C.

17 APR 1949

CSJAGI CM 335000 1st Ind

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

TO: Commanding General, Fifth Army, Chicago 15, Illinois

1. In the case of Private First Class Bobby Cellner (RA 18290565), 9953 Technical Service Unit, Surgeon General's Office, Patients Detachment, Fitzsimons General Hospital, Denver, Colorado, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under Article of War 50e (3), this holding, together with my concurrence, vacates the findings of guilty and the sentence.

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

(CM 335000).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

MAR 9 1949

CSJAGV CM 335048

UNITED STATES v. Recruit PETER NELSON (RA 37477316), 9225 Technical Service Unit, Transportation Corps, Receiving Company, Embarkation Regiment, NYPE, Camp Kilmer, New Jersey.	HEADQUARTERS COMMAND AND GENERAL STAFF COLLEGE AND FORT LEAVENWORTH, KANSAS Trial by G.C.M., convened at Fort Leavenworth, Kansas, 4 February 1949. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

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

1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Recruit Peter Nelson, 9225 Technical Service Unit-Transportation Corps Receiving Company Embarkation Regiment, NYPE Camp Kilmer, New Jersey, and attached Detachment #3, Headquarters Company, Station Complement, 5025 Area Service Unit, Fort Leavenworth, Kansas, then Private, 9225 Technical Service Unit-Transportation Corps, Receiving Company Embarkation Regiment, NYPE, Camp Kilmer, New Jersey, did, while en route from Fort Omaha, Nebraska to Camp Kilmer, New Jersey, on or about 19 May 1947, desert the service of the United States and did remain absent in desertion until he was apprehended at Allen, South Dakota, on or about 20 December 1948.

He pleaded guilty to the specification "except the words 'desert' and 'in desertion', substituting therefor respectively the words 'absent himself without leave' and 'without leave'," of the excepted words not guilty, of the substituted words guilty and not guilty of the charge but guilty of a violation of the 61st Article of War. He was found guilty of the charge and specification. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay

and allowances due or to become due 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 but reduced the period of confinement to one year, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or elsewhere as the Secretary of the Army may direct, as the place of confinement and forwarded the record of trial for action under Article of War 50e.

3. The only question to be considered is the propriety of the investigating officer acting as defense counsel. The record of trial discloses that the charges were investigated by Captain Vincent F. Coogan, Inf., who was the regularly appointed defense counsel of the court which tried accused, and who signed the record of trial as defense counsel (R2,3,17). It appears from the report of investigation accompanying the record of trial that Captain Coogan recommended that the accused be tried by general court-martial. Before the accused was arraigned the following statements were made to the court:

"The court proceeded to the trial of Recruit Peter Nelson, RA 37477316, 9225 TSU-TC Receiving Co. Emb. Regt NYPE who, on appearing before the court, was asked by the trial judge advocate whom he desired to introduce as counsel.

DEFENSE: The regularly appointed defense counsel and assistant defense counsel.

PROSECUTION: No member of the prosecution has acted as member, defense counsel, assistant defense counsel or investigating officer in this case. Has the defense counsel or assistant defense counsel acted as investigating officer, member or trial judge advocate in this case?

DEFENSE: The defense counsel has acted as investigating officer in the case.

PROSECUTION: The regularly appointed defense counsel has previously acted as investigating officer in this case. Under Article of War 11 he may not now act as defense counsel unless expressly requested by you. Do you expressly request that Captain Coogan act as defense counsel in this case, notwithstanding the fact that he acted as investigating officer previously?

ACCUSED: No, sir.

PROSECUTION: He does not expressly request that Captain Coogan so act?

DEFENSE: He has no objections to him acting.

PROSECUTION: For the purpose of the record will the accused so state that he does not object loud enough so the reporter can hear.

ACCUSED: No, sir, I have no objection". (R 3).

Article of War 11 (Public Law 759, 80th Congress) provides in part:

"Provided further, That no person who has acted as member, trial judge advocate, assistant trial judge advocate or investigating officer in any case shall subsequently act in the same case as defense counsel or assistant defense counsel unless expressly requested by the accused".

Prior to the enactment of the present articles of War (Public Law 759, 80th Congress) the Board of Review had occasion to discuss the propriety of investigating officers acting as defense counsels.

In CM 315877, Ellis, 65 B.R. 151, 159, the Board of Review said:

"***It follows that when the investigating officer then takes up the side of the defense he has placed himself in an inconsistent position which is incompatible with his prior view of the matter as investigating officer. We do not mean to say that in no event is it permissible for an accused to be represented in his trial by the officer who made the formal pre-trial investigation of the case; indeed, to so hold could very well constitute an abridgement of the right of an accused person to be defended by military counsel of his own choice. What we do hold, however, as a matter of fundamental fairness, is that, in the absence of a full recorded explanation to the accused of the factors and principles involved in such a choice, it cannot be assumed to his detriment that he appreciated the full significance of that choice or realized the inconsistent position in which such defense counsel would be placed in the eyes of the court".

In CM 316898, Mesquite, 66 B.R. 107,108, the Board of Review said:

"The Board of Review is of the opinion that where it affirmatively appears that the officer who investigated the charges against accused and who recommended trial by court-martial thereon acts as defense counsel at the trial and there is no indication that accused particularly desired and sought the services of such officer in preference to or along with those of other defense counsel the conviction obtained upon such trial must be set aside". (Underscoring supplied)

In view of the above cases and Article of War 11, the Board of Review is of the opinion and holds that an investigating officer is competent to act as defense counsel or assistant defense counsel for an accused only when expressly requested to do so by the accused. In the instant case the Trial Judge Advocate explained to the accused that the regular appointed defense counsel, Captain Coogan, had been the investigating officer in the case and could not act as defense counsel unless the accused expressly desired his services. He then asked the accused if he desired the services

of Captain Coogan. The accused replied "No sir". The defense counsel then stated that the accused had no objection to his, Captain Coogan, acting as defense counsel. The prosecution then asked the accused to state that he did not object to Captain Coogan as defense counsel and the accused replied "No sir, I have no objection". Under these circumstances Captain Coogan was not eligible to serve as defense counsel. The statement of the accused that he did not expressly desire the services of Captain Coogan is conclusive of the matter. The fact that the accused stated that he had no objection to Captain Coogan acting as defense counsel is not the equivalent of a specific request by accused to be represented by Captain Coogan in preference to other counsel (CM 320391, McDonald, 69 B.R. 337, 340).

Although the Trial Judge Advocate explained to the accused that Captain Coogan was ineligible to act as defense counsel unless the accused expressly desired his services, he did not explain to the accused the factors and principles involved in his choosing as defense counsel one who had acted as investigating officer in the case. In the absence of such explanation it cannot be assumed that the accused fully realized the significance of the position the defense counsel would be placed in the eyes of the court. The record of trial shows that Captain Coogan was the investigating officer. His recommendation as investigating officer was not before the court but the court, from the fact that the case was being tried by general court martial, might well infer in the absence of any statement to the contrary that the investigating officer had recommended trial by court martial. Such defense counsel would therefore be in an inconsistent position before the court.

The obvious purpose of Article of War 11 was to foreclose the possibility of such an inconsistency without full knowledge and expressed assent on the part of the accused.

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

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

(Sick in hospital), J.A.G.C.

George B. Springston, J.A.G.C.

25 MAR 1949

CSJAGV CM 335048 1st Ind.

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

To: Commanding General, Command and General Staff College and Fort Leavenworth, Kansas.

1. In the case of Recruit Peter Nelson (RA 37477316), 9225 Technical Service Unit, Transportation Corps, Receiving Company, Embarkation Regiment, NYPE, Camp Kilmer, New Jersey, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under Article of War 50e(3) this holding, together with my concurrence, vacates the findings of guilty and the sentence. You are authorized to direct a rehearing.

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

(CM 335048)

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of Trial

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

(13)

CSJAGK CM 335051

18 MAR 1949

UNITED STATES	)	82D AIRBORNE DIVISION
	)	
v.	)	Trial by G.C.M. convened at Fort Bragg, North Carolina, 1 February 1949. Dismissal.
Captain EDWARD F. BISHOP (0-1302262), 3rd Battalion, 505th Airborne Infantry, Fort Bragg, North Carolina	)	

OPINION OF THE BOARD OF REVIEW
SILVERS, SHULL and LANNING
Officers of The Judge Advocate General's Corps

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Captain Edward F. Bishop, 505th Airborne Infantry did, at Fort Benning, Georgia, on or about 14 August 1948 with intent to deceive, officially state to Lt. Colonel Shields Warren Junior, that he the said Captain Edward F. Bishop, had made an allotment out of his pay of $80.00 per month payable to the Federal Service Finance Corporation for the purpose of paying a debt owed by said Captain, Edward F. Bishop which allotment had been in effect for a period of 6 months, which statement was known by the said Captain Edward F. Bishop to be untrue.

Specification II: In that Captain Edward F. Bishop, 505th Airborne Infantry, being indebted to the Federal Service Finance Corporation, Washington D. C. in the sum of $461.40, which amount became due and payable on or about 10 February, 1948, did, at Fort Bragg, North Carolina from 10 February 1948 to about 26 October 1948, dishonorably fail and neglect to pay said debt.

He pleaded not guilty to and was found guilty of the charge and the specifications thereunder. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of specification 2 of the charge but approved the sentence and forwarded the record of trial for action under Article of War 48.

(14)

3. Evidence

For the prosecution

On or about 30 July 1948 Lt. Colonel Shields Warren, Jr., Airborne Battalion Commander, Fort Benning, Georgia, received a communication from higher headquarters directing him to obtain information from the accused as the basis for a reply to certain correspondence that had been received. Colonel Warren contacted accused requesting him to appear for an interview on the following morning. Accused made his appearance whereupon Colonel Warren advised him of his rights under Article of War 24 and proceeded to interrogate him about a debt he allegedly owed to a Finance Corporation. He read to accused a letter which had been received from the Finance Company and asked accused if he desired to make any comment with respect thereto.

The accused stated that he had contracted the debt in January 1948 and in February 1948 he made an allotment from his pay in the sum of $80.00 to run for six months in order to pay the debt. Colonel Shields Warren testified that after mental calculation, he remarked to the accused "that would take care of all but about $20.00 wouldn't it?" The accused replied, "Yes, sir, that's true," at which time he took out a copy of his pay voucher and said, "See, here's the allotment showing on this July pay voucher". (R 7,8) Colonel Shields Warren looked at the pay voucher, noted the $80.00 allotment and in his report to the Regimental Commander inclosed a copy of the July pay voucher recommending that the allotment be checked with the Finance Office.

On cross-examination the witness testified that he did not believe the accused stated at any time during this conversation that he had made an allotment to the Federal Services Finance Corporation. A member of the court asked the following question:

Q. From what Captain Bishop said to you at the time he showed you the voucher, did you understand that the $80.00 was to be put on this debt? (R 8)

The witness replied as follows:

A. There's no doubt in my mind but what he said that was to repay that debt. (R 8)

The deposition of Marian DeBelle of 718 Jackson Place NW, Washington D.C. was admitted in evidence without objection by the defense. (Pros Ex 1) It reveals that during the months of January to October 1948 Marian DeBelle was the manager of the Collection Department on all military accounts for the Federal Service Finance Corporation; that the accused entered into a contract with the corporation on January 16, 1948 signing a note for $504.00, payable at $42.00 monthly for twelve months. Payments were to begin on February 10, 1948 but nothing was paid until October 22, 1948.

The deposition of Lt. Colonel William C. Thompson, Finance Department, Class E Allotment Division, Army Finance Center, Office Chief of Finance, St. Louis 20, Missouri, was received in evidence without

objection by the defense. (Pros Ex 2) It reveals that Lt. Colonel Thompson was chief of the Class E Allotment Division of the Army Finance Center, and, as such, had custody of the allotment records of the accused. The Fifth and Sixth Interrogatories read as follows:

"Fifth Interrogatory: What do his records show with regard to allotments between 1 January 1948 and 26 October 1948?

"Answer: The following allotments paid on his behalf:

"Allottee	Effective Date	Amount	Present Status
Trenton Banking Co., Trenton, New Jersey Credit: Mrs. Matilda B. Bishop	1 May 1948	$80.00	Discontinued 30 June 1948

"Sixth Interrogatory: After a check of his records can you state as a fact whether or not the accused ever during this period had an allotment of $80.00 payable to the Federal Service Finance Corporation?

"Answer: Yes. There is no record of any request for such an allotment having been received from him. There were no allotments paying to the Federal Service Finance Corporation."

The deposition of Ralph B. Lucas, cashier of the Trenton Banking Company, Trenton, New Jersey, was admitted in evidence without objection by the defense. (Pros Ex 3) The fourth and fifth interrogatories with answers read as follows:

"Fourth Interrogatory: Can you state as a fact whether Captain Bishop deposited or had deposited by allotment with your Company, a sum of money in the amount of $80.00 a month during 1948 between January and October?

"Answer: We find no record of such deposit or deposits; however, we have a notification that the first payment on an allotment of $80.00 per month would be made on or about June 15, 1948 for the credit of Mrs. Matilda B. Bishop. We find no record that any such allotment was received. We have a further 'Notice of Discontinued Class E Allotment-of-pay,' as of June 30, 1948 which pertains to the same allotment referred to above.

"Fifth Interrogatory: At the time the allotments of $80.00 were sent to your company during May and June did Captain Bishop have with your Company any agreement whereby this amount would be paid to the Federal Services Finance Corporation?

"Answer: No allotments were received nor do we have knowledge of any agreement to disburse them had they been received."

For the Defense

After his rights were explained to him by the Law Member, the accused elected to be sworn as a witness. He testified that he procured the loan from the Finance Company while he was in Monmouth, New Jersey. He went to the Allotment Section and instructed a lady working there to make out an allotment to this bank. He didn't stay for her to finish the form but signed a blank form and walked out because he was in a hurry. (R 10) In a response to a question as to how the Federal Service Finance Corporation instructed him to pay the loan, the accused testified as follows:

> "They instructed - the instructions was I was to pay it to the bank, not to them, because I couldn't make out an allotment to them, that's what I understood. There was two of us borrowed money at the same time, this other officer and myself; he was dealing through the Trenton bank, and I thought I'd do the same thing."(R 10,11)

With regard to his statement to Colonel Warren the accused stated:

> "As well as I can recall, he asked me the question about this bill, and I told him I made out an allotment to take care of the bill - to pay the bill - to the bank, and he asked me did I make out the allotment to the Federal Service Finance Corporation, and I told him I didn't, but this allotment, it was for the purpose of paying that bill, see, and as I understood it, the bill would have been paid, but during the time I was away for about three months, I didn't see my pay vouchers and I tried to cut down my allotments, I had too many; I believe I was drawing $4.50, and I didn't have a chance to go to the Finance Officer down at Benning; I was in school there; I didn't get paid till I got back here in September." (R 11)

The accused stated that he thought the Finance Company was receiving its payments and he realized the account was delinquent when Colonel Warren questioned him about the debt. (R 11)

4. Discussion

The accused was found guilty of making the alleged false official statement to Lt. Colonel Shields Warren, Jr., with an intent to deceive him, knowing such statement was untrue, in violation of Article of War 95. To support the conviction the evidence must show that the accused made the alleged statement, that it was official, that it was false, that he knew it to be false, and that the statement was made with an intention to deceive the person to whom it was made. (CM 324352, Gaddis, 73 BR 181)

The evidence reflects that the investigation by Colonel Warren concerned whether or not accused was delinquent in an account which he

had with the Federal Service Finance Corporation and that accused well knew that this was the matter in issue. By displaying a voucher with an $80.00 allotment thereon and asserting that he had made it for six months to pay the debt, it can reasonably be concluded that accused induced Colonel Warren to believe he had made an allotment out of his pay of $80.00 per month for a period of six months for the purpose of paying the debt to the Federal Service Finance Corporation. Other averments by accused buttress the foregoing conclusion. Mathematical computations by Colonel Warren, affirmed by accused, indicated that a balance of only $20 was due and owing the Finance Company - assuming of course that accused's prior statement was true. In fact he had no allotment whatever to the Finance Company and at the time of his statement nothing had been paid on his loan. The evidence does show that accused made an allotment of $80.00 to a Trenton New Jersey bank effective 1 May 1948 which he discontinued on 30 June, 1948 but his deceptive use of papers relating to this allotment indicating to Colonel Warren that the allotment was in full force and effect and being applied to his loan with the Finance Company is such a deliberate false pretense as to leave no doubt but that accused knew the allotment indicated was not for the purpose of paying the Finance Company and his actions and words were intended to deceive Colonel Warren. It follows that the court was warranted in concluding that the accused made the false official statement substantially as alleged.

5. Department of the Army records show that accused is 32 years of age and that he attended college for two years. He enlisted in the Army 24 March 1941 at Gainesville, Florida, and was commissioned on 3 December 1942. He completed Infantry Basic Training at Fort Benning, Georgia, in July 1941. He qualified as a parachutist on 5 September 1948. Accused served in the Pacific Theatre from 21 July 1944, apparently returning sometime in 1947. He was married while in the Philippines and has one child. He was promoted to 1st Lieutenant on 13 October 1945 and to Captain on 15 February 1947. Adjectival efficiency reports average a high "Excellent."

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

Quinton E. Gibson, J.A.G.C.

Lewis F. Shull, J.A.G.C.

Harley A. Lanning, J.A.G.C.

(18)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CSJAGU CM 335051

Brannon, Shaw, and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of

Captain Edward F. Bishop (0-1302262), 3d Battalion, 505th Airborne Infantry, the sentence is confirmed and will be carried into execution upon the concurrence of The Judge Advocate General.

Franklin P. Shaw

Franklin P. Shaw, Brig Gen, JAGC

C. B. Mickelwait

C.B. Miclelwait, Colonel, JAGC

E.M. Brannon

Ernest M. Brannon, Brig Gen, JAGC
Chairman

I concur in the foregoing action

Thomas H. Green

THOMAS H. GREEN
Major General
The Judge Advocate General

31 April 1949

(GCMO 20, Apr 15, 1949)

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

CSJAGH CM 335052

APR 14 1949

UNITED STATES v. Lieutenant Colonel ROBERT J. VENERABLE, 0448409, Headquarters and Headquarters Company, 51st Quartermaster Base Depot, APO 954.	UNITED STATES ARMY PACIFIC Trial by G.C.M., convened at APO 958, 19 November, 8 December 1948. Dismissal and total forfeitures.

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

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

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

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

Specification: In that Lt Colonel Robert J. Venerable, QMC, 51st Quartermaster Base Depot, Honolulu, T.H., did without proper leave absent himself from his station at Kapalama Basin, Honolulu, T.H., from about 7 May 1948 to 27 May 1948, when he surrendered himself to the military authorities, Military District, Washington, D. C.

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

Specification 1: In that Lt Colonel Robert J. Venerable, QMC, 51st Quartermaster Base Depot, Honolulu, T.H., did at Honolulu, T.H., on or about 7 April 1947, wrongfully, unlawfully, and bigamously marry Alma Delphine Pomerleau, having a lawful wife then living, to-wit: Etta H. Venerable.

Specification 2: In that Lt Colonel Robert J. Venerable, QMC, 51st Quartermaster Base Depot, Honolulu, T.H., being then and there a married man, having a lawful living wife, and not being divorced, did, at Schofield Barracks, T.H., from

on or about 31 May 1947 to on or about 7 May 1948, wrongfully, dishonorably and unlawfully live and cohabit with Alma Delphine Pomerleau, a woman, not his wife.

He pleaded not guilty to and was found guilty of all Charges and specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the finding of guilty of the specification of Charge I as involved findings that the accused did without proper leave absent himself from his station at Kapalama Basin, Honolulu, T. H., from about 7 May 1948 to 27 May 1948, when he surrendered himself to the military authorities, and only so much of the finding of guilty of specification 2 of Charge II as involved findings that the accused did, under the circumstances alleged, at Fort Kamehameha, T. H., from on or about 1 July 1947 to on or about 31 July 1947, and at Schofield Barracks, T. H., from on or about 1 August 1947 to on or about 30 April 1948, wrongfully, dishonorably and unlawfully live and cohabit with Alma Delphine Pomerleau, a woman, not his wife. The reviewing authority further approved the sentence and forwarded the record of trial for action under the provisions of Article of War 48.

3. Evidence for the prosecution.

On 7 May 1948, the accused absented himself without proper authority from his unit, Headquarters and Headquarters Company, 51st Quartermaster Base Depot (R 5; Pros Ex 1) and returned to military control 27 May 1948 (R 5; Pros Ex 2).

The accused and one Etta-Pauline Haun were united in marriage on 22 May 1935 at Gaithersburg, Maryland (R 15; Pros Ex 5).

On 21 March 1947, the accused and a woman companion giving the name of Alma D. Pomerleau appeared before Leila L. Rank, marriage license agent for Honolulu City, T.H. and requested that a marriage application be made in their behalf. In gathering the necessary data from the parties which was to be placed upon the face of the application, Mrs. Rankin inquired of the applicants whether either had been married before, and if they had the necessary medical examination (Pros Ex 8). Mrs. Rankin also asked them whether either party had been divorced, and whether they were to be married in Honolulu, T.H. If a divorce was indicated, it was customary to require the production of divorce papers before proceeding with the inquiries called for in the body of the application. The statements contained in the application were made by each applicant to Mrs. Rankin in the presence of

each other. Mrs. Rankin personally wrote the information thus obtained by her into the application and both parties then signed it under oath (R 22,23,24). There appears on the face of the application, in answer to inquiry number 6, a statement wherein accused claimed to be a bachelor. In response to question number 19, the accused claimed no previous marriage or marriages dissolved (Pros Ex 8).

On 7 April 1947 the accused and one Alma Delphine Pomerleau were united in marriage in Honolulu, T. H. (R 7; Pros Ex 3).

On 23 May 1947, Mrs. Edith Sutherland, who is employed in the billeting office at Schofield Barracks, took the accused's application for quarters. Present with her at that time was a Mrs. McNair, a clerk typist. The accused was accompanied by a woman who Mrs. Sutherland believed to be his wife because of statements made by them that they had been married but five days (R 17). She saw the accused affix his signature to a "Certificate of Acceptance of Quarters" at Schofield Barracks (R 16; Pros Ex 6). When shown a photograph purporting to be the likeness of the accused and a woman, the witness identified the likeness as a reasonable representation of the couple to whom she assigned quarters on 23 May 1947 (R 21; Pros Ex 7). On cross-examination Mrs. Sutherland testified that her memory was frequently refreshed concerning the accused because she often got him mixed up with a Major Venables, and each time upon straightening out her records, she remembered that accused and his wife were the couple who talked about just being married (R 19). She testified further that the accused stood out in her memory because at the time she gave him the acceptance of quarters to sign, he and his wife were holding hands and the witness thought accused would not be able to sign the certificate of acceptance (R 21).

During the latter part of October 1947, Lieutenant Colonel George Patrick O'Neill, another Quartermaster Officer, accompanied by his wife, visited the accused at the latter's quarters. There the accused introduced Colonel O'Neill to a woman he referred to as his wife. On this occasion the four spoke of generalities and the accused showed Colonel O'Neill several photographs that had been taken during their honeymoon. A photograph purporting to be the likeness of the accused and a woman, was identified by Lieutenant Colonel O'Neill as being a reasonable likeness of the accused and the woman introduced to him by the accused as his wife on the occasion previously mentioned (R 30a).

From August or September 1947, until May of 1948, the accused was a member of a car pool operating between Schofield and Kapalama, T.H. Major Norman K. Brown, who was also a member of this same car pool

during this period, testified that members were picked up at their individual quarters around 7:00 or 7:15 a.m., and that on numerous occasions he had stopped at the accused's quarters in furtherance of the common purpose for which the car pool had been organized. At such times he had seen a lady about the quarters, either in the early morning or afternoon. This lady was introduced by the accused to the witness as his wife. He also identified the picture of the lady appearing in Prosecution Exhibit 7, supra, as a reasonable representation of the person introduced to him by the accused as his wife (R 31-32).

Major Charley L. Worthington, Finance Department, United States Army, testified he had been Disbursing Officer since July 1947 and that there were certain records kept in his office pertinent to the accused among which was WD AGO Form 35, the accused's card certifying his official signature (R 26,27,50; Pros Ex 9). The witness further testified he was official custodian of certain records and account cards known as WD AGO Form 14-5 relating to the accused (Pros Ex 10). Such records disclose that for the month of June 1947, voucher number 1173655 in the amount of $464.03 was paid by the witness' predecessor, of whose accounts he was the official custodian. For the month of July 1947, voucher number 933, was paid in the amount of $466.13, and for the month of April 1948 voucher number 27206 was paid in the amount of $480.08 (R 27-28).

Properly authenticated photostatic copies of the corresponding vouchers on which the accused's signature appears were admitted into evidence (R 7,50; Pros Ex 4). The voucher for June 1947 discloses Etta H. Venerable as his lawful wife, Quarters 708, APO 957, which is Schofield Barracks, T.H. The voucher for July 1947, discloses Alma P. Venerable as his lawful wife, Quarters #31, Fort Kam, APO 954. The voucher for April 1948 discloses Alma P. Venerable as his lawful wife with quarters at 708, Schofield Barracks, APO 957 (Pros Ex 4).

In a pretrial sworn statement made by the accused in the presence of Lieutenant Colonel Royden A. Konopaska, CMP, and three criminal investigation personnel in Washington, D.C., the accused stated that he had received word, on or about October 1946, from one Ralph Crooks that divorce proceedings had been instituted in his behalf in November 1946, and that he received a call from the said Crooks stating that his divorce would become final about the first of April 1947. Upon receiving this information the accused stated he felt free to remarry. The accused admitted remarriage on April 7, 1947, and that one month thereafter he learned through the said Crooks that his divorce was not granted. The accused further stated that he had made every effort to locate Crooks and straighten the matter out, but that his efforts had

been unsuccessful (Pros Ex 11). This statement was admitted into evidence qualifiedly, as an admission against interest only so far as it related to specification 2 of Charge II (R 42,43,45,49).

4. Evidence for the defense.

The accused, having been advised of his rights as a witness, elected to remain silent (R 51).

After the court was closed to deliberate on the findings, and then reopened to receive evidence of previous convictions and to hear the personal data concerning the accused, the defense introduced its Exhibit A through G (R 53) consisting of commendation of the accused while in the performance of his various assignments. Defense Exhibit E evidences the award of the Bronze Star Medal to the accused pursuant to General Orders 30, Headquarters Western Pacific Base Command, dated 31 January 1946, for meritorious achievement in connection with military operations against the enemy on Saipan, Marianas Islands, during the period 15 July 1945 to 2 September 1945. Also, attached thereto appears the individual citation upon which the award was based.

5. Evidence adduced by the prosecution competently and undisputably establishes that the accused was absent without leave from his organization from 7 May 1948 to 27 May 1948, at which time he surrendered to military authorities. Since the place of the termination of accused's unauthorized absence is neither an essential nor a material element of the offense, the deletion thereof by the reviewing authority in his action was wholly proper. There is, accordingly, no substantial question presented by the record of trial in connection with the legal sufficiency of the findings of the accused guilty of this offense.

With reference to the remaining offenses of bigamy and unlawful cohabitation, alleged in specifications 1 and 2 of Charge II, the record of trial contains several serious questions. These relate to the sufficiency of the proof and, in view of the relationship between the two offenses and the patent dependence of the offense of unlawful cohabitation upon the legal sufficiency of the offense of bigamy, it appears that a single consideration of the offense last mentioned will suffice.

The offense of bigamy has been defined as:

> "* * the act of marrying while the spouse by a former marriage is still alive and the former marriage is still in force" (7 Am Jur 749; see also CM 272642, Bailey, 46 BR 343,347),

and,

"* * willfully and knowingly contracting a second marriage where the contracting party knows that the first marriage is still subsisting" (CM 258630, Reynolds, 5 BR (ETO) 259, 263; CM 326147, Nagle, 75 BR 159).

It is well settled in military jurisprudence that bigamy is an offense both violative of Article of War 95, being conduct unbecoming an officer and a gentleman, if committed by a commissioned officer, and violative of Article of War 96, being conduct of such a nature as to discredit the military service, without resort to the public law as enforced by the civil power (par 152c, MCM 1928, p.188; par 54, Winthrop's Military Law and Precedents, Second Edition, p.718; Dig Ops JAG 1919, pp. 142,143; CM 258630, Reynolds, supra; CM 250233, Moore, 32 BR 297).

Turning to the elements of proof of the offense, it has recently been stated by the Board of Review:

"* * 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, at 174).

Analysis of the evidence adduced in the present case in the light of these requirements establishes that the accused entered into a valid marriage in 1935 with one Etta-Pauline Haun, age 24, and that he entered into a marriage on 7 April 1947 with one Alma Delphine Pomerleau. The evidence of these two marriages appears clearly to satisfy the first and third requirements above set forth except that there is no showing that the first marriage was undissolved at the time of the second marriage. In this regard, however, it is unnecessary to consider the possibility of dissolution by divorce, since it appears to have been uniformly held that it is incumbent upon the defense to show the first marriage was dissolved by divorce. In this connection, it is stated in Fuquay v. State, 114 So 898, in quoting from Fletcher v. State, 169 Indiana 77:

"'* * Public policy and convenience do not require the state, in this class of cases, to search all records extant for proof of a negative fact peculiarly within the knowledge of the defendant; but, when the state shows that the accused has been married to a woman who was still living at the time

of his second marriage to another, it is incumbent upon him to show a divorce from such former wife. State v. Barrow (1879) 31 La. Ann. 691; Com. v. Boyer (1863) 7 Allen, 306; 4 Elliott, Ev. § 2873; 3 Greenl. Ev. 16th ed. § 208; Fleming v. People (1863) 27 N.Y. 329; Hull v. State (1880) 7 Tex. App. 593; May v. State (1878) 4 Tex. App. 424."

Similarly, it has been held by the court in Bennett v. State, 100 Miss 684:

"'The onus of proof is on him to show, as a matter of defense, that he had been divorced by competent authority at the time of his second marriage, or that his former marriage had been declared void by competent authority.' * *."

In view of the precedents just cited and quoted in part, and the fact that the record of trial contains no suggestion of a defense predicated upon the above premise, the Board of Review, as aforementioned, need consider only dissolution through death, which has the effect of incorporating the excepted element as to dissolution with that of survival and thus limiting consideration of the issues to those enunciated in subparagraph (2) above. Thus, the legal sufficiency of specification 1 of Charge II as well as the offense alleged in specification 2, appears to be dependent upon whether the evidence of record competently establishes (1) the survival of the first spouse, (2) to the knowledge of the accused.

Considering the above stated issues more in detail, it is clear that there are two separate and distinct requirements presented. It is necessary to show affirmatively, by competent proof, that the spouse of the earlier marriage was in fact surviving at the time of, or subsequent to, the succeeding marriage. It is equally requisite to conviction to establish that the accused was chargeable legally with knowledge of such survival of the first wife. It is essential to note at the outset that proof of the element of accused's belief of the survival of the first spouse will not serve as a substitute for evidence establishing the fact of her survival. Otherwise stated, proof that the accused thought his first wife was still living, no matter how strong, will not satisfy the requirement that there be legal proof of her survival nor preclude an independent determination of the proof of this element upon appellate review. To conclude otherwise would permit the conviction of an accused upon his belief of guilt alone when in fact, and unbeknown to him, his wife may not have been surviving. This would have the effect of permitting a legal conviction in an instance where the second marriage was valid, and not void, and where the offense of bigamy had not actually been committed. A hypothesis subject to such

a gross result would obviously be untenable and clearly without the contemplation of the safeguards afforded each accused by the law.

In applying these principles to the present case, it is to be observed that the record of trial is totally void of any direct evidence to establish or to indicate that Etta-Pauline Haun Venerable was living on or after 7 April 1947 at which time the accused entered into the allegedly bigamous marriage with Alma Delphine Pomerleau. The proof of survivorship of the first spouse is therefore dependent upon circumstantial evidence competent to show this essential element of the offense of bigamy. Such evidence appears limited in the instant case to the marriage certificate which establishes that Etta-Pauline Haun was living on 22 May 1935, at which time she married the accused (Pros Ex 5); the accused's false statements on the "Application for License to Marry" dated 21 March 1947, to the effect that he was a bachelor and had not previously married (Pros Ex 8); the accused's statement on his pay voucher for June 1947 that Mrs. Etta H. Venerable, Quarters 708, APO 957, was his lawful wife (Pros Ex 4); and, since we are considering specification 1 and specification 2 of Charge II, together, the admissions of the accused contained in his pretrial statement of 8 June 1948, made to military authorities of the Military District of Washington (Pros Ex 11).

Even though we accept the marriage certificate, and particularly that portion thereof relating to the minister's certification as to the fact of marriage, as conclusive proof that Etta-Pauline Haun was living on 22 May 1935, we are equally aware that this, without more, is of little or no evidential value in connection with the issue of her survivorship on or after 7 April 1947. In answer to the contention that such showing, together with attendant legal presumptions, would be sufficient to establish prima facie that the first spouse was surviving at the time of the bigamous marriage, the court has stated, in Prentice v. McCormick, 23 F2d 803:

> "* * * That she had been married in 1911 to Avann and had never been divorced from him is also admitted; but those facts, in the absence of a showing that Avann was living when she married the second time [on 8 August 1921], do not show the second marriage to have been bigamous, as against the formal ceremony thereof, in favor of which there is a presumption of validity. Wagoner v. Wagoner, 128 Mich. 635, * *, Killackey v. Killackey, 156 Mich. 127 * *; May v. Meade, 236 Mich. 109 * *."

Although the precedents above cited involve suits civil in character, the rule would have equal application in a criminal prosecution. Indeed, the rationale for the rule would appear much greater in such a case.

In otherwise approaching the problem, but still from the standpoint of legal presumptions, Section 654 (599) of Underhill's Criminal Evidence, Fourth Edition, provides at page 1245 as follows:

> "Presumptions and proof of death of spouse.--The state must prove affirmatively, and beyond a reasonable doubt that the first husband or wife was alive at the date of the void marriage. This is not presumed, as matter of law, from proof that he or she was alive at a prior date, for the presumption that the accused is innocent will nullify the presumption of the continuance of life. Hence, in the absence of direct evidence that the earlier spouse was alive when the later marriage was solemnized, the jury must acquit." (Underscoring supplied)

For the purpose of avoiding an endless repetition of similar quotations from both legal text writers and from the courts, it may be stated in resume that the weight of legal authority emanating from our courts recognizes the rules above set forth. (See also 25 C.J.S. 1054).

Insofar as concerns consideration of the matter of similar presumptions by an appellate tribunal in the military establishment, it has been stated by the Board of Review in CM 307370, Schultz, 34 BR (ETO) 239 at page 241:

> "* * * The presumptions of innocence, of regularity and of morality, do in fact countervail the presumption of the continuance of life in a bigamy case; and the continuance of life being an element of the offense, the prosecution must prove it."

Thus it is apparent herein that the evidence showing the accused's first wife to be alive at the time of their marriage will not competently prove her survival at the time of a second and purportedly bigamous marriage some twelve years later. In arriving at this conclusion, we are not unmindful of the opinion to the contrary in the case of CM 254548, Harmon, 35 BR 279. This precedent has not only been subsequently rejected by the Board of Review in CM 307370, Schultz, supra, but may further be distinguished from the instant case from a factual standpoint since there is a lapse of but two and one-half years between the accused Harmon's two marriages. In the Harmon case also, it should be noted that the Board appears to rely to a degree upon a factual approach to the problem by citing but not quoting Wharton's Criminal Evidence, Twelfth Edition, Vol I, page 161, which provides:

> "The presumption of continuance of life, which exists in cases where a person living a given time since is inferred to

be living now, is necessarily variable, readily yielding to the presumption, already noticed, derivable from the expiration of a period beyond which the continuance of life is improbable. The presumption of innocence, as has been already noticed, may be invoked in criminal prosecutions, either to weaken or to strengthen the presumption that the life of a particular person continues. But where a party is shown to have been alive at a stated time, the presumption is that he still lives, until the contrary is shown by testimony." (underscoring supplied)

Conceding that there is merit to the approach to the problem above presented, even aside from that indicated by the underscored portion which supports our position, we are, nevertheless, persuaded by considerations of logic and reason to accept the view that in a criminal prosecution, and especially under the circumstances shown in the present case, the presumptions of innocence, regularity, morality, and the validity of the second marriage countervail the presumption of continuance of life. To decide to the contrary would be to conclude that, without more, and notwithstanding these presumptions enuring to an accused, life could be presumed to continue for twelve years, and thus to establish beyond a reasonable doubt, as a necessary element of the proof in a criminal prosecution, that the first spouse was still living. This we are unable to do.

In next considering the evidential effect of the accused's patent falsifications upon the "Application for License to Marry" of 21 March 1947, it should be observed that these relate to considerations prior to the time of the commission of the alleged bigamy or unlawful cohabitation and are of no value to show the fact of his first wife's survival on or after 7 April 1947.

With respect to the accused's pay voucher for June of 1947, a date subsequent to his second marriage, as well as to his statements made almost a year later to the military authorities in the Military District of Washington, since we are likewise considering specification 2 of Charge II, it is clear that these are of probative value only to show the accused's culpable belief that his first wife was still living rather than the fact thereof. There is no evidence contained in the record of trial to show that accused had corresponded with his first wife, and indeed, from his pretrial statement, it is only reasonable to assume that he did not. Having this premise in mind, it follows that, from the standpoint of the legal sufficiency of the record, there appears to be no more than the accused's assumption that his first wife survived. Such an assumption, no matter how reasonable, logical, or well founded upon probability for that matter, if it is no more than an

assumption, cannot be held to be acceptable as legal proof. Should his belief in her survival alone be accepted as legal proof of the fact that his first wife was living at the time of making these statements, then an accused could be convicted of bigamy when the offense had not in fact been perpetrated. Nor may guilt of these particular offenses of bigamy and unlawful cohabitation be inferred from accused's unauthorized absence and return from Hawaii to the United States in 1948. Again we have in this, at best, but additional evidence of accused's troubled mind.

The Board of Review must conclude, therefore, that the record of trial does not contain competent evidence, either direct or circumstantial, to establish beyond a reasonable doubt that Etta-Pauline Haun was living on or after 7 April 1947. Taken singly or collectively, neither the proof of her marriage to the accused in 1935, together with whatever presumptions may flow therefrom, nor the accused's false statements upon the 1947 marriage application, nor the statement attributable to the accused upon his June 1947 pay voucher, nor his subsequent admissions to military authorities are sufficient to provide the requisite proof that the accused's first wife was in fact living at the time of his second and allegedly bigamous marriage.

In support of a conclusion contrary to that we have reached, the precedents of CM 228971, Tatum, 17 BR 1, and CM 326147, Nagle, supra, have sometimes been cited. An analysis of these cases shows, however, that in each instance the first spouse was present and testified at the court-martial. More competent evidence of her survival than her living presence before the court cannot be imagined. It is perhaps the following language in these precedents which may have caused some misgiving, viz:

> "* * The first wife did not expressly testify that her marriage to accused was still subsisting at the time of the second marriage. She did at the time of the trial, however, identify accused as her husband. A marriage once contracted is presumed to continue in the absence of proof of death or legal dissolution. Such a presumption is factual and may be inferred if warranted by all the circumstances (par. 112a, p. 110, M.C.M.). The circumstances here warranted such an inference by the court. Thus it was proved that accused committed bigamy by contracting a second marriage while his first wife was alive and at a time at which the first marriage had not been dissolved (sec. 2030, Wharton's Criminal Law, 12th Ed.; sec. 601, Title 22, D. C. Code; 10 C.J.S. 359). * *." (CM 228971, Tatum, 17 BR 1,3)

> "* * Mrs. Nagle's testimony also establishes that she was alive at the time of trial. A marriage once contracted is

presumed to continue in the absence of proof of death or legal dissolution (Tatum, supra). That the accused knew that Angela Iturralde Nagle was alive was shown by the admissions of the accused to his friends, the pay card, War Department Finance Department Form 3, and the AAF Personal Affairs statement, both of which show Angela Nagle of Havana, Cuba, as his wife. The pay card shows that accused was paid for the months of January 1946 through August 1946 and that a Class E Allotment of $150.00 was paid during these months. The AAF Personal Affairs Statement of accused (Pros Ex 8) shows a Class E allotment of $150.00 to Mrs. George E. Nagle, Havana, Cuba." (CM 326147, Nagle, 75 BR 159,174). (Underscoring supplied)

In connection with the first case cited in part above, it is clear that the language used, especially that pertaining to presumptions, was intended to be limited in its application solely to the matter of dissolution of the earlier marriage through divorce. Since the first wife was physically present before the court, reference therein to the question of her survival is patently dictum.

The language in the second case above cited appears to have been used for the purpose of showing the accused's knowledge of his first wife's survival and not the fact thereof. Again we have a situation wherein the first wife was physically present before the court and where there is no question in the case as to the proof of the fact of survival. Thus, in the Nagle case as well as in the Tatum case, which is also cited therein, the presumption set forth and underscored has been submitted by the Board of Review for a purpose wholly collateral to that presented in the instant case. We are required to conclude, therefore, that these precedents are not in point, and that under the circumstances in the present case, the presumption therein cited, having been countervailed by other presumptions, as previously indicated, is not acceptable as proof of survival of the first spouse.

Since there is a failure of legal proof of the fact that the accused's first wife was living at the time of his marriage to Alma Delphine Pomerleau on 7 April 1947, or subsequently during their alleged unlawful cohabitation, and consequently a failure of proof of either the offenses of bigamy or unlawful cohabitation, it is unnecessary for the Board of Review to consider the further question presented by the record of trial as to whether the record contains the required proof of corpus delicti for the offense of bigamy.

6. Records on file in the Department of the Army show that the accused is 44 years of age, married, and has two children, ages 12 and 9. He has completed high school and has two years training as an automotive

engineer. In civilian life he was an automotive engineer. He has six years and seven months service as an enlisted man commencing in 1932. He was commissioned as a captain in the Quartermaster Corps from civilian life on 8 April 1942. He has served overseas in the Asiatic-Pacific Theater from 20 June 1945. He is authorized the Bronze Star Medal, American Theater Ribbon, Asiatic-Pacific Ribbon, and American Victory Ribbon. His efficiency ratings include one rating of very satisfactory, ten ratings of excellent, and eight ratings of superior.

7. The court was legally constituted and had jurisdiction of the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge (I) and the specification thereunder, as approved by the reviewing authority, legally insufficient to support the findings of guilty of specifications 1 and 2 of Charge II and of Charge II, and legally sufficient to support the sentence. Dismissal and forfeiture of all pay and allowances due or to become due an officer are authorized upon conviction of a violation of Article of War 61.

Wilmot T. Baughn, J.A.G.C.

Charles J. Berkowsky, J.A.G.C.

J. S. Lynch, J.A.G.C.

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

CSJAGU - CM 335052

UNITED STATES v. Lieutenant Colonel ROBERT J. VENERABLE, 0448909, Headquarters and Headquarters Company, 51st Quartermaster Base Depot.	UNITED STATES ARMY PACIFIC Trial by G.C.M., convened at APO 958, 19 November and 8 December 1948. Dismissal and total forfeitures.

OPINION OF THE JUDICIAL COUNCIL
Brannon, Shaw, and Mickelwait

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

2. The accused was found guilty of absenting himself without proper leave from his station at Kapalama Basin, Honolulu, T.H., from about 7 May 1948 to 27 May 1948, in violation of Article of War 61 (Charge I, Spec); of wrongfully, unlawfully, and bigamously marrying Alma Delphine Pomerleau on or about 7 April 1947; and of wrongfully, dishonorably and unlawfully living and cohabiting with Alma Delphine Pomerleau, a woman, not his wife, at Schofield Barracks from about 31 May 1947 to about 7 May 1948, both in violation of Article of War 96 (Charge II, Specs 1 and 2). He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the finding of guilty of the specification of Charge I as involved findings that the accused did, without proper leave, absent himself from his station at Kapalama Basin, Honolulu, T. H., from about 7 May 1948 to 27 May 1948, when he surrendered himself to the military authorities, and only so much of the finding of guilty of Specification 2 of Charge II as involves findings that the accused did, under the circumstances alleged, at Fort Kamehameha, T. H. from on or about 1 July 1947 to on or about 31 July 1947, and at Schofield Barracks, T. H., from on or about 1 August 1947 to on or about 30 April 1948 wrongfully, dishonorably and unlawfully live and cohabit with Alma Delphine Pomerleau, a woman not his wife. The reviewing authority, Major General E. L. Parks, approved the sentence and forwarded the record of trial for action under the provisions of Article of War 48. The Board of Review is of the

opinion that the record of trial is legally sufficient to support the approved findings of guilty of Charge I and its specification, legally insufficient to support the findings of guilty of Charge II and both specifications thereunder, and legally sufficient to support the sentence.

3. The Council finds the statement of the evidence to be as stated in paragraphs 3 and 4 of the Opinion of the Board of Review except as hereinafter set forth:

Over objection by the defense, on the ground that entries therein were hearsay, there was received in evidence as Prosecution Exhibit 10, two pay cards - Commissioned Officer W.D., AGO Form No. 14-5, pertaining to the accused. These cards, properly identified as official records in the custody of the Disbursing Officer, Finance Officer, U.S. Army Pacific, showed the disbursements made to the accused as pay and allowances from January 1947 to April 1948. In addition thereto the entry pertaining to the lawful wife of the accused appearing on the pay card for 1947 was: "Etta H. Venerable." The pertinent entry on the 1948 card showed that the name of "Etta" had been deleted and "Alma" substituted therefor. Thereafter "Alma" was deleted and a new entry of "Etta Venerable" was recorded on the card.

4. Discussion

Charge I and Specification thereof

As indicated by the Board of Review, the record of trial is legally sufficient to support the approved findings of guilty of absence without leave in violation of Article of War 61.

Charge II, Specification 1

Under this specification the accused was found guilty of bigamy in violation of Article of War 96. The Board of Review is of the opinion that the evidence fails to establish the survival of the first wife at the time of the second marriage for the reason that the presumption of continued life of the first wife was overcome by the presumption in favor of the validity of the second marriage, and for the further reason that the accused's declarations that Etta Venerable was his lawful wife made after the date of the alleged offense merely tended to establish his belief in her survival and did not supply proof of her actual survival.

The proof of survivorship of the first spouse is dependent upon the following:

a. The marriage certificate, which establishes that Etta H. Venerable, then 24 years of age, was living on 22 May 1935 (Pros Ex 5).

b. The accused's statement on his pay voucher for June 1947

that Etta H. Venerable was his lawful wife (Pros Ex 4).

c. The entries of W.D. AGO Form No. 14-5, pertaining to the accused for 1947 and 1948, which show Etta H. Venerable to be the accused's lawful wife during 1947 and a part of 1948 (Pros Ex 10).

d. The presumption of continuing life of the first spouse (MCM 1928, par 112a).

The fact that Etta H. Venerable, then 24 years of age, was alive in 1935, standing alone, is not strong evidence that she was alive on 7 April 1947 (Vreeland v. Vreeland, 78 N.J. Eq 256; 79 Atl 336).

In bigamy cases the Boards of Review have accepted the presumption of continuing life after 2-1/2 years (CM 254548, Harmon, 35 BR 279), and after four months (CM 328250, Lunde, 77 BR 29,36).

In this case proof of survival is not dependent solely upon presumption of continued life. The entry appearing on accused's official pay card which was prepared in January 1947, less than three months before the second marriage, shows that Etta was then his lawful wife. Furthermore there was a declaration by the accused in support of a claim for pay and allowances, dated 30 June 1947, less than three months after the second marriage, that Etta Venerable was his lawful wife.

The entry on the 1947 pay card as to the accused's lawful wife was received in evidence over the objection that it was not shown to be executed by the accused, that it was compiled by a third party who was not before the court, and that therefore the entry was based on hearsay (R 29). It is to be noted that any objection as to authentication was expressly waived (R 29) and that there was no objection on the ground of the best evidence rule.

It is clear that the accused's pay card is an official record. The entry thereon pertaining to the accused's lawful wife is a fact which the recording officer had a duty to know in order to determine the allowances due the accused and it was his duty to record that fact (par 76, TM 14-500). Although it may not have been based upon the personal knowledge of the recording officer, it was nevertheless based upon information which he, having a duty to ascertain the facts, had obtained from other sources which did reflect the matter contained in the entry. Such information is obtained from entries on the pertinent officer's initial pay voucher for the year (par 76, TM 14-500). In the absence of an objection based on the best evidence rule, it was properly admitted as an official record, for whatever evidentiary value it had (MCM 1928, par 117a; CM 320957, Boone, 70 BR 223; CM 320307, Robinson, 69 BR 309, 315-316; CM 323197, Abney, 72 BR 149). It was also admissible under the Federal Business Entry Statute (28 U.S.C. 1732).

From the 1947 pay card it may fairly be inferred that Etta H. Venerable was declared to be the lawful wife of the accused in January 1947. From the entries on the 1948 pay card it may be inferred that she was declared at some time during the year to be the accused's lawful wife. Assuming that the pertinent entry made in January 1947 is based on a declaration of the accused himself, such a declaration made prior to the offense need not be independently corroborated to be received in evidence (Warszower v. United States, 312 U.S. 342).

The evidence of the two marriages and the entry on an official record showing Etta Venerable to be the accused's lawful wife in January 1947 are sufficient to show that the offense of bigamy was probably committed. Such a probability is sufficient corroboration of the accused's admissions made after the alleged bigamous marriage to warrant the court in considering the accused's declaration in his June 1947 pay voucher as an admission that Etta Venerable was then his lawful wife (MCM 1928, par 114a, p 115; Deache v. United States, 250 Fed 566; Forte v. United States, 94 Fed 2d 236, 68 App D.C. 111; CM 317673, Wing, 67 BR 19,28-30; CM 325377, Sipalay, 74 BR 169, 172-175; CM 325056, Balucanag, 74 BR 67, 70-73).

This admission may be considered as more than a mere conjecture on his part that the first wife was alive. A voluntary admission, if corroborated by other competent evidence of the corpus delicti (CM 325056, Balucanag, supra) is admissible against the person who made it notwithstanding the fact that it was made without personal knowledge of the subject matter. The law holds everyone responsible for what he says to the extent that his saying may be used as evidence against himself. Lack of personal knowledge affects the weight, not the competency of such admission (20 Amer. Juris, Sect 544, and cases cited therein; U.S. v. Wood, 39 U.S. 430,443; 14 Peters 443). In bigamy cases similar admissions on official records have been held to be evidence of a wife's survival to the knowledge of the accused (CM 254548, Harmon, 35 BR 279; CM 326147, Nagle, 75 BR 159,174). Considering the importance of a pay voucher as a claim against the government it may be inferred that the declarant had a reasonable basis for the assertion. Furthermore, in the absence of a showing that a wife has disappeared and not been heard from, it is reasonable to assume that the husband will know whether she is alive or dead. Accordingly, we are of the opinion that the accused's admissions amounted to substantial evidence of his first wife's survival, and that the evidence is sufficient to support the findings of guilty of bigamy.

In our view of the evidence, it is not necessary for us to consider the question arising with respect to the effect of conflicting presumptions as discussed by the Board of Review.

Charge II, Specification 2

As approved by the reviewing authority, the accused was found guilty

under this specification of wrongful, dishonorable and unlawful cohabitation with Alma Delphine Pomerleau from 1 July 1947 to 30 April 1948 in violation of Article of War 96.

The cohabitation of the accused and Alma Pomerleau was adequately established by testimonial and documentary evidence. The evidence heretofore discussed with respect to the specification alleging bigamy which showed that the accused had a lawful wife living to his knowledge establishes the wrongfulness of the cohabitation. The accused's wrongful knowledge and unlawful intent is further corroborated by his pretrial statement which was received in evidence as Prosecution Exhibit 11, over the objection of the defense, as an admission against interest so far as it related to this specification.

The defense objected to the admissibility of the pretrial statement on the ground that it was not shown to have been voluntarily made. Other than the recitals contained in the exhibit itself the prosecution adduced no proof as to the circumstances under which the statement was obtained. The accused testified for the limited purpose of attacking the voluntary nature of the pretrial statement. He stated that the officers of the Military District of Washington who had obtained the statement, had asserted that if he would make a statement that they would endeavor to obtain approval of his resignation in order to reenlist as a master sergeant. He also testified that they had assured him that they had been successful in obtaining the approval of resignations in more aggravated cases than his.

Although the accused's statement was received in evidence as only an admission with respect to wrongful cohabitation, it was nevertheless a full confession as to the bigamy alleged in Specification 1, Charge II. In spite of the law member's instruction that it was to be considered only with respect to the specification alleging wrongful cohabitation, it is reasonable to assume that the statement made some impression upon the minds of the members with respect to the other offense charged in the same trial. Although we do not view with favor the practice of receiving, without proof of its voluntary nature, a confession to one of several offenses as an admission against interest with respect to another offense charged in the same case, we are nevertheless of the opinion that the circumstances as recited by the accused are not of such nature as to render involuntary the statement of a mature officer of the accused's age and rank, if considered as a confession (MCM 1928, par 114a, p 116; CM 320455, Gaillard, Cohen, 69 BR 345, 373, 376; CM 317064, Johns, 66 BR 169, 186). This view is fortified by the sworn statement of the accused that he was not compelled to incriminate himself and that no promise or reward had been made to him (Pros Ex 10). Accordingly, we are of the opinion that the statement was properly received in evidence.

The accused's statement clearly showed that divorce proceedings were instigated in his behalf against Etta H. Venerable with his knowledge and consent. This tends further to corroborate the survival of the first wife for it is unreasonable to suppose that divorce proceedings will be brought against a dead wife. His statement further shows that, without any reasonable effort to ascertain whether a divorce decree had been granted, he undertook to contract a subsequent marriage. Any cohabitation under the guise of such an admittedly bigamous marriage is clearly wrongful, dishonorable, and unlawful as alleged.

Accordingly we are of the opinion that the evidence is legally sufficient to support the approved findings of guilty of Specification 2 of Charge II.

5. The court was legally constituted and had jurisdiction of the accused and the offenses. 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 as approved by the reviewing authority and the sentence and to warrant confirmation thereof.

Franklin P. Shaw
Franklin P. Shaw, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Colonel, JAGC

E. M. Brannon
E. M. Brannon, Brig Gen, JAGC
Chairman

(GCMO 32, May 27 1949).

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

CSJAGV CM 335070

MAR 25 1949

UNITED STATES v. Recruit ROBERT H. BROWN, JR. (RA 14248708), Detachment "A", 7747th Military Police Railway, Security Group.	HEADQUARTERS FRANKFURT MILITARY POST Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 3 and 4 February 1949. Dishonorable discharge and confinement for three (3) years. Federal Reformatory.

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

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: Finding of Not Guilty.

Specification 2: In that Recruit Robert H. Brown, Detachment "A", 7747th Military Police Railway, Security Group, did, at Frankfurt am Main, Germany, on or about 22 December 1948, with intent to defraud, wrongfully, knowingly and unlawfully have in his possession and conceal approximately eleven thousand, eight hundred dollars ($11,800.00) in counterfeited United States Federal Reserve Notes.

Specification 3: Finding of Not Guilty.

Specification 4: Withdrawn prior to arraignment.

The accused pleaded not guilty to the charge and all specifications. He was found not guilty of specifications 1 and 3 but guilty of specification 2 of the charge and the charge. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor at such place as the reviewing authority might direct for a period of three years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action under Article of War 50e.

3. a. Prosecution Evidence.

On 21 December 1948 accused was guard commander aboard a mail train travelling between Paris, France, and Frankfurt, Germany. Immediately prior to the departure of said train from the Paris station accused was observed speaking to a Frenchman identified only as "Ronnie" by Private First Class Mitchell, the other guard on the train (R 10). Later accused reported to Private First Class Mitchell, that he was in possession of a large amount of United States currency and believed it to be counterfeit and asked Mitchell if he would call the CID and report it to them. However, being in the French Zone, Mitchell and the accused decided that because of bad telephone communications between the French and American Zones they would not have time to make the contact, and decided to wait until they arrived at their organization to report accused's possession of the money. (R 11). Upon discovering the possession of such an unusual amount of money accused became alarmed and started drinking heavily (R 11). When the train arrived in Frankfurt accused and Mitchell were approached by three civilians, one named Charlie, who demanded that accused deliver a package to him. Instead of delivering the package accused informed Charlie and the two other civilians that the CID took the package at the border (R 12, 14).

Charlie asked Private First Class Mitchell to explain to one of the civilians that the package had been taken by the CID. Private First Class Mitchell made the explanation and then told the accused that the train was being broken up and that they should get into the baggage car. The accused and Mitchell rode in the baggage car to South Station. On the way to South Station the accused asked Mitchell not to mention the money in the company as "he wanted to turn the money in himself". Brown and Mitchell arrived at their barracks between 10:00 and 11:00 a.m. 22 December 1948 (R 12, 13).

Between 10:00 a.m. and 11:00 a.m. on 22 December 1948 Captain Paul B. Aurand, Detachment A, 7747 MP Railway Security Group, the accused's Commanding Officer, made a routine inspection of barracks. The barracks were being painted and accused's bed was temporarily in the transit billets. During this inspection he saw the accused "sitting on the bunk in uniform". The mattress was rolled up and the accused was sitting on the springs. He called the attention of the accused to some dirt around the bed and directed him to clean it up. He also told the accused to either go to bed or get off the bed. The accused then started to remove his leggings. Captain Aurand did not notice anything unusual about the accused (R 37, 38, 39).

During the morning of 22 December 1948 Recruit George Sweet, 7747 MP Railway Security Group, entered the transit barracks and observed the accused lying on his bed. The accused was "lying on his clothes on his stomach and looked wet, looked like he had urinated". The accused seemed a little weak and he (Sweet) could smell alcohol on the accused's breath. Sweet testified:

"A Well, I walked in the room and I seen some money laying on the floor. I walked up to the bed and I shook Corporal Brown. I said, 'Corporal Brown, you dropped some money on the floor'. He said, 'Let me alone; let me sleep, ' so I reached down and picked the money off the floor and said, 'There's money on the floor.' He said, 'Well, keep it for a Christmas present.' Well, about that time, about five minutes later, Corporal Berry come walking in the room and he started talking to Corporal Brown. Corporal Brown asked Berry to take his leggings off. And then Corporal Brown requested that I would leave the room, he would like to talk to Corporal Berry alone.

****

Q Take anything with you when you left?

A Yes, sir.

Q What did you take?

A Greenbacks.

****

Q Well, the size. How much money did each one represent, a five-dollar bill, twenty, fifty?

A Fifty and two twenties, sir."

Sweet took the ninety dollars and gave them to Hildegard Schuetz, a German national. Hildegard Schuetz changed a $20.00 note into German marks and gave the marks to Sweet. She was questioned by "SIS" men concerning this money at about 10:00 p.m. 22 December 1948. Some of this money was recovered and found to be counterfeit (R 29-32, 34, 44).

Corporal James V. Berry 7747 MP Training Center saw the accused "during a ten minute break, sir, on the hour, either ten or eleven, I am not sure" on the morning of 22 December 1948. He asked the accused to loan him some money and the accused asked him if he would like to have a drink. Berry answered no he was on duty. The accused asked Berry if he wanted money. Berry answered that he wanted to borrow $30.00. The accused said "I have a surprise for you" and pulled out a cargo bag filled with money. Berry further testified:

"Q Is that what is known as a cargo bag?

A Cargo bag, and I saw this money in there and I says, 'That is no good.' He didn't say anything. I says, 'This place is too hot for me,' and then he started talking about something I didn't understand, something about, 'I can see it now,' and 'the local boy makes good and cracks the ring' or 'rag' - I am not sure

about the last word, and then he talked about a man's head or window and then seemed like he was going off to sleep; he was drowsy.

Q Did you borrow any money?

A No, sir. And then I left the room and passed Mitchell. I spoke to him and he said, 'Brown I have a letter for you.' When I left the room I saw Captain Aurand going into the room.

Q Did he offer you any of this money in this bag?

A No, sir.

Q Did he say anything else, about that time?

A No, sir.

Q Didn't say he was going to buy you anything?

A Oh, yes, sir. He said, 'I will buy you a Buick, if you want.'

****

Q Corporal, what was the condition of Brown on that occasion?

A I would say he was drunk, sir, very drunk.

Q Speaking very incoherently, was he?

A Yes, sir, he was - gibberish.

Q Now why was it you didn't take the thirty dollars?

A I wanted scrip, sir." (R 19-20).

Private John F. Fahey, Detachment "A", 7747 Railway Security Group was ordered by the company commander to help Corporal Brown move his belongings to the dispatch office. While assisting the accused and at about 11:15 p.m. on 22 December 1948, he found six or seven pieces of American money (bills) under the accused's bed. He picked them up and said, "I am going to take them to the company commander." The accused said "Yes, go ahead". He delivered this money to Captain Aurand. The accused looked as if he had been drinking and his breath smelled of alcohol (R 35, 36).

Warrant Officer Robert R. Michaelson, 52nd CID saw the accused in his billet on the night of 22 December 1948. He warned the accused of his rights under Article of War 24 and asked the accused "where all this money was we heard he had." The accused took Michaelson to the end of the hall and

turned the money over to him. Some money was on the floor. The accused picked this money up and put it in a green cargo bag and gave the bag and the money to Michaelson. The bag contained eleven thousand five hundred and ninety dollars. There were four hundred thirty eight five dollar notes; two hundred twenty seven ten dollar notes, two hundred thirty nine twenty dollar notes and thirty seven fifty dollar notes (R 41, 42). This money was counterfeit (R 44).

A voluntary pretrial statement made by accused was introduced into evidence as prosecutions exhibit 5, without objection by the defense. In this statement the accused said that while in Paris a person he knew as Ronnie asked him to deliver a package to a person who would meet the train in Frankfurt and identify himself as Charlie. He asked if it was permissible to open the package. Ronnie stated that it was all right to open the package. When he opened the package he saw the money and became nervous. He had some cognac and began drinking and was "pretty drunk". Two or three persons boarded the train at Frankfurt one of whom was supposed to be Charlie. He told them to get off. When he arrived at the Company he "was pretty drunk" and not in shape to see the Captain. He went upstairs and went to sleep. Later the gate guard told him three people were waiting outside for him. He "thought they were French, but they talked German". He "had a couple of bottles of cognac and that all I can remember". Later the CID came and asked him if he had some counterfeit money and he answered yes. They also asked if he could show them the man to whom he was supposed to deliver the package. He went with the CID to the railroad station where he pointed out the person who had represented himself to be Charlie. The CID arrested Charlie.

b. Defense Evidence.

The accused took the stand under oath as witness in his own behalf. He stated that in Paris, France, on 21 December 1948 he was approached by a Frenchman named "Ronnie" whom he had seen and talked to several times before, who asked accused if he would deliver a package to a man named Charlie in Frankfurt, Germany. Accused suspected Ronnie of doing some blackmarketing and asked if he could look into the package and was advised by Ronnie he could do so. Some time later while on the train en route to Frankfurt accused opened the package and discovered that it contained a sizeable amount of money, United States currency, at which time he became alarmed and asked his fellow guard to contact the CID at the border. He believed that this money was counterfeit because there was so much of it. He took the money from the package and put it in his pocket. He threw the package away. He knew that he could not turn the package over to the "person" when he got to Frankfurt and he "knew that they would be desperate to get it". Upon arriving in Frankfurt the person described as Charlie boarded the train with two other civilians and asked for the package. They were informed by accused that the CID took the package at the border. Charlie and the two civilians then searched the compartment. He could not leave to notify the CID because he had a mail train to guard. After discovering the

unusual amount of money in his possession, the accused continuously drank while en route and upon arrival at the billets he was drunk. He could not go see the company commander while drunk. He went to bed intending to turn the money in to the company commander when he "came to himself". He remembered nothing thereafter until some CID personnel asked him where he had the counterfeit money, to which he replied, "I have a bag full of money", and took the CID agent to the hallway where he had placed the money. He did not have a locker and the money was placed in the hallway because it was dark there and he thought it was a safer place for it. He then assisted the CID in the location and arrest of Charlie (R 58-60).

In the opinion of Sergeants Safford, Brown and Routhier the accused is a good soldier, has an excellent reputation and character, and has a good reputation for truth and varacity (R 57, 61-62).

4. Accused was charged with and found guilty of wrongfully, knowingly and unlawfully having in his possession and concealing counterfeit money with intent to defraud.

The Manual of Courts-Martial 1949, paragraph 183c, provides in part:

> "Crimes or offenses of unlimited application.--Certain noncapital crimes and offenses denounced by Title 18, U.S.C., such as counterfeiting (18 U.S.C. 471), various frauds against the Government not denounced by Article 94, and other offenses which are directly injurious to the Government and are made punishable wherever committed are made applicable under the third clause of Article 96 to all persons subject to military law regardless of where the wrongful act or omission occurred".

The applicable Federal law is contained in Title 18 U.S.C. Section 472, and provides:

> "Uttering Counterfeit Obligations or Securities. - Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

The words "with like intent", as used in that part of the section prohibiting the possession of counterfeit obligations (meaning money, Title 18 U.S.C. Section 8) means "with intent to defraud" U.S. v. Provenzano, 171 F 675. Judge Ray, in the Provenzano case said:

> "There must be, with keeping in possession, an intent to defraud....It is plain that Congress intended to make the

intent to defraud the criminal intent".

To like effect is the holding by the Board of Review in CM 296230, Housel, 27 B.R. (ETO) 77.

In order to sustain a conviction under this section of the criminal code, it was incumbent upon the Government to prove (1) possession of the counterfeit obligations by accused and (2) his accompanying intent to defraud. Without proof of both elements the conviction may not be sustained(U.S. v. Campanaro 63 F Supp 811.) The accused's possession of the counterfeit money is uncontroverted. However, the evidence introduced by the Government failed to prove any intent to defraud on the part of the accused. Contra, evidence as a whole tended to substantiate the story of the accused, and equally supports the conclusion that the existence of a fraudulent intent was lacking. The burden of proof on the question of intent to defraud was upon the prosecution. Possession, coupled with other factors, might be sufficient to authorize a finding of guilty where fraudulent intent is a vital issue, but where, as here, all of the facts, other than the mere possession of the counterfeit currency, point to lack of an intent to defraud the prosecution has not carried its burden. In such a case there should be contained in the record of trial some substantial evidence of sufficient clarity to overcome the doubt raised by the uncontroverted facts appearing to support accused's contentions.

Under Article of War 50g it is our right and duty to weigh the evidence as well as to pass upon the formal legal sufficiency of the record of trial. In weighing the evidence, we may arrive at a different conclusion than did the court and the reviewing authority, even though their conclusions are, strictly speaking, legally justified by the evidence appearing in the record. Briefly stated, we are allowed a difference of opinion. We, too, must be convinced of accused's guilt beyond a reasonable doubt (CM 320681, Watcke, 70 B.R. 125, 135).

The record of trial shows that the accused, while in Paris, France, accepted a package for delivery to one "Charlie" in Frankfurt, Germany. The accused suspected the person who gave him the package to be a black marketeer. He found that this package contained money and asked his companion not to mention the money in the company stating he wanted to turn the money over to his company commander. The accused's company commander entered the barracks shortly after the accused arrived in the barracks and the accused did not mention the money to him. He told Recruit Sweet to keep some of the money, which Sweet had found on the floor of the barracks, as a Christmas present. Corporal Berry asked the accused for a loan and the accused showed him the money and stated that he would buy Berry a Buick if Berry wanted one. The accused did not turn the money over to the authorities until apprehended by the "CID" which was several hours after he arrived at the barracks. However, it further appears that the accused did not know the contents of the package when it was delivered to him, he was told that everything was all right and he was given persmission to inspect the package. When he inspected the package and discovered the large sum of money he immediately showed the money to the other guard on the train and

asked him to contact the "CID" immediately. The military authorities were not contacted because the train was in the French sector and it was the duty of the guards to protect the mail on the train. The accused and the other guard believed it better to wait until the train reached Frankfurt, Germany, before contacting the military authorities. After the accused discovered the money, he began drinking and became very intoxicated. Upon arrival in Frankfurt he refused to deliver the money to "Charlie" and told him the money had been confiscated by the CID. When he arrived at his barracks the accused went to bed while fully dressed. Within a short time after going to bed he urinated and was apparently unaware of this act. He was obviously in a drunken stupor and remained in that condition until about the time he was taken in custody by the CID. When aroused from this stupor by Recruit Sweet the accused asked to be left alone. When Sweet persisted in trying to give the money to him the accused told him to keep it. When Corporal Berry talked to the accused the accused displayed the money and began talking in a very incoherent manner. Upon his arrest the accused admitted possession of the money, detailed the circumstances relating to his possession of it and assisted in the arrest of "Charlie". After a careful and thorough examination of all the evidence contained in the record of trial, we are of the opinion that the evidence fails to establish any intent on the part of the accused to use this money to defraud.

Considering all the facts presented a conclusion that the accused retained possession of the counterfeit money for the purpose of defrauding someone necessarily rests upon a mere suspicion as to what he intended to do with the money in the future. Upon such a conjecture a conviction of wrongful possession with intent to defraud may not properly be sustained. Credible evidence emanating from a source other than the accused, which itself contained no indicia that it was other than the truth, established the fact that the circumstances surrounding accused's possession of the money were as consistent with his innocence as with his guilt. These facts, coupled with accused's conduct as a whole in relation to the money, neither occasion nor warrant an application of the presumption of an intent to defraud which might otherwise have arisen from the mere fact of accused's possession of the money, CM 325523, Hanni, 74 B.R. 285, 306 and cases there cited. Under the conditions here shown to exist, the evidence is obviously insufficient to exclude every other reasonable hypothesis except that of accused's guilt. The Board of Review, considering and weighing the evidence as a whole, is of the opinion that it is insufficient to sustain the finding of guilty and the sentence. (CM 319591, Pogue, 68 B.R. 385, 398).

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

Carlos E. McAfee J.A.G.C.
Laurel R. Chandler J.A.G.C.
George R. Springston J.A.G.C.

8 APR 1949

CSJAGV CM 335070 1st Ind.

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

To: Commanding General, Frankfurt Military Post, APO 757,
c/o Postmaster, New York, New York.

1. In the case of Recruit Robert H. Brown, Jr. (RA 14248708), Detachment "A", 7747th Military Police Railway, Security Group, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50e the holding and my concurrence therein vacate the findings of guilty and the sentence.

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

(CM 335070).

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of Trial.

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

MAR 2 2 1949

CSJAGK-CM 335095

UNITED STATES	)	2D ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Camp Hood, Texas, 9 December 1948. Confinement at hard labor for six (6) months and forfeiture of $33.40 per month for a like period.
Recruit LESLIE ALEXANDER (RA 38033650), Service Battery, 508th Armored Field Artillery Battalion, Camp Hood, Texas.	)	

HOLDING by the BOARD OF REVIEW
SILVERS, SHULL and LANNING
Officers of The Judge Advocate General's Corps

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Recruit Leslie Alexander, Service Battery, 508th Armored Field Artillery Battalion, having received a lawful command from First Lieutenant Charles D. Wilson, Service Battery, 508th Armored Field Artillery Battalion, his superior officer, to return to the barracks, unpack and display his equipment for inspection, did at Camp Hood, Texas, on or about 29 October 1948, willfully disobey the same.

The accused pleaded not guilty to the Specification and the Charge.

The court made the following findings:

"Of the Charge under the 64th Article of War: Not Guilty, but guilty of violation of the 96th Article of War.

Of the Specification as written: Not Guilty, but guilty of the following Specification: In that Recruit Leslie Alexander, Service Battery, 508th Armored Field Artillery Battalion, having received a lawful order from 1st Lt. Charles D. Wilson, Service Battery, 508th Armored Field Artillery Battalion, the officer being in the execution of his office, did, at Camp Hood, Texas, on or about 29 October 1948, fail to obey the same."

Evidence of three previous convictions by summary court-martial was received. Accused was sentenced to be confined at hard labor at such place as the reviewing authority might direct for six (6) months and to forfeit thirty-three dollars and forty cents ($33.40) of his pay per month for a like period. The reviewing authority approved the sentence, ordered it executed and designated the Post Stockade, Camp Hood, Texas, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 30, Headquarters, 2D Armored Division, Camp Hood, Texas, 23 February 1949.

3. It is fundamental in courts-martial pleading that an offense charged necessarily must contain an express act or omission to support it. It is also requisite that the offense found by the court to have been committed, if any, carry with it the act or omission supporting the offense charged, or an essential element thereof if a lesser included offense is found, and no more. The Manual for Courts-Martial provides that "One or more words or figures may be excepted and, where necessary, others substituted, provided the <u>facts as so found</u> 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 * * *" (par. 78<u>c</u>, MCM, 1928) (Underscoring supplied).

In the present case the fact or act properly alleged as supporting the offense of willful disobedience of a lawful command of his superior officer, was accused's refusal "to return to the barracks, unpack and display his equipment for inspection." It is conceded that the court was authorized to find that he merely <u>failed to obey</u> the lawful order to return to the barracks, unpack and display his equipment for inspection, in violation of Article of War 96, for the latter offense is necessarily included in the former. But the court acquitted the accused of both the offense and the facts or acts pleaded and by a substituted Specification found him guilty of failing to obey an

unspecified order of the officer in violation of Article of War 96.

It might be inferred that the court intended to find the accused guilty of failing to obey the order "to return to the barracks, unpack and display his equipment for inspection," but the court did not so declare and, as was stated in CM 330750, Pilgrim, 79 BR 163, 164, "It is not within the power of either the court or the reviewing authority to find an accused guilty of an offense which is /in/ any way open to an interpretation that it may decry acts with which he was not confronted upon his arraignment."

Stated in another manner, the substituted Specification herein completely fails to supply an allegation of specific facts or circumstances which can be relied upon to constitute a lesser offense necessarily included in that charged, for it is impossible to determine that the order accused was found to have failed to obey is the order "to return to the barracks, unpack and display his equipment for inspection," which accused was charged with willfully disobeying. The finding having deleted matters essential to a conviction under the charge and specification as pleaded, and to a lesser included offense, there is no legal basis for the imposition of a sentence (CM 232190, Lester, 19 BR 13).

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

Chester D. Gilroy, J. A. G. C.
Lewis F. Shull, J. A. G. C.
Harley A. Lamming, J. A. G. C.

29 MAR 1949

CSJAGK - CM 335095 1st Ind

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

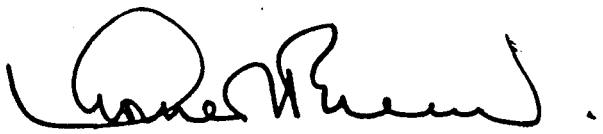
TO: Commanding General, 2d Armored Division, Camp Hood, Texas

1. In the case of Recruit Leslie Alexander (RA 38033650), Service Battery, 508th Armored Field Artillery Battalion, Camp Hood, Texas, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under Article of War 50e (3) this holding, and my concurrence therein, vacate the findings of guilty and sentence. A rehearing is not legally authorized under the circumstances of this case.

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

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

(CM 335095).



2 Incls
1. Record of trial
2. Draft of GCMO

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(53)

MAY 10 1949

CSJAGQ - CM 335123

UNITED STATES v. Recruit JOHN W. GREEN (RA 16281248), Company B, 73rd Engineer Combat Battalion, Camp Hood, Texas.	2D ARMORED DIVISION Trial by G.C.M., convened at Camp Hood, Texas, 7 January 1949. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
GOFF, SKINNER and CURRIER
Officers of The Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Recruit John W. Green, Company B, 73rd Engineer Combat Battalion did, at Camp Hood, Texas, on or about 1 December 1948 wrongfully use marijuana cigarettes, a narcotic drug.

Specification 2: In that Recruit John W. Green, Company B, 73rd Engineer Combat Battalion did, at Camp Hood, Texas on or about 1 December 1948, have in his possession one (1) ounce, more or less, of a habit forming drug, to wit, four (4) marijuana cigarettes, said drug not having been ordered by a medical officer of the Army.

The accused pleaded not guilty to the charge and specifications and was found guilty of the Charge and Specification 2 but not guilty of Specification I. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority might direct for one (1) year. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or elsewhere as the Secretary of the Army might direct as the place of confinement and forwarded the record of trial for action under Article of War 50e.

3. The evidence for the prosecution shows that the accused was apprehended by a military police sergeant who was on the lookout for civilians who might be carrying marihuana to soldiers on the post (R. 7). The accused was taken to the orderly room and upon being searched, his wallet was found to contain four cigarettes wrapped in paper. The sergeant expressed his opinion that the accused had been smoking marihuana and that the cigarettes contained such substance, but objections to this testimony and to admissions made by the accused before being warned of his rights under Article of War 24 were sustained by the court (R. 8, 26). Thereafter the accused was duly warned of his rights and signed a written statement (Exhibit 4) admitting that the four cigarettes found on his person were those remaining from ten marihuana cigarettes purchased for him by another soldier. This soldier, one Doyle, was called as a witness for the defense and denied any connection with the case (R. 32), but did state he had observed the accused smoking marihuana on the morning of the arrest (R. 34). The accused did not take the stand. As proof of the corpus delicti the prosecution submitted a copy of a letter to the Provost Marshal from the Texas Department of Public Safety stating that an analysis of four cigarettes submitted for examination disclosed that the cigarettes contained marihuana (Exh. 3). The defense objected to the admission of the report in evidence only because the original was not introduced (R. 17, 18). The four cigarettes taken from the accused were not even admitted in evidence although offered by the prosecution (R. 15, 16).

4. The failure of the defense to base its objection to the laboratory report on proper grounds does not cure the error. The letter was not an official record or a business entry, but the expression of an opinion or conclusion derived from the application of tests made by experts. The letter was clearly inadmissible as hearsay. The toxicologist who made the analysis should have been called personally as a witness or a comprehensive stipulation arranged for in advance of trial. Aside from the confession, the only other evidence upon which the court could have based its finding was the testimony of Doyle, the fellow soldier, that he "knew" the accused was smoking marihuana much earlier in the day. Obviously the court placed no reliance on this testimony because it found the accused "not guilty" of Specification 1 charging "use" of marihuana. That the accused carried four cigarettes wrapped in paper in his wallet was merely a suspicious circumstance and in no way conclusive that they contained either a narcotic or the particular drug the accused was charged with possessing.

Consideration of the confession was improper in the absence of evidence that the precise offense charged had probably been committed.

CM 193828, Morande and Mingo, 2 BR 95; CM 215241, Scott, 10 BR 377; CM 325377, Sipalay, 74 BR 169. Paragraph 127a, Manual for Courts-Martial, 1949, incorporating the more recent interpretations on the subject, lays down the rule as follows:

> "An accused cannot be legally convicted upon his uncorroborated confession. A court may not consider the confession of an accused as evidence against him unless there is in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be substantial evidence of the corpus delicti other than the confession." (Underscoring supplied).

In Wharton's Criminal Evidence, Eleventh Addition, Section 869, page 1500, it is stated:

> "The fact that a crime has been actually committed is the foundation of, and the primary issue in, every criminal trial."

We cannot say that the offense of possession of marihuana was actually committed without positive and substantial competent proof that the cigarettes in fact contained that substance.

5. Even if the evidence aside from the confession had been sufficient to establish the corpus delicti there is another and closely related ground requiring the setting aside of the conviction. With respect to the consideration to be given the admission of incompetent hearsay evidence, it has been repeatedly held:

> "The test of legal sufficiency to be applied in cases of admission of illegal evidence is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty." CM 211829, Parnell, 10 BR 137; CM 316780, Leech, 66 BR 41; CM 331556, Diggins, 80 BR 53.

That Doyle, the fellow soldier, was permitted to state the accused had been smoking marihuana was not error but was of little probative value and properly so regarded by the court. In the case of Medina v. State (Texas) 193 S.W. 2nd 196, the court upheld the overruling of an objection to similar evidence with this statement:

"We think the evidence was admissible. The objection went more to its weight than its admissibility. When the witness testified that he knew marihuana, that he had smoked it and dealt in it, he would be qualified to testify." (Underscoring supplied).

However, it is significant that in this case the chemist from the same Texas Department of Public Safety, who made an analysis, appeared and testified that the cigarette contained marihuana.

In the instant case it seems obvious the hearsay report of the analysis was the major basis for the conviction. Again referring to CM 211829, Parnell, 10 BR 137, 142, we find this quotation from an earlier case:

"It is not necessarily to be implied that the substantial rights of the accused have been injuriously affected by the admission of incompetent testimony; nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony had been excluded enough legal evidence remains to support a conviction. The reviewer must, in justice to the accused, reach the conclusion that the legal evidence of itself substantially compelled a conviction." (Underscoring supplied).

We can reach no such conclusion. The absence of the requisite quantum of competent evidence necessary to support a conviction cannot be supplied by calling it a mere irregularity under Article of War 37. We cannot safely sa that the members of the court were not influenced by what they must have considered as conclusive proof, from unbiased experts, that the cigarettes contained marihuana.

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

Alec McGregor Goff, JAGC

[illegible], JAGC

Roger W. Ernier, JAGC

CSJAGG CM 335123 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 10 JUN 1949

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

In the foregoing case of Recruit John W. Green, RA 16281248, Company B, 73d Engineer Combat Battalion, Camp Hood, Texas, The Judge Advocate General has not concurred in the holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Pursuant to Article of War 50e (4) the holding and record of trial are accordingly transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.

FOR THE JUDGE ADVOCATE GENERAL:

1 Incl
Record of trial

HUBERT D. HOOVER
Major General, United States Army
Assistant Judge Advocate General

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

CSJAGU CM 335123 26 July 1949

UNITED STATES 2D ARMORED DIVISION

v.

Recruit JOHN W. GREEN (RA 16281248), Company B, 73rd Engineer Combat Battalion, Camp Hood, Texas

Trial by G.C.M., convened at Camp Hood, Texas, 7 January 1949. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks

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Opinion of The Judicial Council

Brannon, Shaw and Harbaugh
Officers of the Judge Advocate General's Corps

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1. Pursuant to Article of War 50e(4) the record of trial by general court-martial in this case has been transmitted to The Judicial Council which submits this opinion to The Judge Advocate General.

2. The accused was tried by general court-martial at Camp Hood, Texas, on 7 January 1949, on a charge and two specifications laid under Article of War 96, which alleged that at Camp Hood, Texas, on or about 1 December 1948 the accused wrongfully used (Specification 1), and possessed (Specification 2) marijuana cigarettes. He pleaded not guilty to the charge and specifications, was found not guilty of Specification 1 and guilty of Specification 2 and of the charge, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for one year. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or elsewhere as the Secretary of the Army may direct, 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 in its opinion, dated 10 May 1949, held the record of trial legally insufficient to support the findings and sentence. By first indorsement on that opinion, to the Chairman of The Judicial Council, dated 10 June 1949, The Judge Advocate General advised that he had not concurred in the holding of the Board of Review, supra, and pursuant to Article of War 50e(4) transmitted the holding and the record of trial to The Judicial Council for appropriate action, with the advice that the participation by The Judge Advocate General in the confirming action is required.

3. The evidence shows that Sergeant Carr, 73rd Engineer Combat Battalion, on the night of 1 December 1948 was on the lookout for civilians carrying marijuana to soldiers. At approximately 1935 hours he observed the accused leaving the vicinity of the battalion headquarters "as though he was under the influence of narcotics or had stolen something". Sergeant Carr stopped the accused, took him to the battalion orderly room and there searched him and found in his wallet four cigarettes, the contents of which had the appearance of green weeds, "which I believed to be marihuana and know now

as being marihuana cigarettes" (testimony of Sergeant Carr). Sergeant Carr placed the accused in arrest and sent him to the provost marshal's office in the custody of Sergeant Hudson, joining them there later.

The record is not clear as to just what occurred at the office of the provost marshal, but the testimony of Carr and Hudson shows that the accused was interrogated during a period of about fifty minutes, and initially made some inculpatory admissions. The testimony regarding these was later stricken when it was shown that they preceded advice to the accused of his rights under Article of War 24.

According to Hudson, after he had asked the accused some questions, eliciting the admissions hereinbefore mentioned, he secured a "statement blank that has the 24th Article of War typed on it" and read the 24th Article of War to the accused and asked if he wanted to make a statement, telling the accused that any statement he made "was voluntary", that he could not be forced to make or sign a statement and "We * * * could not make any promise, threat or anything", the accused responded by saying "No". According to Hudson's account, Carr then took the accused to the desk sergeant, relieved him of his effects and directed the desk sergeant to give the accused a receipt therefor, after which -

> "* * * We went back into what we call investigation room, sit down and talked with the accused. I did not have nothing to do with the questioning. He decided he still did not want to make a statement. I got up and went out and talked to the Desk Sgt. and I came back in and Sgt. Carr told me the man wants to make a statement. He wanted us to give him some time to think it over. So Sgt. Carr asked the accused do you want him to go out and Sgt. Hudson. He said yes.
>
> "The two of us went out where the Desk Sgt. was and in about five minutes later the accused came to the door and called to both of us. We went back in there and in his own hand writing he had written out a statement concerning the ownership and purchasing of the four cigarettes. Sgt. Carr read the statement and then he asked the accused to sign it if it was the truth, and he signed it and Sgt. Carr typed it up.
>
> "There was no officer there to administer oath to the accused so therefore we had to wait until the following morning. The accused was given the same statement that had been typed and Sgt. Carr is the one that carried him before the officer that administered the oath." (R 14)

The next day, 2 December, the accused appeared before Captain Adamson of the military police, a summary court, with Carr and Hudson, and signed and swore to the typewritten statement. Captain Adamson was called as a witness, and identified a paper as the statement so signed by the accused, which was received in evidence as Prosecution Exhibit 4. Captain Adamson testified that, so far as he knew, no force or duress was used in obtaining the statement; that the accused did not appear reluctant to sign it; that

it was his practice to ask every person brought before him to sign a statement if he understood the 24th Article of War and the statement, and not to have the statement signed unless the answer was "yes"; that he sometimes signed "thirty or forty a day", and "I always ask if the statement is voluntary".

There is no evidence explaining what caused the accused to change his mind and make a statement after twice declining to do so.

4. Prosecution Exhibit 4 was executed on a mimeographed form which contained blank spaces for insertion of the name, rank, Army serial number and organization of the person making the statement, a recitation that he had been advised of his rights under Article of War 24, with spaces for entering the names of those giving such advice, following which are recitations that the person concerned knows those listed as giving the advice to be members of the military police, understands his rights in respect of self-incrimination (which the form set forth in language copied in large part from AW 24), and finally that the statement which follows is made voluntarily, with full awareness of the matter previously set forth, and without any promise of clemency or reward, or any threat or intimidation. Sergeants Carr and Hudson are listed as the persons who advised the accused of his rights under Article of War 24. Below the foregoing recitations and above the signature of the accused is the following (typewritten):

"On 30 November 1948, I saw Pfc Doyle after we were paid, I asked Pfc Doyle if he was going to town, He (Doyle) said he 'Was'. I asked him to purchase me some Marihuana Cigarettes, He (Doyle) said 'OK'. Wednesday Morning (1 December 1948), I asked Pfc Doyle for my Marihuana Cigarettes He (Pfc Doyle) gave me ten (10) Sticks that he purchased for me at one dollar a stick ($1.00). I then gave Pfc Doyle Six dollars ($6.00), I now owe Pfc Doyle Four Dollars ($4.00) on the ten sticks that he purchased for me. I smoked six (6) of them. The four that was found on me are part of the ten sticks that Pfc Doyle purchased for me. I don' know who Pfc Doyle purchased them from.

"I have read the foregoing statement which together with this paragraph comprises 1 page; I do not care to add anything; and this statement is true and correct to the best of my knowledge and belief, and no force or promise has been used to secure this statement."

Concerning the receipt in evidence of this document the record shows:

"TJA: Subject to objection by the defense I offer this document in evidence, being a sworn statement made by the accused after he had been advised of his rights under the 24th Article of War.

"DEFENSE: The defense feels it can show this was made under duress and with possibility of inducement present, and that the statement, the major portions of the statement itself can be shown to be incorrect.

"PRESIDENT: This will be accepted in evidence until such time as it is shown it was taken under duress or promises made, or the like. (Underscoring supplied)

"TJA: The document will be marked Prosecution Exhibit No. 4, and attached to the record.

"PRESIDENT: I would like you to read that.

"(Statement read by trial judge advocate.)"

It appears from the record that the accused was held in what is referred to by the witnesses as the "bull pen" (apparently a place of confinement used by the military police) from about 2030, 1 December 1948 until he was confined at the post stockade, Camp Hood, on 3 December 1948, and that he was questioned repeatedly on 2 and 3 December, while confined in the bull pen. How much, if any, of this further interrogation preceded the appearance of the accused before Captain Adamson on 2 December does not appear.

Captain Adamson testified that the reason for holding the accused in the bull pen and for the continued interrogation "through the next day", was to try to find out "where it came from", that is, the source of the marijuana. In reply to questions as to whether he recalled a statement being made to the accused that he "would not suffer if he made those statements, but you were primarily interested in the source", the witness testified that he did not recall, and "we are interested in the men who are using it but we are primarily interested in where it come from and trying to break it up to where they can't get it". This witness stated that he was not present during the entire interrogation and could not say that no such statement had been made to the accused.

The defense recalled the two sergeants to the stand, and interrogated them with reference to what occurred on the night of 1 December and during the next two days. In response to a question as to "the accused having been stood up against the wall" during the interrogation on the night of 1 December, Sergeant Carr, stated: "I cannot recall that." He also stated positively that he had not told the accused he "was after the source of the marihuana cigarettes in question and not so much the user as the source", and had no knowledge as to whether or not any other person had made such a statement to the accused. Sergeant Hudson likewise was interrogated as to whether the statement of the accused was induced by telling him that he was interested in the source of the marijuana rather than in the user. He testified that he recalled no such statement being made to the accused when he was present; that Sergeant Carr conducted the interrogation, and that he (Hudson) saw the statement of the accused only after it had been typed.

5. To prove that the cigarettes taken from the accused contained marijuana the prosecution introduced in evidence a document (Pros. Ex. 3, hereinafter referred to as the "laboratory report"), which purports to be a copy of a letter from the Chief, Bureau of Identification and Records, Texas Department of Public Safety, to the Provost Marshal, Camp Hood, dated 3 December 1948, bearing the signatures of three persons who signed as chemists and toxicologist. The letter, after recitation of the submission to "our laboratory" of four cigarettes, by Sergeant William C. Hudson of Camp Hood, Texas, with the request that they be examined to determine whether or not they contained marijuana, stated:

"We have completed the examination requested and wish to report all four of the cigarettes contained Cannabis sativa L., commonly known as marihuana."

The defense objected to the receipt of this document on the ground that the original rather than a certified true copy should be submitted, citing paragraph 98, TM 27-255, Military Justice Procedure, February 1945 to which the prosecution replied by inviting attention to paragraph 117b, page 121, Manual for Courts-Martial, 1928, "exceptions", stating that the original was the property of the provost marshal. The president and law member directed that the document be received in evidence, provided a copy authenticated by the provost marshal should be substituted for it. The paper appended to the record as Exhibit 3 is certified as a true copy over the signature "Melville H. Rubin, Major, CMP, Provost Marshal".

Pfc Doyle, called by the defense, testified that he had been interrogated in connection with the statements made by the accused in Prosecution Exhibit 4, which he testified were false. He denied that he had agreed to purchase, or that he had purchased for, or given to, the accused any marijuana cigarettes, or that the accused owed him any money. On cross examination he identified a paper as a statement made by him on the subject. This was received in evidence, over the objection of the defense (Pros. Ex. 5), and contains the following:

"When Rct John W Green was arrested he tried to get me in trouble by telling the Military Police that I bought the marihuana cigarettes for him. I don't know where or how he got them. In fact, I don't know anything about the whole case."

The following shows pertinent testimony elicited from this witness:

"QUESTIONS BY THE COURT

"Q. How long have you known the accused in this case?
"A. Ever since July.

"Q. Are you pretty good friends?
"A. Yes, we are from the same town.

"Q. From the same town, did you say?
"A. Yes, sir.

"Q. Ever had any trouble with him, any personal trouble?
"A. No, sir.
"Q. Did you know he was smoking Marihuana?
"A. Yes, sir"

* * * * * * * *

"Q. Is that personal knowledge or did you just hear of it?
"A. When he walked in the barracks that morning he was smoking and went on up stairs; he was smoking when he came in the barracks.

"Q. Did you say 'Smoking one', or 'smoking'?
"A. Smoking, don't know how many

"Q. Have you any qualifications to qualify you to determine whether the cigarette which he was smoking was a marihuana cigarette or not?
"A. Yes, I am positive it was.

"Q. What qualifications do you have?
"A. I use the stuff myself. Used it myself and somebody stopped me." (R 34-35)

6. The Board of Review holds that the laboratory report was incompetent and improperly received in evidence, on the grounds that it was not an official record or business entry which the law permits to be received in evidence, but merely hearsay as to the opinion of experts, which should have been proven by securing the testimony of such experts or by proper stipulation. The Council concurs.

The Board further states that this leaves as a basis for the finding that the accused possessed marijuana as alleged, only the testimony of Doyle and the confession of the accused. Stating that the court obviously placed no reliance on the testimony of Doyle, because it found the accused not guilty of Specification 1 alleging the use of marijuana, the Board holds there is lacking the substantial evidence of the corpus delicti legally necessary to corroborate a confession.

It is true that the opinion of Doyle might not be entitled to great weight, and the record discloses an obvious motive for hostility on his part toward the accused. Nevertheless, the evidence of the corpus delicti necessary to corroborate a confession need not have such weight, in and of itself, as to carry conviction beyond a reasonable doubt that the offense charged had been committed (MCM 1928, par 115; Deache v. United States, 250 F.566; Forte v. United States, 94 F.(2) 236; CM 325377, Siplalay, 74 BR 169).

It has frequently been held that actual or seeming inconsistencies between findings of guilty under particular counts of an indictment, or under particular specifications of charges in trials by court-martial, and findings of not guilty on closely related counts or specifications in the same proceedings, do not require reversal of a judgment of conviction or disapproval of findings of guilty (Dunn v. United States, 284 U.S. 390; 80 ALR 161; Selvester v. United States, 170 U.S. 262; United States v. Dotterweich, 320 U.S. 277; CM 197115, Froelich, 3 BR 81; CM 255203, King, 36 BR 62).

It is the opinion of the Council that the record in the instant case, exclusive of the confession of the accused, but including the testimony of Doyle, shows competent evidence of the corpus delicti sufficient to corroborate a confession by the accused.

7. Assuming the confession contained in Prosecution Exhibit 4 to have been properly received, there is for consideration the question whether or not errors in the admission of evidence disclosed by the record of trial have prejudicially affected the substantial rights of the accused.

Although admission of the extrajudicial statment of Doyle (Pros. Ex. 5) was erroneous, that statement contained little more than a summary of part of what the witness testified to on the stand. Considering this evidence in the light of the proceedings as a whole, the Council sees no reason to suspect that this evidence materially affected the findings or prejudicially affected any substantial right of the accused.

The error in receiving the laboratory report presents a more serious question. 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; * * *"

The conclusions of the experts which that document purports to set forth go to the very heart of the case, and if credited, would be practically conclusive of the guilt of the accused.

In Kotteakos v. United States ((1946) 328 U.S. 750, 757), the Supreme Court had occasion to consider the Federal harmless error statute then in effect (sec 269, Judicial Code, as amended, 28 U.S.C.; sec 391 now incorporated in Rule 52a, Federal Rules of Criminal Procedure), the provisions of which are substantially similar to those of Article of War 37. Section 269, reads as follows:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

After discussion of the origin and legislative history of the statute and a review of previous opinions interpreting and applying it, the Supreme Court 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, at 294. 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."

See also Bollenbach v. United States ((1926) 326 U.S. 607), in which it was said, in part:

"* * * The 'technical errors' against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency. See Taft, Administration of Criminal Law (1905) 15 Yal L.J.1, 15. Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts, and it is these which Congress rendered harmless. Bruno v. United States, 308 U.S. 287, 293-94; Wester v. United States, 323 U.S. 606, 611. From presuming too often all errors to be 'Prejudicial', the judicial pendulum need not swing to presuming all errors to be harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty." (326 U.S. 615)

8. Notwithstanding the rule in respect of inconsistencies between findings cited in paragraph 6, supra, it is the opinion of the Council that where on appellate review, as in this case, it becomes necessary to consider the question of the effect of incompetent evidence on findings of guilty, such inconsistencies, in conjunction with other facts and circumstances disclosed by the record as a whole, may be considered to the extent that they tend to throw light on that particular question.

As pointed out in paragraph 6, above, the Board of Review in considering the question of the competency of the evidence of the corpus delicti, adverted to the finding of not guilty of Specification 1, and inferred that the court must have disbelieved Doyle and relied upon the laboratory report in reaching its finding of guilty of Specification 2. In this connection it is to be noted that the finding of not guilty of Specification 1 was made also in the face of the statement of the accused in Prosecution Exhibit 4, admitting the use of six of the ten marijuana cigarettes which he claimed to have obtained from Doyle.

That the prosecution relied principally on the laboratory report to prove possession as alleged in Specification 2 is clear. In his closing argument the trial judge advocate, after stating that the prosecution had not been able to present "other than a circumstantial case or inference that the accused is guilty under Specification 1, of the use of narcotic drug" argued that "the laboratory analysis showing the cigarettes to contain marihuana" left no element of doubt of the accused's guilt as alleged in Specification 2.

That the right of the accused to be confronted by the experts who signed the laboratory report, or at least to have an opportunity to cross examine them either personally in court or by way of cross interrogatories on a deposition, is a substantial one is not open to question. The Council cannot, under the facts and circumstances of the instant case conclude that the laboratory report did not influence the findings, or that its influence was slight. On the contrary, an examination of the entire proceedings compels the Council to conclude the findings of guilty in this case were substantially swayed, if not controlled, by this evidence.

9. There remains for consideration the question whether the evidence of a confession by the accused contained in Prosecution Exhibit 4 so detracts from the prejudicial effect which the admission of the laboratory report otherwise would have as to justify the conclusion that, on the basis of an examination of the entire proceedings, the error has not injuriously effected the substantial rights of the accused. "Where * * * a confession is explicit and deliberate as well as voluntary, * * * it is indeed one of the strongest forms of proof known to the law" (par. 114a, MCM, 1928).

> "Elementary writers of authority concur in saying that, while from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession" (Wilson v. United States, 162 U.S. 613, 622)

In this case we do not have the benefit of a comprehensive presentation of the events leading up to the writing by the accused of the longhand statement on the night of his arrest, or of what occurred on the morning of 2 December before he appeared before Captain Adamson and signed and swore to Prosecution Exhibit 4. Although, according to the testimony of Sergeant Hudson, the interrogation of the accused on the night of his arrest and later was conducted principally by Sergeant Carr, the fullest account of what happened in this connection appears in the testimony of Hudson. This shows that shortly after the accused was arrested he made inculpatory statements to Hudson; but as soon as Hudson advised him of his rights under Article of War 24 and asked him if he wanted to make a statement the accused replied "No". Hudson's testimony shows that after he had been relieved of his effects and was taken back into the investigating room, following a further conversation the accused stated he "still did not want to make a statement". After this second refusal of the accused to make a statement, Hudson left the room. Apparently Sergeant Carr remained with the accused, and Hudson testified that when he returned Sergeant Carr told him "the man wants to make a statement".

No account is given of what was said or done while Sergeant Carr and the accused were alone; and it would be naive to assume that nothing was said or done at that time which had any bearing on the decision of the accused to reverse his twice repeated decision not to make a statement. The circumstances were such as to suggest as full and careful inquiry as practicable. The accused was not advised of his right to testify for the limited purpose of showing the circumstances under which a confession was

obtained; and it is reasonable to infer from this record that neither the defense counsel nor the court was familiar with this right of an accused.

Although the defense failed to produce evidence of any duress or other improper conduct inducing the confession, and failed to interrogate the witnesses in such a manner as to develop fully the facts and circumstances, it is pertinent to note that the president and law member, on three separate occasions during the trial, including that on which Prosecution Exhibit 4 was offered and received in evidence (see par 4, supra) in overruling objections by the defense to evidence showing that inculpatory statements had been made by the accused; directed that such evidence be received until such time as it might be shown the statements of accused were improperly induced. The inference from the record is clear that the president and law member considered the burden to be on the defense to show that the confessions were involuntary, rather than on the prosecution to show that they were voluntary.

10. Summarizing, the competent evidence in this case, aside from the confession of the accused, shows that the accused on 1 December 1948 had in his possession and was smoking cigarettes suspected by the military police to contain marijuana. A fellow soldier, whose credibility is open to serious question, testified that he had observed the accused smoking in the barracks on that day and knew that what the accused was smoking was marijuana, because he had previously been addicted to its use himself. There was also evidence of a confession, made under circumstances which were not fully developed at the trial and after the accused had twice refused to make a statement, which was received in evidence over the objection of the defense, pursuant to a ruling by the president and law member in which for the third time during the trial language was used the clear implication of which was that the president and law member believed that the defense had the burden of proof to establish that the confession was involuntary. Added to this was evidence (the laboratory report), clearly incompetent, which if credited by the court would be practically conclusive of the guilt of the accused, and which was stressed by the prosecution as having that effect. The inference from the record as a whole is compelling that the evidence last mentioned materially affected, if it did not control, the findings of guilty.

11. The Judicial Council feels compelled to conclude on the basis of an examination of the entire proceedings that the record in this case shows error in the admission of evidence, to the prejudice of the substantial rights of the accused, and that the record of trial is not legally sufficient to sustain the findings and the sentence.

Franklin P. Shaw, Brig Gen, JAGC

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

E. M. Brannon, Brig Gen, JAGC
Chairman

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Recruit John W. Green (RA 16281248), Company B, 73rd Engineer Combat Battalion, Camp Hood, Texas, upon the concurrence of The Judge Advocate General the findings of guilty and the sentence are vacated.

Franklin P. Shaw, Brig Gen, JAGC
J. L. Harbaugh, Jr., Brig Gen, JAGC

26 July 1949

E. M. Brannon, Brig Gen, JAGC
Chairman

CM 335123

I concur in the foregoing action.
A rehearing is authorized.

THOMAS H. GREEN
Major General
The Judge Advocate General

28 July 1949

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

CSJAGK - CM 335159

APR 21 1949

UNITED STATES	FIRST ARMY
v.	Trial by G.C.M., convened at Fort Jay, Governors Island, New York, 6 and 7 January 1949. "Dishonorable discharge."
First Lieutenant BYRAM W. SMITH (0-1300872), Infantry, Manchester Recruiting Main Station of Recruiting Detachment 8, 1202d ASU with station at U.S. Army and U.S. AF Recruiting Station, Concord, New Hampshire.	

OPINION of the BOARD OF REVIEW
SILVERS, SHULL, and LEVIE
Officers of The Judge Advocate General's Corps

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

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

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

Specification: In that First Lieutenant Byram W. Smith, Manchester Recruiting Main Station of Recruiting Detachment 8, 1202D Area Service Unit with station at United States Army and United States Air Force Recruiting Station Concord, New Hampshire, did, without proper leave, absent himself from his station at United States Army and United States Air Force Recruiting Station Concord, New Hampshire, from about 0001, 13 September 1948 to about 1600, 7 October 1948.

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

Specification 1: In that First Lieutenant Byram W. Smith, ***, did, at Houston, Texas, on or about 16 September 1948, with intent to defraud, wrongfully and unlawfully make and utter to First Lieutenant Kathryn E. Laing a certain check, in words and figures to wit:

CUSTOMER'S DRAFT

Houston, Texas 16 Sept 1948

Courtesy of
The Industrial State Bank
of Houston, Texas

PAY TO THE
ORDER OF 1st Lt. Kathryn E. Laing $100.00

One Hundred & 00/100 ---------- DOLLARS
Value received and charge to account of with exchange

TO Plainfield Trust Co.,

Plainfield, New Jersey

Byram W. Smith 1/Lt
0-1300872

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and, by means thereof, did fraudulently obtain from First Lieutenant Kathryn E. Laing One Hundred Dollars ($100.00), he, the said First Lieutenant Byram W. Smith, then well knowing that he did not have, and not intending that he should have, sufficient funds in the Plainfield Trust Co., Plainfield, New Jersey, for the payment of said check.

Specifications 2 and 3: (Findings of guilty disapproved by reviewing authority).

Specifications 4, 5 and 6: These vary materially from Specification 1 only with respect to the date of offense, and the date, payee, and amount of the check, as follows:

Date of Offense	Date of Check	Amount of Check
11 Sept 48	11 Sept 48	$54.18
11 Sept 48	11 Sept 48	25.00
16 Sept 48	16 Sept 48	20.00

The check referred to in Specification 4 was given to the Baker Hotel, Dallas, Texas, for hotel accommodations. The checks referred to in Specifications 5 and 6 were given to the Baker Hotel and to the Woodrow Hotel, Houston, Texas, respectively, for cash.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of any previous conviction was introduced. He

was sentenced "to be dishonorably discharged from the service." The reviewing authority disapproved the findings of guilty of Specifications 2 and 3 of Charge II, but approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

For the Prosecution

Specification 1, Charge I

A duly authenticated extract copy of the morning report of Manchester, New Hampshire Recruiting Main Station of Recruiting Detachment #8, 1202d Area Service Unit, MPPS, First Army, for 20 September 1948 was received in evidence without objection as Prosecution Exhibit 1 (R 12). The following entry appeared thereon:

"20 September 1948

Smith Byram W. (INF) 01300872 1st Lt.
Emergency lv to AWOL 0001 13 Sept 48

/s/ N. E. Welch
Capt USAF"

It was orally stipulated that accused returned to military control on 7 October 1948 (R 12,13).

Specification 1, Charge II

On 16 September 1948 accused gave to Second Lieutenant Kathryn E. Laing a check dated on that day drawn on the Plainfield Trust Company, Plainfield, New Jersey, payable to First Lieutenant Kathryn E. Laing in the sum of $100.00. Accused received in return therefor the sum of $100.00 in cash. Lieutenant Laing presented the check for payment on 20 September and 30 September 1948, however, on each occasion it was returned and charged against her account (R 13-17,35; Pros Ex 2,10).

Specifications 4 and 5, Charge II

On 11 September 1948 accused presented to the Baker Hotel, Dallas, Texas, two checks dated on that day drawn on the Plainfield Trust Company, Plainfield, New Jersey, each made payable to the said hotel. One of the checks in the sum of $54.18 was received by the hotel in payment of hotel accommodations, the other was in the sum of $25.00 and accused received from the hotel the sum of $25.00 in cash therefor. Each of the checks were presented for payment by depositing them in a bank and they were subsequently returned marked "insufficient funds" (R 28-31,32,35; Pros Exs 6,7,13,14).

Specification 6, Charge II

On 16 September 1948 accused gave a check to the cashier of Woodrow Hotel, Houston, Texas, dated that day, drawn on the Plainfield Trust Company, Plainfield, New Jersey, payable to the Woodrow Hotel in the sum of $20.00. He received cash therefor in the sum of $20.00. The check was presented for payment within a reasonable time through regular banking channels but payment was refused (R 32,33,35; Pros Exs 8,15).

As to all specifications of Charge II

It was stipulated by and between the prosecution and defense that the signature appearing on each of the checks referred to was that of the accused (R 33,34; Pros Ex 9).

By the deposition of Mr. C. Northrop Pond, Vice President of the Plainfield Trust Company, Plainfield, New Jersey, it was established that on about 18 November 1946 accused and his wife, Marjorie Lee Smith, opened a joint account at the mentioned bank. The account was active through October 1948. A statement of the account was received in evidence without objection showing the status thereof for the months of August, September and October 1948, as follows:

Checks:		Deposits:	Date:		Balance:
			August	1	$40.00
20.00	15.00			2	5.00
	170.00	$235.00		6	70.00
40.50				16	29.50
25.00				18	4.50
.62	(service charge)			19	3.88
		$235.00	Sept.	7	238.88
	170.00			7	68.88
43.40	5.00			10	
3.75				10	16.73
.50	(debit memo)			15	16.23
1.00	", "			20	15.23
10.00				20	5.23
1.00				21	4.23
.50				23	3.73
.30	(service charge)			29	3.43
2.63				30	.80
30.00	170.00	235.00	Oct.	6	
3.56				6	32.24
25.00				7	7.24
1.00	(service charge)			22	6.24
		Balance	Oct.	31	$ 6.24

The bank statement also shows that during the months of August and September the following checks were drawn on the accused's account and were returned by the bank because of insufficient funds:

Date	Amount
August 2	$ 15.00
" 4	20.00
" 19	15.00
Sept. 15	25.00
" 20	25.00
" 20	54.18
" 21	15.00
" 21	20.00
" 23	100.00

(R 35-41, Pros Ex 16)

The statement does not reveal whether accused or his wife issued these checks, however, it would appear that three of these checks are those described by Specifications 4, 5 and 6.

For the Defense

After being duly advised of his rights as a witness, accused elected to be sworn and testified in his behalf. He recited his military history from the time he entered the Army as a private in 1942 to his assignment at the recruiting station in Concord, New Hampshire. He is married and the father of two sons. He was hospitalized during the summer of 1948. Upon his discharge from the hospital on 6 September 1948 he was granted a 12-day emergency leave which would have expired on 19 September 1948. He then applied for additional leave to about 6 October and gave as his home address, 1122 Stillman Avenue, Plainfield, New Jersey. He did not remain at that address but called there several times. He never received any information concerning his request for an extension of leave. He had accumulated about 65 days leave and had believed that it would be granted. On 6 October he was apprehended in Plainfield, New Jersey, while on his way to Concord. (R 43-48)

Prior to his departure for overseas duty, he opened a joint account at the Plainfield Trust Company, Plainfield, New Jersey, with his wife. A deposit was made each month thereafter in the form of an allotment of his pay in the sum of $235.00. Accused and his wife each had power to write checks on the account. Statements concerning the status of the account were sent to his wife upon her request. In April 1948 accused believed the balance on deposit in the account was about $500.00. His wife was living with her parents at Plainfield, New Jersey, and he had no reason to believe her withdrawals from the account would be substantial. He never authorized her to draw a specific amount such as $170.00 per month. He believed that when the checks in question were written by him there were sufficient funds in his account to cover payment thereof. The balance

of his pay after insurance premiums and the allotment were taken out was about $35.00 per month. He believed he had a right to rely upon a substantial amount of the allotment to the bank for his own expenses (R 43-61).

On cross-examination it was disclosed that the accused did not use a check book but wrote counter checks and kept a record of the amounts. Although it was the habit of his wife to write checks for the monthly expenses, he never attempted to ascertain the amounts withdrawn by her. She had notified him occasionally as to the status of their account. He verified his account with the bank in June and again in August. There had been no agreement as to the amount his wife could draw for her support. He could not explain the withdrawals by her of $170.00 in August and September. He thought that her expenses would be much less and he was not aware that any of his checks had "bounced" until he reverted to military control on 7 October 1948 (R 61-74).

The accused's wife testified that she had not made any large withdrawals from the bank until April or May 1948 when she withdrew $125.00 followed by $150.00 in June, $150.00 in July, $150.00 in August, $200.00 in September. Occasionally she wrote additional checks for smaller amounts. These withdrawals were not made pursuant to any agreement with accused and she had not notified him of these unusual withdrawals. The joint account had been a "continual source of trouble" to the witness because she and accused had been in separate places so much of the time. She had been notified by the bank in August that checks were being returned to the payees because of insufficient funds (R 74-87).

Lieutenant Colonel John T. Corley testified that he had lived with accused from November 1943 until June 1944 while they were overseas and in his opinion accused "was a clean cut individual, never subject to any disciplinary causes. His work was considered excellent or better. He was reliable. I could depend upon the individual and he would perform. He had periods in his performance of duty which were far and above normal. In other words, he was eager to do a job and he would do his best, and then, at other times, he would fall down, but his overall effectiveness, I would say, would be excellent. He was never the cause of any disciplinary action at all while he was under my command. He left my command shortly after the invasion of Normandy" (R 88,89).

4. Discussion

Charge I and its Specification

Prosecution Exhibit 1 established a prima facie case of unauthorized absence as of 13 September 1948 terminated, as stipulated, on 7 October 1948. There is no substantial evidence in the record to controvert this evidence.

Charge II and its specifications

Accused has been convicted of uttering the checks described in Specifications 1, 4, 5 and 6 of Charge II, with intent to defraud, then well knowing that he did not have, and not intending that he should have, sufficient funds on deposit with the drawee bank for payment thereof. The evidence shows that accused and his wife had a joint account at the drawee bank, that accused had an allotment of $235.00 per month to the bank which was regularly deposited to the joint account, that accused and his wife were living at different places, and that neither party notified the other of the checks which either had drawn. The bank statements introduced in evidence cover a period from 1 August 1948, when there was a balance of $40 in the account, until the close of business on October 6, 1948. During this period there was allotted from accused's pay and deposited to the account the sum of $705. It is impossible to determine however from the ledger account and the testimony of the witnesses that the account was depleted by checks given by accused so as to render it insufficient to cover the checks mentioned in the specifications and of which he has been found guilty. The evidence is entirely consistent with the theory that accused's wife, by checks she had drawn without his knowledge, depleted the account. Furthermore, there is no evidence to show that accused had knowledge that payment had been refused on any of the checks he had uttered. In fact, the evidence is quite to the contrary. The bank statements were sent to his wife. Prior to the period in question accused's wife had customarily drawn only nominal sums against the account. During the period shown she withdrew, apparently without accused's knowledge, amounts aggregating almost the total amount of the allotment. According to her testimony, she withdrew the latter amounts anticipating maternity expenses in a civilian hospital. Although it might be reasonable to assume that accused knew that his wife would draw checks upon the account, the evidentiary situation here is not sufficient to fasten upon accused knowledge that there were insufficient funds on deposit to his credit to meet payment of the described checks which he had drawn.

In the ordinary case an accused is charged with knowledge of the status of his bank account. But this rule applies only to cases where the status of the account results from acts of accused, such as making deposits or drawing checks, or from changes otherwise made in the account which have been brought to the attention of accused (CM 202601, Sperti, 6 BR 171,214; CM 236070, Wanner, 22 BR 279,283).

The evidence in this case failing to show that accused's account had been rendered insufficient by his own acts to meet payment of the checks when presented, and also failing to show that accused knew, or had reason to believe, that the account had been depleted or rendered insufficient by reason of checks previously drawn by his wife, there is no basis in the record to justify the conclusion that the checks described in Specifications 1, 4, 5, and 6 of Charge II were given with intent to defraud. Nevertheless, as a matter of military law, the

utterance of checks, without maintaining sufficient funds on deposit to provide for the payment upon presentation, in itself constitutes conduct discreditable to the military service in violation of Article of War 96, regardless of intent to defraud or guilty knowledge (CM 249232, Norren, 32 BR 95, 102-103, 3 Bull, JAG 290; CM 320578, Himes, 70 BR 31,37, 6 Bull. JAG 182).

Having maintained a joint account with his wife, it was accused's reasonable duty to make timely inquiry concerning the true status of his account. This he did not do and such carelessness and neglect on his part is sufficient to constitute the offense of uttering checks without maintaining sufficient funds on deposit to meet payment thereof. As was stated in CM 249232, Norren (supra),

> "Proof that a check given for value by a member of the military establishment is returned for insufficient funds imposes upon the drawer of the check, when charged with conduct to the discredit of the military service, the burden of showing that his action was the result of an honest mistake not caused by his own carelessness or neglect."

The sentence "to be dishonorably discharged the service" is inappropriate in the case of an officer, but is interpreted to mean "dismissal" and this irregularity may be cured by the action of the confirming authority (CM 249921, Maurer, 32 BR 229; CM 271119, Simpson, 46 BR 53,58).

5. Records of the Department of the Army show that accused is 33 years of age, married, and the father of two children. He completed two years of college, majoring in business administration. He enlisted in the Army in April 1942 and was commissioned a second lieutenant in November of the same year. He served in the European and Mediterranean Theaters and has been awarded the Silver Star, two battle stars and the Bronze arrowhead. His adjectival efficiency ratings have averaged "Excellent."

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted herein, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its specification, but legally sufficient to support only so much of the findings of guilty of Charge II and Specifications 1,4,5 and 6 as involves findings that on the dates alleged the accused wrongfully and unlawfully made and uttered the described checks to the parties alleged and did fail to maintain a balance in the drawee bank sufficient to meet payment thereof, in violation of Article of War 96, legally sufficient to support

the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Article of War 61 or 96.

Christy D. Silvers, J.A.G.C.

Lewis F. Shull, J.A.G.C.

Howard S. Levie, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 335159

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

In the foregoing case of First Lieutenant Byram W. Smith (0-1300872), Infantry, Manchester Recruiting Main Station of recruiting detachment 8, 1202d Area Service Unit, with the concurrence of The Judge Advocate General, only as much of the findings of guilty of ChargeII and Specifications 1, 4, 5 and 6 thereunder is approved as involves findings that the accused wrongfully and unlawfully made and uttered checks in the words and figures, at the times and places and to the persons alleged, and did thereby obtain monies, and alleded in Specifications 1, 5 and 6, and credit for payment of a hotel accomodation account, as alleged in Specification 4, and that the accused uttered each of said checks without having, and without intending to assure that he should have, sufficient funds in the drawee bank for payment thereof, in violation of Article of War 96; and the sentence is confirmed and will be carried into execution.

Franklin P. Shaw
Franklin P. Shaw, Brig Gen, JAGC

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

20 May 1949

E.M. Brannon
E.M. Brannon, Brig Gen, JAGC
Chairman

I concur in the foregoing action.

Thomas H. Green
THOMAS H. GREEN
Major General
The Judge Advocate General

1 June 1949

(GCMO 35, June 8, 1949)

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

MAR 25 1949

CSJAGI - CM 335165

U N I T E D S T A T E S	)	TRIESTE UNITED STATES TROOPS
v.	)	Trial by G.C.M., convened at Trieste, Free Territory of Trieste, 22 January 1949. Dishonorable discharge (suspended) and confinement for two (2) years. Disciplinary Barracks.
Recruit PAUL WILLIAM ERICKSON (RA 32690041), 281st Military Police Company.	)	

HOLDING by the BOARD OF REVIEW
JONES, ALFRED and JUDY
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 I: Violation of the 58th Article of War.

Specification: In that Recruit Paul William Erickson, 281st Military Police Company, did, at Trieste, Free Territory of Trieste, on or about 6 November, 1948, desert the service of the United States and did remain absent in desertion until he was returned to military control at Road Block Number 8, Opicina-Sesana road, Free Territory of Trieste, on or about 4 December, 1948.

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

Specification: In that Recruit Paul William Erickson, 281st Military Police Company, did, at Trieste, Free Territory of Trieste, on or about 6 November, 1948, wrongfully leave the Free Territory of Trieste, without having in his possession authenticated documents granting him permission to leave the Free Territory of Trieste, in violation of standing orders, to wit: Memorandum Number 74, Headquarters TRUST, dated 4 August 1948.

He pleaded not guilty to and was found guilty of both charges and their specifications and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two years. The reviewing authority approved the sentence and ordered it executed, suspended the execution of the dishonorable discharge until the soldier's release from confinement, and designated the Branch, United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement. The result of trial was published in General Court-Martial Orders Number 12, Headquarters Trieste United States Troops, APO 209, U.S. Army, 12 February 1949.

3. The record of trial is legally sufficient to support the findings of guilty. The only question to be considered is whether the record of trial is legally sufficient to support the sentence.

4. In the Specification of Charge I, of which accused was found guilty, it is alleged that accused was in desertion from 6 November 1948 "until he was returned to military control at Road Block Number 8, Opicina-Sesana road, Free Territory of Trieste, on or about 4 December 1948," a period of twenty-eight days.

In a recent case the Board of Review held that although the words "was returned to military control" imply some degree of involuntary action, they are not equivalent to apprehension, and that a finding of guilty of a specification containing those words amounts only to a finding of guilty of desertion at the time and place and for the period alleged terminated in a manner not shown, the maximum punishment for which cannot exceed that provided for desertion under similar circumstances terminated by surrender (CM 325603, Cote, 74 BR 359, 360).

The maximum sentence to confinement authorized, for the offense of desertion terminated by surrender after absence of not more than sixty days was one year (par. 104c, MCM, 1928).

5. The offense of failing to obey a standing order in violation of Article of War 96 was not listed in paragraph 104c, MCM, 1928, the Table of Maximum Punishments in effect at the time accused committed the offense of which he was found guilty under the specification of Charge II. However, it has been held that this offense is closely related to the offense of failing to obey the lawful order of a superior officer (CM 199969, Harris, 4 BR 205, 206). Applying the rule of closely related offenses, the Board of Review holds that the maximum period of confinement to which accused may be sentenced under this specification is six months.

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 involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and six months.

_____, J.A.G.C.

_____, J.A.G.C.

_____, J.A.G.C.

(82)

13 MAY 1949

CSJAGI CM 335165 1st Ind

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

TO: Commanding General, Trieste United States Troops, APO 209, U. S. Army, c/o Postmaster, New York, New York.

1. In the case of Recruit Paul William Erickson (RA 32690041), 281st Military Police 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 of the charges and specifications and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and six months. Under Article of War 50e(3), this holding and my concurrence therein vacate so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and six months.

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

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

(CM 335165)

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls:
1. Record of trial
2. Draft GCMO

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

MAR 1 0 1949

CSJAGH CM 335179

UNITED STATES v. First Lieutenant GILBERT C. MULLIGAN, 01998705, Headquarters and Headquarters Company, 15th Infantry Regimental Combat Team (formerly Headquarters and Headquarters Company, 325th Infantry Regimental Combat Team), Fort Benning, Georgia.	THE INFANTRY CENTER Trial by G.C.M., convened at Fort Benning, Georgia, 25 January 1949. Dismissal.

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

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

2. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that First Lieutenant Gilbert C. Mulligan, Headquarters and Headquarters Company, 15th Infantry Regimental Combat Team (formerly a member of Headquarters and Headquarters Company, 325th Infantry Regimental Combat Team), did, without proper leave, absent himself from his organization at Fort Benning, Georgia, from about 9 November 1948, to about 12 November 1948.

Specification 2: In that First Lieutenant Gilbert C. Mulligan, Headquarters and Headquarters Company, 15th Infantry Regimental Combat Team (formerly a member of Headquarters and Headquarters Company, 325th Infantry Regimental Combat Team), did, at Fort Benning, Georgia, on or about 1 December 1948, fail to repair at the fixed time to the properly appointed place of assembly for detail.

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

Specification: In that First Lieutenant Gilbert C. Mulligan, Headquarters and Headquarters Company, 15th Infantry Regimental Combat Team (formerly a member of Headquarters and Headquarters Company, 325th Infantry Regimental Combat Team), did, at Fort Benning, Georgia, on or about 1 December 1948, render himself unfit for military duty by the excessive use of intoxicants.

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

Specification: In that First Lieutenant Gilbert C. Mulligan, Headquarters and Headquarters Company, 15th Infantry Regimental Combat Team (formerly a member of Headquarters and Headquarters Company, 325th Infantry Regimental Combat Team), did, without proper leave, absent himself from his organization at Fort Benning, Georgia, from about 3 December 1948 to about 7 December 1948.

He pleaded guilty to Charge I and the specifications thereunder, not guilty to Charge II and its specification, and guilty to the Additional Charge and its specification. Accused amended his plea of guilty to specification 1 of Charge I during the course of the trial by excepting the words "12 November 1948," and substituting therefor the words "11 November 1948" (R 28). No evidence of previous convictions was introduced. He was found guilty of all Charges and specifications and sentenced to be dismissed the service and to pay to the United States a fine of one hundred dollars ($100.00). The reviewing authority approved the sentence, but remitted the fine, and forwarded the record of trial for action under the provisions of Article of War 48.

3. Evidence for the prosecution.

In support of accused's plea of guilty, relative to the offenses of absence without leave, the prosecution introduced, without objection, the following extract of morning report entries of Headquarters and Headquarters Company, 325th Infantry RCT:

"10 November 1948

Mulligan Gilbert C (Inf) 01998705 1st Lt
Dy to AWOL eff 1400 hrs 9 Nov 48

/s/ Claude R Keogh
/t/ CLAUDE R KEOGH

12 November 1948

Mulligan Gilbert C (Inf) 01998705 1st Lt
AWOL to Dy 0745 hrs

/s/ Claude R Keogh
/t/ CLAUDE R KEOGH

3 December 1948

Mulligan Gilbert C (Inf) 01998705 1st Lt
Dy to AWOL 0800 hrs

/s/ Claude R Keogh
/t/ CLAUDE R KEOGH

7 December 1948

Mulligan, Gilbert C (Inf) 01998705
AWOL to Apprehended by Mil Auth & placed in arrest in Qrs 1830 hrs
Violation 61st AW Charges pending

/s/ ClaudeR Keogh
/t/ CLAUDE R KEOGH" (Pros Ex 1)

About 0800 or 0830 hours on 9 November 1948, the accused telephoned Private First Class Vaughn W. Shull, the assistant company clerk of his organization, and requested that Shull "pass on" to the first sergeant that he was going to have surgery performed upon his foot (R 25,27). Private First Class Shull passed this information on as requested (R 27). According to First Lieutenant Ted W. Hines, Administrative Assistant of the Fort Benning Station Hospital, however, there was no record of accused's having been treated at any of the hospital facilities on the post on 9 November 1948 (R 10,11). Between 1000 and 1100 hours on 10 November 1948 Second Lieutenant Robert J. Longardner of Company C, 15th Infantry, a friend of the accused, received a telephone call from Columbus, Georgia, placed by the accused. The latter asked Lieutenant Longardner what he "* * was doing that afternoon." The Lieutenant replied that he had a detail and informed the accused that the latter had been dropped as "AWOL." Lieutenant Longardner also told the accused that he had a Section 368 Board Proceedings for him to sign (R 7-10). The following day, 11 November 1948, the accused stopped by Lieutenant Longardner's quarters and signed these proceedings (R 9,10).

On 30 November 1948, the accused was assigned the project of setting up and clearing a building to be used as Third Division Headquarters (R 13). This assignment was to be completed on the morning of 1 December 1948, and if possible, prior to a parade formation scheduled for 0930 hours. The accused failed to meet and to take charge of the detail he was to supervise on the morning of 1 December (R 14,18,19,22,23,24,26),

and it was necessary for First Lieutenant Albert W. Childress, Jr., the Executive Officer of Headquarters and Headquarters Company, to finish the project originally assigned to the accused (R 14,23,25). At approximately 0945 that same morning, the accused reported to Lieutenant Childress in the organization orderly room (R 15). In the course of obtaining some Quartermaster property turn-in and issue slips from the accused, Lieutenant Childress noticed that the accused had the odor of alcohol on his breath and that he acted very unusual (R 15). It was this officer's belief that the accused "* * was too drunk to place on duty" (R 15). This conclusion stemmed from Lieutenant Childress' observation that the accused's fingers were stiff and he appeared to have great difficulty in extracting the papers from his pockets (R 15). Lieutenant Childress thereupon placed the accused in arrest and informed him that he was going to take him to the dispensary and have him examined by the medical officer. This disclosure precipitated the following conversation between the two officers:

> "* * 'You wouldn't do that to me, your old buddy,' and I [Lieutenant Childress] told him, 'I can't consider friendship,' that I had done everything I could to help him, and he said he was thoroughly ashamed of himself and said, 'Keogh must have told you what to do.' I told him I was acting on my own. * *" (R 16)

Lieutenant Childress took the accused to the dispensary at approximately 1015 hours. There accused was examined by a medical officer, and at about 1130 hours, he was taken to the Station Hospital and given a blood test (R 16). While being prepared for the blood test, according to Lieutenant Childress, the accused said, "Who is going to hold me; you better get six or seven men to hold me." Further, the accused "* * walked about with no apparent aim, wringing his hands, and he didn't act as a sober man would." (R 16).

Captain Claude R. Keogh, the commanding officer of Headquarters and Headquarters Company, 325th Infantry, also observed the accused at about 1200 hours on 1 December 1948. Captain Keogh could detect the odor of liquor on accused's breath and noticed that the accused appeared to be under the influence of liquor (R 20,21). In this officer's opinion the accused was unfit to perform military duty at that time (R 21). He could not, however, state that the accused was drunk (R 22). Private First Class Shull also testified that he smelled alcohol on accused's breath at about 0830 that morning, and that he observed accused "* * had blood shot eyes, his hair was messed up" (R 26,27)

In accordance with instructions given him, Agent Robert L. Davis of the Criminal Investigation Division, Fort Benning, Georgia, returned the accused from Anniston, Alabama, to Fort Benning, Georgia, on 7

December 1948 (R 6,7). The accused accompanied Agent Davis without offering resistance (R 7).

4. Evidence for the defense.

It was stipulated that if First Lieutenant R. J. Runk were called as a witness for the defense he would testify substantially:

> "That he is a First Lieutenant in the Medical Corps, Dispensary 'A,' Fort Benning, Georgia; that on 1 December 1948, at 1100 hours, he examined First Lieutenant Gilbert C. Mulligan, 01998705; that the examination was essentially negative and in view of these findings and not a trace of alcohol in the blood, it is his opinion that he was not under the influence of alcohol." (R 28).

The defense introduced, without objection, "Certificate in lieu of Lost or Destroyed Discharge" dated 20 October 1947, showing accused's honorable discharge as a Technical Sergeant on 23 November 1944 to accept a commission ("Character: Excellent, Efficiency rating as a soldier: Superior") (Def Ex 1); a "Certificate in lieu of Lost or Destroyed Discharge" also dated 20 October 1947 showing his honorable discharge as a corporal on 3 October 1936, with character and efficiency "Excellent" (Def Ex 2); a "Certificate of Service" and "Separation Qualification Record" showing accused's honorable commissioned service from 24 November 1944 to 9 May 1947 wherein he attained the grade of Captain and received numerous combat decorations for battle participation, as hereinafter set forth, (Def Ex 3); and the accused's WD AGO Form 66-1, showing in detail his commissioned military record (Def Ex 4) (R 28,29).

At the request of the defense the court took judicial notice that 9 November 1948 was on Tuesday and 3 December 1948 was on a Friday and that 11 November 1948 was Armistice Day, a holiday officially declared and on which date military personnel were excused from duty with the exception of having to perform fatigue details (R 30).

After having been advised of his rights as a witness in accordance with TM 27-255, the accused elected to remain silent (R 30).

5. The accused has pleaded guilty to the offenses of absence without leave on two separate occasions (Specification 1 of Charge I and the Specification of the Additional Charge) and failing to repair at a fixed time to the properly appointed place of assembly for detail (Specification 2 of Charge I), all in violation of Article of War 61. While such plea has been modified as to the specification first mentioned by reducing the period of admitted unauthorized absence from

four (4) to three (3) days (R 28), there is otherwise no variance or inconsistency between the accused's pleas and the evidence offered by the prosecution in support of these three offenses.

To show the circumstances relating to each of the above offenses, and to thus supplement the accused's pleas of guilty and the recitations in the specifications, as provided for by paragraph 70, MCM 1928, p.54 and paragraph 71, MCM 1949, p.67, the prosecution has offered competent proof that the accused was absent without leave from his organization from 9 November 1948 until 12 November 1948 (R 9,10,11,27; Pros Ex 1); that he was absent without leave from 3 December 1948 to 7 December 1948 (R 6,7; Pros Ex 1); and that he failed to repair at the properly appointed place of duty on 1 December 1948 (R 18,19,22,23). Thus, the only question presented as to accused's legal guilt of the three violations of Article of War 61 concerns Specification 1 of Charge II and relates to the conflict between the accused's modified plea of guilty to absence without leave from 9 November 1948 to about 11 November 1948 and the evidence of the prosecution showing an absence similarly unauthorized from 9 November 1948 to about 12 November 1948. In determining whether the court's findings of guilty of absence without leave for the period last set forth are sustainable, it is necessary for the Board of Review to consider that 11 November was Armistice Day, a legal holiday, and that the accused signed a Board Proceedings in another officer's quarters on that day (R 9,10). In first considering whether a legal holiday has the effect of interrupting a period of absence without leave and thus to place an accused once more upon a record duty status, we are confronted with the realization that to so hold would be to decide that in every case of absence without leave, even over extended periods, an accused must be credited with every legal holiday. This would mean that an accused absent without authority for a period of one year would have to be charged with eight different offenses, a requirement so manifestly untenable legally as to clearly illustrate our answer without further discussion. The second question relative to the effect of accused's performance of the official act of signing a Board Proceedings during a day of unauthorized absence must also be resolved against the accused. Relative to a comparable situation and one wherein an accused's purported return to a duty status from unauthorized leave was far less token and much more real than that herein, the Board of Review has stated in CM 225754, Wykoff, 14 BR 333, at pages 335 and 336:

> "* * Although it thus appears that accused was not continuously absent for the entire period alleged in the Specification, the interruption of the status of absence without leave was of but a few hours duration on August 18 and 19. Accused was punishable for his absence on each day alleged. The variance involved is immaterial and the findings need not be disturbed. Violation of Article of War 61 is established."

The Board of Review in the instant case must similarly conclude that the court's findings of guilty of absence without leave from 9 November 1948 to about 12 November 1948 are fully warranted on the basis of competent evidence introduced by the prosecution, and are not subject to being disturbed either by reason of the legal holiday, above discussed, or by accused's performance of the isolated act of affixing his signature to official documents during the period of his unauthorized absence.

With reference to the offense recited in the specification of Charge II, to which the accused pleaded not guilty, the Board of Review must likewise agree with the conclusions of the court-martial that the evidence convinces beyond a reasonable doubt that accused rendered himself unfit for military duty by the excessive use of intoxicants on or about 1 December 1948. To weigh against the stipulated testimony of a medical officer that an examination of the accused performed at approximately 1100 hours was "essentially negative" and there was "* * not a trace of alcohol * *" in accused's blood (R 28), there is the lay testimony to the contrary of two officers and one enlisted man. Lieutenant Childress testified in this connection that he observed the accused at approximately 0945 hours and concluded that he was drunk because of the odor of alcohol on his breath and accused's conversation and actions. His testimony clearly and convincingly portrays accused as unfit to perform the military duties required of him as an officer. This evidence is corroborated by the testimony of Captain Keogh who reached a similar conclusion as to accused's lack of military fitness, and by Private First Class Shull who observed that accused's eyes were "blood shot" and his hair was "messed up." It should be noted that Lieutenant Childress and Private First Class Shull observed the accused several hours before he was taken to the medical officer and at the time when he was required to perform military duty. Captain Keogh's testimony as to accused's lack of sobriety after the negative blood test casts substantial doubt on the validity of the procedures employed in the test. Further corroboration of accused's lack of sobriety at the time alleged is afforded by accused's failure to report for his assigned duty.

The principle that a lay witness is qualified to express an opinion on matters within common observation and the experience of mankind such as the sobriety or intoxication of a person is settled by express executive proclamation for purposes of military law (Par 112b, MCM 1928, and MCM 1949, pps 111 and 153, respectively). Considered in the light of the permissible and warranted legal limitation, the testimony in the instant case established that accused rendered himself unfit for military duty by the excessive use of intoxicants, as alleged.

It is accordingly the opinion of the Board of Review that the accused's pleas of guilty and the evidence introduced by the prosecution

are ample to sustain the findings of the accused guilty of the offenses alleged, in violation of Articles of War 61 and 96, and to support the sentence.

6. Records on file in the Department of the Army show that the accused is 32 years of age, divorced and remarried. He is the father of one child by his first marriage. According to information recently furnished by accused to the Staff Judge Advocate at Fort Benning, he has a total of three children. He attended Anniston High School, Anniston, Alabama, for three years and Burns High School, Burns, Mississippi, for one year, being graduated from the institution last mentioned in 1934. In civilian life he was employed in a lumber yard and as a professional baseball player.

Accused enlisted in the Army on 3 October 1936 and was honorably discharged as a corporal from the 22d Infantry Regiment on 9 October 1939. He reenlisted on 10 October 1939 and was honorably discharged as a technical sergeant in the 325th Infantry on 24 November 1944 to accept a battlefield commission as a second lieutenant. He was promoted to first lieutenant on 7 September 1945 and, upon separation from active service, to captain on 10 March 1947. He remained on terminal leave until 9 May 1947 and subsequently reenlisted on 22 October 1947 and was serving as a sergeant first class when he was recalled to extended active duty, a first lieutenant, effective 10 August 1948.

The accused served overseas in the European Theater from 7 April 1944 until 24 October 1945 and following the war, he served in the Asiatic-Pacific Theater from 1 September 1946 until 14 February 1947. He participated in the campaigns of Normandy, Northern France, Rhineland and Central Europe and is entitled to wear four Bronze Service Stars therefor. He is further entitled to wear the Bronze Star, Purple Heart, the Distinguished Unit Badge and the Combat Infantryman's Badge. His efficiency ratings include six (6) of "Superior," and two (2) of "Excellent."

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to sustain the findings of guilty and the sentence, as modified by the reviewing authority, and to warrant confirmation of the sentence. A sentence to be dismissed the service is authorized upon conviction of a violation of Articles of War 61 and 96.

Wilmot T. Baughman, J.A.G.C.

Charles J. Berkowitz, J.A.G.C.

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

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CSJAFH CM 335179

THE JUDICIAL COUNCIL

Brannon, Shaw, and Mickelwait
Officers of The Judge Advocate General'S Corps

In the foregoing case of First Lieutenant Gilbert C. Mulligan, (O- 1998705), Headquarters and Headquarters Company, 15th Infantry Regimental Combat Team (formerly Headquarters and Headquarters Company, 325th Infantry Regimental Combat Team), Fort Benning, Georgia, the sentence is confirmed and will be carried into execution upon the concurrence of The Judge Advocate General.

Franklin P. Shaw

Franklin P. Shaw, Brig Gen, JAGC

C. B. Mickelwait

C.B. Mickelwait, Col. JAGC

E.M. Brannon
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11 April 1949 E.M. Brannon, Brig Gen, JAGC
Chairman

I concur in the foregoing action.

Thomas H. Green

THOMAS H, GREEN
Major General
The Judge Advocate General

21 APR 1949

(GCMO 24, April 27, 1949).

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

MAR 17 1949

CSJAGH CM 335181

UNITED STATES	)	FIFTH ARMY
v.	)	Trial by G.C.M., convened at Percy Jones General Hospital, Battle Creek, Michigan, 14 December 1948. Forfeiture of twenty-five dollars ($25.00) pay per month for one (1) month.
Private First Class JAMES C. LA VIGNE, RA 36585300, 5612 Area Service Unit, Fort Custer, Michigan.	)	

HOLDING by the BOARD OF REVIEW
BAUGHN, BERKOWITZ and LYNCH
Officers of The Judge Advocate General's Corps

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class James C. LaVigne, 5612 Area Service Unit, Percy Jones General Hospital, then of Headquarters Detachment, Post Operating Company, did, at Camp Beale, California on or about 27 June 1946 desert the service of the United States and did remain absent in desertion until he surrendered himself at Detroit, Michigan, on or about 7 October 1948.

The accused pleaded not guilty to the Charge and Specification. He was found guilty of the Specification except the words "desert" and "in desertion," substituting therefor, respectively, the words "absent himself without leave from" and "without leave,", and not guilty of the Charge, but guilty of a violation of the 61st Article of War. No evidence of previous convictions was introduced. He was sentenced to forfeit $25.00 of his pay for one month. The reviewing authority approved the sentence and ordered it executed. The result of trial was published in General Court-Martial Orders No. 30, Headquarters, Fifth Army, Chicago 15, Illinois, 10 February 1949.

3. The accused's unauthorized absence from his organization at Camp Beale, California, from about 27 June 1946 until his surrender at Detroit, Michigan, on or about 7 October 1948, was established by competent evidence adduced at the trial (R 6,7; Pros Ex 1), and was admitted by accused while testifying as a witness in his own behalf (R 15,16,17,20).

The only question presented for determination by the Board of Review is whether it was obligatory upon the court in the instant case to advise the accused of his right to plead the statute of limitations when the offense with which he was charged was not barred by the statute of limitations but the lesser included offense of which he was found guilty was barred by said statute. In this connection the pertinent portion of Article of War 39 provides:

> "Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: * * *" (Underscoring supplied.)

It is to be noted in this regard that the accused's unauthorized absence herein commenced on 27 June 1946 and that the accused was not arraigned until 14 December 1948, a date almost two and one-half years after the commission of such offense of absence without leave (See Par 87b, MCM 1928).

The same question presented by this case has been decided by the Board of Review in CM 313593, Sawyer, 63 BR 185; CM 315512, Pittman, 65 BR 5; CM 315713, Williams, 65 BR 81; CM 316772, Martinez (October 1946); and CM 329022, Mathews, 26 February 1948, and in all cases it has been uniformly held that a failure of the court to advise the accused of his rights in the premises constitutes fatal error. In deciding that the principle of an earlier case, CM 231504, Santo, 18 BR 235, should no longer be followed, the Board in CM 313593, Sawyer, supra, stated:

> "'This rule [in the Santo case to the effect that it is not mandatory that the court advise an accused of his right to plead the statute of limitations under these circumstances] rests not only on the presumption that defense counsel did his duty, but also on the premise that he was familiar with his duty. Military law, like all law, has its technicalities which only training and practice can thoroughly master. As applied to the facts in the case the assumption is made that defense counsel not only anticipated that the court might find accused guilty of absence without leave,

an unusual result since accused was gone just 18 days short of two years, but also that he was aware that the period of limitations for this offense was different than that with which accused was originally charged.

"'It is interesting to note that the paragraph of the Manual describing defense counsel's duties (par 45) states that he shall advise accused of his right to remain silent or testify and yet it is almost the universal practice for the court to instruct an accused as to these rights. If the court feels it necessary to give this instruction relative to a situation which is elementary and which occurs in every trial, what is left of the presumption that defense counsel performed his duty in explaining the rare and recondite point which is involved in this case?

"'To be sure the attention of accused and his counsel was directed toward the fact that he had been found guilty of absence without leave but this was done under such circumstances that there was little real opportunity to plead the bar of the statute. Where an accused is found guilty the prescribed procedure is to open the court for evidence of previous convictions and personal data, close the court, vote on the sentence, open the court, and announce the findings and sentence (MCM, 1928, App. 6, pp.267,268). That procedure was followed in this case and immediately thereafter the court adjourned. All that defense counsel knew when the court opened after closing for a vote on the findings was that his client had been found guilty of some offense and, as we have said, he might not unreasonably assume that it was desertion. After the court had fixed the punishment it reopened and then for the first time accused and his counsel learned that he had been found guilty of absence without leave. Immediately after that announcement, however, the court pronounced the sentence and adjourned. Neither accused nor his counsel had any genuine opportunity to ponder the effect of these findings or reflect upon the legal principles which might govern the changed situation. In our opinion, it would be grossly unfair to penalize accused on the basis of an assumption that his failure to plead the statute at that point in the trial was the result of a conscious choice made with full knowledge of his rights.

"'It may be argued that the Manual, in stating that in the situation here involved the "court <u>may</u> advise the accused in open court of his right to plead the statute" (MCM, 1928, par.78<u>a</u>), has laid down the applicable rule and we are bound to follow it. This argument gains force from the fact that in the 1917 and 1921 Manuals it was mandatory upon the court to make such an explanation if the facts in the particular case warranted it. We do not believe,

however, that the permissive character of the present rule is a bar to our holding in the present case that the court was bound to advise the accused of his rights. There are situations where the giving of such advice would be an idle gesture. It may appear that the accused is cognizant of his rights. It may be plain that the statute has been tolled. In these circumstances to require that the court give an explanation would only serve to create confusion. In brief, we think that the Manual, in failing to require such advice by the court in all circumstances, does not preclude us from requiring it in those cases where consideration of justice and fairness demand it.

"'Doubtless some of the arguments adduced above would have equal application in the case where it appears that the statute has outlawed the original specification brought against accused. On the other hand, there are considerations, to which we have had reference, applicable here that are inapplicable in that situation. That case is not before the Board, however, and does not have to be decided. What the Board does decide is that where, as here, an accused is found guilty by exceptions and substitutions of an offense against which the statute has apparently run, although it had not run against the offense with which he was originally charged, and the record fails to disclose that he was cognizant of his rights to plead the statute, and there is no indication that it had been tolled, a failure of the court to advise accused of his rights in the premises is fatal error voiding the conviction of that specification!"

The logic and the reasoning advanced by the Board of Review in support of its conclusions in the precedent above quoted is equally applicable and impelling of a similar conclusion in the instant case. Accordingly, on the basis of this authority, as subsequently reaffirmed by CM 315512, Pittman, supra; CM 315713, Williams, supra; CM 316772, Martinez, supra; CM 329022, Mathews, supra; and CM 330078, Ostrander, supra; the Board of Review is of the opinion that the failure of the court to advise the accused that he could not legally be punished under the circumstances shown if he elected to invoke the statute of limitations, constituted error which injuriously affected his substantial rights.

Although the precedents cited in the preceding paragraph are necessarily controlling in the instant case since the accused was tried on 14 December 1948, it is interesting to note that the rule therein announced, and followed in this case, has been incorporated in the Manual for Courts-Martial, U. S. Army, 1949, which became effective on 1 February 1949 (see Par 78a, MCM 1949, p 75).

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

Wilmot T. Baughn, J.A.G.C.

Charles J. Berkowitz, J.A.G.C.

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

30 MAR 1949

CSJAGH CM 335181 1st Ind

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

TO: Commanding General, Fifth Army, Chicago 15, Illinois

1. In the case of Private First Class James C. LaVigne, RA 36585300, 5612 Area Service Unit, Fort Custer, Michigan, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under Article of War 50e(3) this holding and my concurrence therein vacate the findings of guilty and the sentence.

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

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

(CM 335181).

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 Record of trial
2 Draft GCMO

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

CSJAGK - CM 335195

APR 6 1949

UNITED STATES	)	KOBE BASE
v.	)	Trial by G.C.M., convened at Kobe, Honshu, Japan, 31 January and 4 February 1949. Dishonorable discharge (suspended) and confinement for six (6) years. Disciplinary Barracks.
Recruit THOMAS P. JORDON (RA 18294464), 539th Transportation Truck Company, APO 317.	)	

HOLDING BY THE BOARD OF REVIEW
McAFEE, CHAMBERS and SPRINGSTON
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 I: Violation of the 94th Article of War.

Specification: In that Recruit Thomas P. Jordon, 539th Transportation Truck Company, APO 317, did, at Kobe, Honshu, Japan, on or about 25 October 1948, wrongfully, knowingly and without proper authority dispose of, by delivering to Japanese nationals at the Yamagen Lumber Yard, one hundred seventy four pair of trousers, wool, serge, OD, of the value of about $8.63 per pair, one hundred sixty shirts, flannel OD, of the value of about $4.40 each, eighty sweaters, high neck, of the value of about $4.08 each, three hundred undershirts, winter, OD, of the value of about $2.21 each, two hundred pair drawers, wool of the value of about $1.55 per pair, sixteen hundred caps, wool, knit, M-1941, of the value of about $0.48 each, and one hundred sixty pair of socks, wool, ski, of the value of about $0.85 per pair, and of a total value of about $4409.02, property of the United States, furnished and intended for the military service thereof.

CHARGE II: Violation of the 58th Article of War.

Specification: In that Recruit Thomas P. Jordon, ***, did,

at Kobe, Honshu, Japan, on or about 22 November 1948 desert the service of the United States and did remain absent in desertion until he was apprehended at Kobe, Honshu, Japan on or about 9 January 1949.

CHARGE III: Violation of the 69th Article of War

Specification: In that Recruit Thomas P. Jordon, ***, having been placed in confinement in Camp Carver, Kobe, Honshu, Japan, on or about 22 November 1948 did at Camp Carver, Kobe, Honshu, Japan on or about 22 November 1948 escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to all charges and specifications. He was found guilty of Charges I and III and the specifications thereunder and guilty of the Specification of Charge II except for the words "desert the service of the United States and did remain absent in desertion" and substitute therefor, "absent himself from his organization", of the excepted words not guilty, of the substituted words guilty, of Charge II not guilty, but guilty of the violation of the 61st Article of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for six years. The reviewing authority approved the sentence and ordered it executed, but suspended that portion adjudging dishonorable discharge until the soldier's release from confinement, and designated the Branch, United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement. The results of trial were promulgated in General Court-Martial Orders No. 6, Headquarters, Kobe Base, dated 14 February 1949.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification, of Charge III and its Specification and the sentence.

4. The only question presented is the legality of the finding made by the court in reference to Charge II and its Specification.

In this specification the accused was charged with desertion beginning on 22 November 1948 terminated by apprehension on 9 January 1949 in violation of Article of War 58. The court by exceptions and substitutions found the accused guilty of absenting himself from his organization for the period alleged in violation of Article of War 61. Under Article of War 61 absence itself is not the gist of the offense, but absence without proper leave (CM 317087, Osbourne, 66 B.R. 201, 203). The failure of a specification under Article of War 61 to allege that the absence was without leave, or the equivalent, is fatal to its legal sufficiency (Dig. Op. J.A.G. 1912-40, Section 419 (1)), and where the findings do not contain incriminatory words they do not amount to conviction of any offense (CM 316886, Chaffin, 66 B.R. 100-101). The court found that the accused was absent from his organization from 22 November 1948 until 9 January 1949, but it did not find that such absence was

without leave. Such a finding is insufficient to establish a violation of Article of War 61.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charges I and III and the specifications thereunder, but legally insufficient to support the findings of guilty of Charge II and its Specification and legally sufficient to support the sentence.

Carlos E. McCafee, J.A.G.C.
Laurel L. Chambers, J.A.G.C.
George B. Springston, J.A.G.C.

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NAVY DEPARTMENT

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CSJAGV CM 335195 1st Indorsement MAY 4 1949

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

To: Commanding Officer, Kobe Base, APO 317, c/o Postmaster, San Francisco, California.

1. In the case of Recruit Thomas P. Jordon (RA 18294464), 539th Transportation Truck Company, APO 317, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification and Charge III and its Specification, but legally insufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support the sentence. Under Article of War 50e(3) this holding, together with my concurrence, vacates the findings of guilty of Charge II and its Specification.

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

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

(CM 335195).

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

2 Incls
1 Record of trial
2 Draft of GCMO

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

CSJAGK - CM 335227

APR 1 1949

UNITED STATES v. First Lieutenant BILLY C. HINSON (O-1106818), TC, 44th Engineer Construction Battalion, Fort Bragg, North Carolina	FORT BRAGG, NORTH CAROLINA Trial by G.C.M., convened at Fort Bragg, North Carolina, 16 February 1949. Dismissal.

OPINION of the BOARD OF REVIEW
SILVERS, SHULL and LANNING
Officers of The Judge Advocate General's Corps

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant Billy C. Hinson, 44th Engineer Construction Battalion, Fort Bragg, North Carolina, did, at Fort Bragg, North Carolina, on or about 31 December 1948, feloniously take, steal and carry away one grey civilian overcoat, value about $50.00, the property of First Lieutenant Guido D. Losasso.

He pleaded not guilty to and was found guilty of the charge and specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, and to be fined the sum of $200.00. The reviewing authority approved the sentence but remitted the fine and forwarded the record of trial for action under Article of War 48.

3. For the Prosecution

On 31 December 1948, at about 1900 hours, First Lieutenant Guido D. Losasso, with a friend, Second Lieutenant Charles S. Ferber, went to Fayetteville, North Carolina, returning at 1950 hours. Both officers lived in the same BOQ building. Upon entering his room Lieutenant Losasso noticed a white scarf on the floor. Since he usually kept this scarf in the sleeve of his civilian overcoat, he investigated and discovered that his overcoat together with two poplin shirts, a pair of

civilian gloves, a set of glasses, and an officer's cap were missing from his room. The military police were called and a report was made of the missing articles. He was asked by the military police to report to the Criminal Investigation Division on Monday morning, which he did in company with Lieutenant Ferber. The overcoat had been left hanging up in the closet of his room when he went to town and he had not given any one permission to use it. The coat had been purchased by Lieutenant Losasso at "Kaufman's" in Pittsburgh, Pennsylvania, and bore the label "Hickey-Freeman Customized Clothes, Kaufman's, Fifth Avenue, Pittsburgh." It was of a light gray material resembling camel's hair, with three buttons and straight pockets. Witness had also bought a tan suit at the same place and time he purchased the overcoat. About three weeks after reporting the disappearance, Lieutenant Lossaso was called to the Criminal Investigation Division office where he was shown a coat bearing the above described label and other distinguishing characteristics. He identified this coat as being his property which he had previously reported as missing. One of the Criminal Investigation Division officers went to witness' quarters and procured the tan suit, which upon comparison was found to have the same label as the overcoat. The overcoat in question was presented in open court and there identified by Lieutenant Losasso as being the one that was taken from his quarters (R 6-9).

Second Lieutenant Charles S. Ferber testified that he and Lieutenant Losasso returned from Fayetteville at about 1950 hours on 31 December 1948 and that after a few minutes Lieutenant Losasso came to his room in excitement and reported the "theft" of his overcoat and several other articles. The next day, at a New Year's gathering, witness and the accused became engaged in conversation, during which accused stated that he had been to witness' room in the BOQ the previous evening between the hours of 1900 and 1950 looking for him and finding his door locked had gone on. After a lapse of several days witness gave this information to a Corporal Casanova of the Criminal Investigation Division (R 10-11).

Agent Pasquale J. Casanova of the 82d Military Police Company and First Lieutenant Richard W. Goins, Chief of the Investigation Section for the 82d Airborne Division Provost Marshal, testified that on 18 January 1949 they contacted the accused at his BOQ and requested permission to search his room. Accused said it was all right and took them up to the room. In the closet of the room they found an overcoat answering the description of Lieutenant Losasso's. The coat was on a hanger covered with a bathrobe. One of the officers asked the accused where he got the coat and accused replied it was his property; that he had purchased it in Baltimore for $59.00. A search was made for the other articles reported as missing but they were not found. Next, they all went over to the Criminal Investigation Division office and Lieutenant Losasso was called in to again describe his coat. Upon being shown the coat taken from accused's room, Lieutenant Losasso identified it as his property.

The accused, who had been "warned of his rights," said "if that wasn't his overcoat where was his coat." He reiterated that he had bought a coat resembling this one, in Baltimore, Maryland, on an occasion in November when he and another officer had gone to Washington, and he had gone on up to Baltimore. In response to questions, accused asserted that he did not know whether this officer saw the overcoat or not, but that he could find someone who had. He did not suggest the name of or produce such a person. The overcoat in question was identified by the witnesses as the one found in accused's room and was admitted as Prosecution's Exhibit 2 (R 14-17).

The value of the overcoat was stipulated to be $50.00 (R 18, Pros Ex 1).

4. For the Defense

The rights of the accused having been explained to him by the law member, he elected to take the stand to testify under oath. He stated that on a Monday night his Battalion Commander called him in and asked if he was in any trouble, to which he replied that he was not. He was then told that the Criminal Investigation Division wanted to search his room. Accused told him they were welcome to do so whenever they desired. At that time he was preparing to move his things from his old quarters to his own organization's BOQ. He made the move that day and immediately notified the Battalion Commander that he was in his new quarters. The next morning the Criminal Investigation Division agent came over to make the search. He took them to his room and they found the gray overcoat "that fits the description of the one in court." He went with them to another officer who identified the coat as his (the other officer's). Accused testified he himself had a gray overcoat that would fit this description, but he could not say what label was in it. He bought his coat in Baltimore during the first week of November, but he did not know the name of the store where he had purchased it. The material resembled camel's hair, light grayish, three buttons, with square cut pockets and blue lining. He had taken a "VOCG", leaving Fort Bragg at about 9:30 a.m., spent about 7-1/2 hours driving to Washington, D.C., and made the purchase in Baltimore at about 5:30 that afternoon. He had never been to Baltimore before. He did not sign out when he left the post. The overcoat, Prosecution Exhibit 2, was not his property, and he could not explain how it got into his room. He had moved twice since coming to Fort Bragg, and kept his blouse, slacks and civilian overcoat hanging under his bathrobe due to the dust from the ventilation system. He had no occasion to wear his new coat since November as he had another one. Enlisted men moved his things for him and he did not know what had happened to his coat. He never went to the Officers' Club or any place where he might have left his coat and picked up somebody else's by mistake. He was in the BOQ occupied by Lieutenant Ferber between 1900 and

2000 hours on 31 December 1948. He knocked on Lieutenant Ferber's door and left after getting no answer. He is now convinced that the overcoat in evidence is not the one he bought (R 18-22).

By stipulation it was agreed that, if present and sworn as a witness, Corporal Robert E. Cunningham, one of the enlisted men who helped move accused's effects, would testify that the accused did have two overcoats. "One was a pinkish gray gabardine top coat that had shoulder loops on the shoulders. The other coat I don't know whether it was a short coat or not. I do not know if Lieutenant Hinson had a civilian overcoat or not" (R 23).

It was further stipulated that, if present and sworn as a witness, Sergeant First Class James E. Baker would testify in substance that on 13 November 1948 he and Lieutenant Hinson went to Washington, D.C. That at that time Lieutenant Hinson was carrying an overcoat, but as it was not worn in his presence he could not describe it (R 23).

5. Discussion

At the close of the evidence and after oral arguments had been made, the law member properly advised the members in open court concerning the presumption of innocence and the nature and quantum of evidence required to sustain findings of guilty (AW 31).

The offense was alleged to have been committed on 31 December 1948, at which time larceny was defined as "the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein (MCM 1928, par 149g, p 171). This is the generally accepted common law definition of the offense. Although the Manual for Courts-Martial (1949) which became effective on 1 February 1949 redefined the crime of larceny, the new definition merely made the offense more comprehensive in scope. The punishment remains the same, and it cannot be doubted but that the acts alleged herein also constitute larceny as defined in paragraph 180g, page 239, Manual for Courts-Martial, 1949.

The evidence shows conclusively that on the evening of 31 December 1948 Lieutenant Losasso left his gray civilian overcoat in his quarters at Fort Bragg and made a short visit to Fayetteville, North Carolina. When he returned, the garment, together with other items of his personal property, were missing under circumstances indicating that they had been stolen from his room. Accused, by his own admission, was in the building where Lieutenant Losasso was quartered at about the time he was absent from his room. Approximately eighteen days subsequent to the time the overcoat disappeared, it was found in accused's room covered by a bathrobe. There is a general principle of law, ancient in origin and universally recognized, to the effect that "Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence. (Wilson v. United States, 162 U.S. 613, 619; CM 192031, Allen, 49 BR 25,28; MCM 1949, par 125a, p 151). The time factor in this case, viz., eighteen

days between the reported loss and the finding in accused's possession, is not of such extended duration as to negative the application of the foregoing principle. Accused's explanation of his possession of Lieutenant Losasso's overcoat is most inadequate to rebut or overcome the reasonable inferences drawn from the prosecution's evidence. He asserted that he purchased a similar coat at some store in Baltimore, Maryland, the name of which he could not recall. The accused testified that he had left Fort Bragg at 9:30 or 10:00 a.m. on a morning in November, arrived at Washington, D.C., 7-1/2 hours later, and proceeded to Baltimore where he made the purchase at 5:30 p.m. on the same day. It was his first trip to Baltimore. The reason for such an urgent journey to procure an overcoat in Baltimore is not explained. When confronted by Lieutenant Losasso and positive evidence that the garment was Losasso's property, accused stated merely that he (Hinson) also had a coat that would fit the description of the stolen coat. He had not worn Lieutenant Losasso's coat during the period that it was in his possession because as he asserted, he (Hinson) had two overcoats. He testified that he was convinced the coat in evidence was not the one he bought and does not know what became of his coat. Without further amplification of accused's inconsistent statements, we conclude as did the court, that the evidence adequately establishes beyond any reasonable doubt that accused feloniously took, stole and carried away the property as alleged.

6. Department of the Army records disclose that accused is thirty-five years of age. He is a high school graduate. In civilian life he was a painter and a construction rigger. He served with the Tennessee National Guard as an enlisted man from 1930 to 1938. His unit, the 117th Infantry Regiment of the 30th Infantry Division, was inducted in the Federal service in September 1940. In 1942 he went to Officers Candidate School and was appointed a second lieutenant on 25 November 1942. On 5 June 1943 he was promoted to the grade of first lieutenant. He has one child by a previous marriage.

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

Charles D. Gilman, J.A.G.C.

Lewis S. Thull, J.A.G.C.

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

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

Cm 335227

THE JUDICIAL COUNCIL

Brannon, Shaw, and Micklewait
Officers of The Judge Advocate General's Corps

IN THE FOREGOING CASE OF

First Lieutenant Billy C. Hinson (O-1106818), Transportation Corps, 44th Engineer Construction Battalion, Fort Bragg, North Carolina, with the concurrence of The Judge Advocate General the sentence, as modified by the reviewing authority, is confirmed and will be carried into execution.

Franklin P. Shaw

Franklin P. Shaw, Brig gen, JAGC

C.B. Micklewait

C.B. Micklewait, Colonel JAGC

E.M. Brannon

Ernest M. Brannon, Brig Gen, JAGC
Chairman

I concur in the foregoing action.

Thomas H. Green

THOMAS H. GREEN
Major General
The Judge Advocate General

APRIL 27, 1949.

(GCMO 26, April 29, 1949)

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

CSJAGV CM 335236

29 MARCH 1949

UNITED STATES v. Recruit FRANK McCOWEN (RA 18023244), Headquarters and Headquarters Company, 7871st Training and Education Group.	HEADQUARTERS UNITED STATES ARMY, EUROPE Trial by G.C.M., convened at Kitzingen, Germany, 10 February 1949. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McAFEE, CHAMBERS and SPRINGSTON
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 charge and specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Recruit Frank McCowen, Headquarters and Headquarters Company, 7871st Training and Education Group, having made a sworn statement on or about 1 November 1948, relative to an accident in which 3/4-ton truck WD No. 2190841 was involved on or about 31 October 1948, as follows: "I, Rct Frank McCowen, had a dispatch to Capt Smith at 0800 Saturday morning 30 October 1948. I finished driving for Capt Smith about 1600 hours the same day. I went to Weisentheid with my truck 3/4 ton WD No. 2190841 after eating Saturday evening. As I was coming back Sunday 31 October 1948 about 1600 hours my stomach started to hurt. I stopped to relieve myself. When I returned Cpl Myles asked me to drive but I told him I was all right. He insisted so I let him drive. As we were coming around a blind 45 degree curve the vehicle 3/4 ton truck WD No. 2190841 hit a stone bridge," did, at Kitzingen, Germany, on or about 17 November 1948, wrongfully, willfully, and corruptly contradict said sworn statement made on 1 November 1948 by testifying under oath before a duly constituted special court-martial relative to the accident in which the 3/4-ton truck WD No. 2190841 was involved on or about 31 October 1948, in substance as follows: That at the time of the accident he did not know whether Myles was driving the vehicle; that he did not know the other person who was in the vehicle with him; that he did not know whether the other person in the vehicle with him was a man or a woman; and that he did not know whether the person in the vehicle with him was in uniform or a soldier; all

to the prejudice of good order and military discipline.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor at such place as the reviewing authority might direct for a period of one year. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement and forwarded the record of trial for action under Article of War 50e.

3. Evidence.

In October 1948 the accused was a driver for the Kitzingen Basic Training Center Motor Pool. On 30 October 1948 a truck was dispatched to the accused. This truck was in a damaged condition on 1 November 1948 (R 10). The accused was questioned in regards to the damaged truck. After he was warned of his rights under the 24th Article of War the accused made the following statement:

"A F F I D A V I T

Personally appeared before me, the undersigned Officer, authorized to administer oats in case of this kind, Rct Frank McCowan, RA 18023244, who after being read and explained AW 24, and warned of his rights thereunder, deposes and says as follows:

I, Rct Frank McCowen, had a dispatch to Capt Smith at 0800 Saturday morning 30 October 1948. I finished driving for Capt Smith about 1600 hours the same day. I went to Weisentheid with my truck 3/4 ton WD No. 2190841 after eating Saturday evening.

As I was coming back Sunday 31 October 1948 about 1600 hours my stomach started to hurt.

I stopped to relieve myself. When I returned Cpl Myles asked me to drive but I told him that I was all right. He insisted so I let him drive. As we were coming around a blind 45 degree curve the vehicle 3/4 ton truck WD No. 2190841 hit a stone bridge.

Further deponent sayeth not.

(Signed) Frank McCowen
Frank McCowen
Rct. RA 18023244

Sworn and subscribed to
before me, this 1 day
of November 1948

(Signed) Philip A. Gilbert
PHILIP A GILBERT
1st Lt Inf
Asst Adjutant, KBTC " (R 11, 19, 20 Pros Ex 1)

On 17 November 1948 the accused appeared as a witness before a Special Court Martial appointed by the Commanding Officer of Kitzingen Basic Training Center. He was sworn and testified:

"* * * * *

I am Recruit Frank McCowan, Headquarters and Headquarters Company 7871st Training and Education Group, APO 800, US Army, Kitzingen, Germany. I know the accused. He is in the military service of the United States. He is a member of Headquarters and Headquarters Company 7871st Training and Education Group, APO 800, US Army, Kitzingen, Germany. His name is Private First Class Wallace P. Myles.

The witness then indicated the accused by pointing directly at him.

I did see the accused 31 October 1948. I don't know where I saw the accused. I don't know if the accused was in the vehicle with me or not.

* * * * *

There was a wreck, but I don't know who was driving the vehicle.

* * * * *

I was not driving the vehicle. I was in the vehicle during the time of the accident. I don't know who was in the vehicle with me. I was on the ground after the accident, but I got up. Two of us were on the ground, and I don't know who got up first. I got up from the ground and then Pfc Myles got up

* * * * *

I was sworn in by Lieutenant Gilbert. I did not make an oath I was merely sworn in. There was no oath made. I was on the post on 31 October 1948. I did leave the post on 31 October 1948. I left the post in the vehicle. I went to Weisentheid. I was the only one in the vehicle when I went to Weisenetheid. I was not the only one in the vehicle there was someone else in the vehicle. I don't know the other person who was in the vehicle. I don't know if the person was a woman or man. I picked the accused up in Weisentheid. I picked him up about 1530 hours. I don't know if it was soldier or not. I don't know if he was in uniform or not. I was sick, I was ptomaine poison.

* * * * *

I was driving the vehicle at first, but I got sick, and got out to relieve myself. When I got back into the vehicle I was not driving. Someone else was driving the vehicle, but I don't know who it was. I did not return the vehicle to the motor pool." (Pros Ex 2)

4. Discussion:

The evidence shows that the accused made the sworn statement set

forth in the first portion of the Specification and thereafter he testified before a Special Court Martial substantially as set forth in the latter part of the Specification. The offense with which the accused is charged in the Specification, however, is that the accused wrongfully, willfully and corruptly contradicted his sworn statement made on 1 November 1948 by his subsequent testimony before a Special Court Martial. To support a conviction for such an offense it must be shown that the testimony given at the trial was false, otherwise it could not be wrongfully, willfully and corruptly given, for it might well be that the testimony given at the trial was honestly, correctly and rightfully given, and true. If the testimony was false the accused would have committed the offense of perjury. It may be conceded that the sworn statement made by the accused on 1 November 1948 and his testimony before the Special Court Martial are contradictory. It is well established that evidence of two contradictory statements does not alone establish the falsity of either statement and does not establish false swearing (Section 451 (53) Dig. Op. J.A.G. 1912-1940; CM 224849, Issacs, 14 B.R. 147; 48 C.J. 900). False swearing is a lesser included offense of perjury. (CM 305815, Strodeur, 31 B.R. (ETO) 101).

There is no evidence in the record of trial to show which of the statements of the accused was false. It cannot be assumed that the accused was not testifying truthfully at the trial. If his trial testimony was true he has not committed the particular offense charged. Under such circumstances it cannot be concluded that accused was guilty beyond a reasonable doubt as that term is defined in paragraph 78a, MCM, 1949.

The Board of Review is of the opinion and holds that inasmuch as the evidence in this particular case fails to show that the testimony of the accused before the Special Court Martial was in fact false the evidence is insufficient to establish that such testimony wrongfully, willfully and corruptly contradicted the sworn statement of the accused as alleged.

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

Carlos E. McAfee, J.A.G.C.
Laurel L. Chandler, J.A.G.C.
George D. Springston, J.A.G.C.

CSJAGV CM 335236 1st Indorsement

JAGO, Department of the Army, Washington 25, D. C. MAY 4 1949

To: Commanding General, United States Army, Europe, APO 403, c/o Postmaster, New York, New York.

1. In the case of Recruit Frank McCowen (RA 18023244), Headquarters and Headquarters Company, 7871st Training and Education Group, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under Article of War 50e(3) the holding together with my concurrence vacates the findings of guilty and the sentence.

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

(CM 335236).

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

1 Incl
Record of Trial

RECEIVED - DEPARTMENT OF THE ARMY
MESSAGE CENTER

Office of The Judge Advocate General
Washington 25, D.C.

CSJAGV CM 335328

1949 APR 07 09 13

16 March 1949

UNITED STATES)
v.)
Recruit HOWARD W. SCOTT)
(36493799), 5612 Area)
Service Unit, Fort)
Custer, Michigan.)

HQ FIFTH ARMY

HEADQUARTERS FIFTH ARMY

Trial by G.C.M., convened at Battle Creek, Michigan, 25 January 1949 and 2 February 1949. Dishonorable discharge and confinement for four (4) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
McAFEE, CHAMBERS and SPRINGSTON
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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Recruit Howard W. Scott, 5612 Area Service Unit, Percy Jones General Hospital, then of Company B, Special Training Unit, 1612 Service Command Unit, did, at Fort Sheridan, Illinois on or about 21 September 1945 desert the service of the United States and did remain absent in desertion until he was apprehended at Lansing, Michigan on or about 29 September 1948.

The accused pleaded "to the specification, guilty except the words 'desert' and 'in desertion,' substituting therefor, respectively, the words 'absent himself without leave from' and 'without leave,'" and "to the charge, not guilty of a violation of the 58th Article of War, but guilty of a violation of the 61st Article of War." He was found guilty of the Charge and its Specification. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for four years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Milwaukee, Wisconsin, or elsewhere as the Secretary of the Army may direct as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. Accused was charged with and found guilty of desertion in violation of Article of War 58. The evidence contained in the record of trial is legally sufficient to support the findings and the sentence. However, the applicability, vel non, of the amended Articles of War, and Manual for Courts-Martial, 1949, to the trial proceedings, presents for determination

the jurisdictional problem which must be resolved as to whether the accused was in fact formally arraigned prior to 1 February 1949.

4. The court was convened on 25 January 1949. After the prosecution had exercised its rights as to challenge the record of trial shows the following transpired:

> "Prosecution to accused: You now have the right to challenge any member or members of the court for cause, and any one member, other than the law member, peremptorily.
>
> Defense: The accused at this time wishes special permission of the court to withhold his right to exercise any challenge whatsoever, peremptory or for cause, until such time as the accused is brought before this court for the completion of his trial.
>
> LAW MEMBER: Permission granted.
>
> The accused was then asked if he objected to any other member present.
>
> DEFENSE: The accused will also ask that that exemption be granted because of the reason just previously stated.
>
> PROSECUTION: Has the accused had sufficient time to confer with counsel and to prepare his defense?
>
> DEFENSE: The accused has not.
>
> PROSECUTION: Do you desire a postponement in order to prepare your case further?
>
> DEFENSE: The accused does.
>
> PROSECUTION: As I understand it, the accused and his counsel are willing to go forward and arraign the accused and continue the case after the arraignment.
>
> DEFENSE: That is right."(R 3, 3a).

The record next contains the statement that "The accused was then arraigned upon the following Charges and Specifications: ", following which appeared the Charge, its Specification, signature of accuser, affidavit verifying the Specification and the Charge, and the first indorsement referring the case for trial (R 4, 5). Thereafter the following occurred:

> "PROSECUTION: Does the accused have any special pleas of any kind?
> DEFENSE: He has no special pleas or motions at this time.
> PROSECUTION: We request continuance because the arraignment has been completed, and ask that the case be adjourned until the call of the President.
> PRESIDENT: The court stands adjourned."

On reconvening, 2 February 1949, the accused was given an opportunity to challenge, which he rejected. He was again asked if there were special pleas or motions, and again there were read the Charge and Specification, to which he was asked to plead. By exceptions and substitutions he pleaded not guilty to an offense under Article of War 58 but guilty to an offense under Article of War 61.

5. If the accused was not arraigned at the proceedings of the court held on 25 January 1949, the record of trial would be legally insufficient to support the findings and sentence because of a deficiency in meeting the requirements of the 1949 Manual for Courts-Martial as to the law member, qualified counsel and other features. Provided the accused was arraigned on 25 January 1949, the trial was properly concluded under the provisions of the 1928 Manual for Courts-Martial (See Executive Order 10020, December 7, 1948, page IX, MCM 1949).

This executive Order provides that any investigation, trial in which arraignment has been had, or other action begun prior to 1 February 1949 may be completed in accordance with the provisions of the Manual for Courts-Martial, 1928.

Paragraph 62 of both the 1928 and 1949 Manuals state substantially:

> "The court being organized and both parties ready to proceed, the trial judge advocate will read the charges and specifications, including the signature of the accuser, to the accused, and then ask the accused how he pleads to each charge and specification. This proceeding constitutes the arraignment. The pleas are not part of the arraignment * * *"

Paragraph 52c of said Manuals provide with respect to making applications for a continuance:

> "* * * The proper time for making an application to the court is after the accused is arraigned and before he pleads * * *"

The Board perceives no particular merit in the purely formal question as to how an accused pleads to the general issue. Concededly, the pleas are not part of the arraignment, the purpose of which, under present practice, is to apprize the accused of the offense of which he stands charged. The court, prosecution and defense all assumed that the arraignment had been completed. Accused expressly agreed that the proceedings should continue to include arraignment predicted upon the understanding that a continuance requested by him would thereafter be granted. The inquiry by the prosecution as to whether the accused had any special pleas was notice to the accused that the arraignment had been completed, as the prosecution thereafter stated, and sufficiently advised the accused that the next appropriate action in the proceedings would be his pleas, if he desired to make them, either specially or otherwise. That he chose instead to secure, through the prosecution, the continuance desired did not alter the fact that procedurally it was his move. To this point the proceedings had been regular, nothing had occurred to accused's disadvantage, he was completely aware of each step theretofore taken, and it cannot be said that he was not fully informed and his rights adequately protected.

CSJAGV CM 335328

We would not consider the question of whether accused had been arraigned on 25 January 1949 questionable but for the decision of the Board in CM 318507, Hayes, 67 B.R. 343 (1947) where, under similar circumstances, it was held such facts did not constitute an arraignment. That case involved the authority to try in absentia an accused who had escaped from confinement during the continuance, which had been granted accused after special pleas and motions had been considered. To a considerable extent reliance for the Board's conclusions in the Hayes case was laid upon the Supreme Court's decision in Crain v. United States, 162 U.S. 625 (1896). However, the Board took no notice of Garland v. Washington, 232 U.S. 642 (1914), which specifically overruled the court's previous decision in the Crain case. In the Garland case the Supreme Court adopted the views previously expressed in the dissent in the Crain case, holding that the accused should be regarded as having waived the wholly unimportant formality in procedure where the parties had proceeded as though the defendant had been duly arraigned. In reversing the Crain case the Supreme Court concluded:

> "Holding this view, notwithstanding our reluctance to overrule former decisions of this court, we now are constrained to hold that the technical enforcement of formal rights in criminal procedure sustained in the Crain case is no longer required in the prosecution of offenses under present systems of law, and so far as that case is not in accord with the views herein expressed it is necessarily overruled."

When, in the instant case, the Specification and Charge were read to the accused he was arraigned, and the failure of the prosecution formally to ask him how he pleaded to the general issue did not operate to deprive him of any substantial right. Accordingly, it must be concluded that the arraignment, as that term is contemplated in fixing the effective date of the applicability of the 1949 Manual for Courts-Martial, had been completed, and the proceedings thereafter concluded on 2 February 1949 properly complied with the procedural and substantial requirements of the Manual for Courts-Martial 1928. It follows that to the extent the foregoing is in conflict with what was said in CM 318507, Hayes, 67 B.R. 343, the views therein expressed should no longer be followed.

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

Carlos E. McAfee, J.A.G.C.
Laurel L Chambers, J.A.G.C.
George B. Springston, J.A.G.C.

CSJAGV CM 335328 1st Ind 4 APR 1949

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

TO: Commanding General, Fifth Army, Chicago 15, Illinois

1. In the case of Recruit Howard W. Scott (36493799), 5612 Area Service Unit, Fort Custer, Michigan, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confirming action is not by The Judge Advocate General or the Board of Review deemed necessary. Under the provisions of Article of War 50 you now have authority to order the execution of the sentence.

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

(CM 335328).

RECEIVED APR 07 09 12

WILLIAM P. CONNALLY, JR.
Colonel, JAGC
Assistant Judge Advocate General

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

(121)

MAY 1 7 1949

CSJAGQ - CM 335448

UNITED STATES v. Recruit JOHN M. DEMONE (RA 12305851), Hq. and Hq. Battery, 546th Field Artillery Battalion, 37th Infantry Regimental Combat Team, Fort Sill, Oklahoma, now Enlisted Det., 4011th Area Service Unit, Station Complement, Fort Sill, Oklahoma.	THE ARTILLERY CENTER Trial by G.C.M., convened at Fort Sill, Oklahoma, 8 February 1949. Dishonorable discharge (suspended), forfeiture of all pay and allowances due or to become due after the date of the order directing the execution of the sentence and confinement for six (6) months. Post Guardhouse.

HOLDING by the BOARD OF REVIEW
GOFF, SKINNER and CURRIER
Officers of The Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Recruit John M. Demone, Headquarters and Headquarters Battery, 546th Field Artillery Battalion, did, at Fort Sill, Oklahoma, on or about 16 January 1949, feloniously take, steal, and carry away one (1) radio, value about $35.00, the property of Recruit Thomas E. Tillery.

He pleaded not guilty to and was found guilty of the Charge and guilty of the Specification, except the figures "$35.00", substituting therefor the words and figures "twenty dollars ($20.00) or less", of the excepted figures, not guilty, of the substituted words and figures, guilty. No evidence of previous convictions was introduced. Accused was sentenced to "be dishonorably discharged the service, to forfeit all pay and allowances due or to become due after the date of the order directing the execution of the sentence, and to be confined at hard labor at such place as the reviewing authority may direct, for six (6) months." The reviewing authority approved the sentence, ordered it executed but suspended execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Post Guardhouse,

Fort Sill, Oklahoma, as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 46, Headquarters, The Artillery Center, Fort Sill, Oklahoma, 7 March 1949.

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

Article of War 16, in part, provides:

> "nor shall any defendant awaiting trial be made subject to punishment or penalties other than confinement prior to sentence on charges against him" (Underscoring supplied).

Executive Order No. 10020, promulgating the Manual for Courts-Martial, 1949, provides that it shall be in force and effect on and after 1 February 1949 with respect to all court-martial processes taken on or after that date. Paragraph 115, page 126, Manual for Courts-Martial, 1949, citing Article of War 16, provides that no accused shall, prior to the order directing execution of the approved sentence, be made subject to any punishment or penalties other than confinement. Paragraph 116g, page 130, thereof, provides that a forfeiture becomes legally effective on the date the sentence adjudging it is promulgated. The prescribed forms of sentences to forfeitures (Appendix 9, pp. 364-365, Forms 8, 9b, 17, 20, MCM, 1949) are worded "to become due after the date of the order directing execution of the sentence." There is no authority, in the Articles of War or in the implementing provisions of the Manual, for the imposition of the forfeitures of pay and allowances due at the date of the order directing execution of the sentence, to become due at that date, or due or to become due after that date (CM 335803, Berry, 11 May 1949). To the extent the forfeitures imposed exceed the limits indicated in the above quoted forms they are illegal.

4. For the foregoing reasons the Board of Review holds the record of trial is legally sufficient to support the findings of guilty of the modified Specification and the Charge, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for six (6) months.

A. McGregor Goff, JAGC

[illegible], JAGC

Roger W. Cissna, JAGC

CSJAGQ - CM 335448 1st Ind

JUN 20 1949

J.A.G.O., Dept of the Army, Washington 25, D. C.

TO: Commanding Officer, The Artillery Center,
Fort Sill, Oklahoma

1. In the case of Recruit John M. Demone (RA 12305851), Headquarters and Headquarters Battery, 546th Field Artillery Battalion, 37th Infantry Regimental Combat Team, Fort Sill, Oklahoma, now Enlisted Detachment, 4011th Area Service Unit, Station Complement, Fort Sill, Oklahoma, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the modified Specification and the Charge, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for six months. Under Article of War 50e this holding and my concurrence vacate so much of the sentence relating to forfeitures as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence.

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

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

(CM 335448).

2 Incls.
R/T
Drft GCMO

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

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

CSJAGK - CM 335462

APR 1 4 1949

UNITED STATES	24TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Kokura, Kyushu, Japan, 25 and 26 February 1949. Dismissal and total forfeitures.
Captain BURT A. STURDEVAN (O-495766), 24th Infantry Division, Military Police Platoon.	

OPINION of the BOARD OF REVIEW
SILVERS, SHULL and LANNING
Officers of The Judge Advocate General's Corps

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

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

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

Specification: In that Captain Burt A. Sturdevan, 24th Infantry Division Military Police Platoon did, at Kokura, Kyushu, Japan, on or about 12 February 1949, with intent to do him bodily harm, commit an assault upon Yukio Nohara, by striking him on the head and body with a dangerous instrument, to wit: brass knuckles.

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

He pleaded not guilty to all charges and specifications and was found not guilty of Charge II and its specification, but guilty of Charge I and its specification except for the words "a dangerous instrument, to wit." He was sentenced "to be dismissed from the service and to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence." The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

For the Prosecution

The evidence in support of the findings of guilty is substantially as follows:

Yukio Nohara testified that he was a sign painter at the Headquarters Officers' Club in the Kokura area. He worked in the club on 12 February 1949 until 10:45 p.m. when he and one Sawada went to the Officers' Club office. The accused came to the office and asked if his gloves had been found. Nohara stated that he searched for the gloves but could not find them. The accused left but came back in the office a few minutes later and asked them if they had a map. Nohara showed the accused a map of the arsenal area, indicating thereon the location of the Bachelor Officers' Quarters. The witness testified:

> "*** I told him, 'Yes, this is the BOQ'. When I answered the captain grabbed me and hit me in the head. I covered my head with my hands because of my pain. I sat down and told the captain, 'I am sorry', because I thought I had done something wrong." (R 8)

Then the accused hit him five or six times on the back of the neck (R 6-8).

Nohara testified further that the accused stopped hitting him when someone came into the office. Then the witness heard someone say, "It is dangerous, take off, get away!" So he stood up and attempted to flee. Upon arising he obtained a fleeting glimpse of a metallic object in the accused's hand, describing it as "iron or steel, like a mountain having knuckles." The witness drew a rough sketch of the object. This sketch was received in evidence without objection by the defense as Prosecution Exhibit 1. It is a pictorial representation of the brass knuckles or metal plate allegedly worn by accused when he struck Nohara, the four shaded areas of the sketch representing fingers and the unshaded portion representing the metallic part of the object (R 11).

When Nohara saw this object in the accused's hand he grasped both hands of the accused and tried to get away by moving backward. The accused managed to free his right hand and hit the witness an underarm blow with the metal object in his hand, striking him in the neck near the Adam's Apple. Nohara bent down again and the accused hit him again in the back, but Nohara did not know whether he was struck by accused's hand or by the metal object. Nohara observed red marks and scratches and a little blood on his throat. His back was swollen for four or five days after this incident and he did not sleep well for some nights. He reported for work the next day but was unable to perform duty. He did not seek medical attention. At the time of the assault the accused took Nohara's watch from his wrist. Nohara saw the watch again the next day when a lieutenant of the military police returned it to him (R 12-24).

Masao Uchimo testified that he was employed by the Officers' Club. On 1115 o'clock in the evening when he entered the office to answer the telephone he saw the accused hit Nohara about the neck three times. Present at the time was another Japanese by the name of Sawada. Nohara

was squatting with his hands over his head. The accused then put his hand in his pocket and took out a steel plate resembling an "American" (translated - brass knuckles). The sketch of the object drawn by this witness was admitted in evidence by agreement as Defense Exhibit A. The object was made of steel or some kind of metal. The witness called to Nohara, "Danger, better get out of the office." Nohara then held both of accused's hands and moved backwards to get away. The accused swung at Nohara with his right hand which contained the knuckles. The witness left to find some other officer. About half an hour later this witness saw a little blood coming out of the neck of Nohara, red marks on his Adam's Apple and some swelling on his back. Because of the position of this witness, he could not see the blow actually strike Nohara (R 29-36). Other evidence tended to show that the accused was about six feet in heighth and weighed about 183 pounds. Nohara was five feet four inches tall and weighed about 116 pounds (R 26,27,35).

For the Defense

Yukio Nohara, recalled as a witness by the defense, testified that he had been interviewed on 25 February 1949 by counsel for the defense through an interpreter, Marikami, in the presence of two "G.I's" (R 43,44).

Sergeant First Class Glen A. Marshall testified that he was present when Nohara was interviewed by the defense counsel on 25 February, and upon being asked if he was hurt the latter answered, "No". Further, that the metal object in his hands could have been rings on the accused's hand. This witness did not remember which questions were asked of Nohara in Japanese and which were asked in English (R 45-46).

Corporal Joseph H. Miller testified that he was present during an interrogation of Nohara by the defense and special defense counsel, and that Nohara had stated at the time that he did not know whether or not the accused struck him in the throat with a metal object because he was looking the captain "straight in the face." Further, that Nohara stated he was not hurt and that the metal object might have been two rings the accused was wearing. On cross-examination this witness testified that Nohara stated that at the moment of impact he could not view the object (R 46-47).

Shigeyuki Murakami testified that he was an interpreter for the military police, Kokura, Kyushu, Japan, and acted as such when Nohara was interviewed by counsel for the defense. Nohara stated that, at the time he was hit under the chin, he had a glimpse of a metal object in accused's hand and that it could have been rings. He also stated that it felt like some kind of metal when he was struck in the throat (R 48-49).

The accused, after stating that he was cognizant of his rights as a witness, elected to remain silent (R 49).

4. Discussion

Accused was charged with committing an assault upon Nohara, at the time and place alleged, with intent to do him bodily harm, by striking him on the head and body with a dangerous instrument, to wit: brass knuckles. By excepting the words "a dangerous instrument, to wit" the court has found accused guilty of an assault with intent to do bodily harm upon the person named by striking him on the head and body with brass knuckles. Both the offense alleged and that found are denounced by Article of War 93, but the assault herein found is lesser to and necessarily included in that charged (MCM 1949, par 117c, p 137; CM 271426, Cannon, 46 BR 119; CM 236547, Killian, 23 BR 55). Although the victim of the assault does not appear to have suffered permanent disability therefrom, the intent to do Nohara bodily harm may be inferred from the accused's acts in striking Nohara sufficient blows about the head and body by use of brass knuckles as to render the victim unable to work for one or more days thereafter. Without considering what may have prompted the court in excepting the words "a dangerous instrument" as being descriptive of the brass knuckles, it may be reasonably concluded that, considering the physical characteristics of the parties and the manner in which accused used the metal object, the instrument was certainly capable of producing great bodily harm to the victim (MCM 1949, par 180m, p 248).

The court was fully justified in concluding, upon all the evidence, that the assault was effected by use of brass knuckles. That portion of the evidence which tended to raise an inference that the object described might in fact have been rings on accused's fingers appears to have been of minor probative value. No motive for the assault appears in the record and it is obvious that accused was not acting in self-defense.

5. Records of the Department of the Army show accused to be about 37 years of age and single. He was an enlisted soldier from 13 May 1931 to 2 October 1942. On 3 October 1942 he was appointed a second lieutenant, Army of the United States. He was promoted to first lieutenant on 20 May 1943 and to captain on 1 June 1948. His adjectival efficiency ratings average "Superior."

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

Christis E. Silva, J.A.G.C.

Lewis F. Shull, J.A.G.C.

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

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 335462

Brannon, Shaw, and Mickelwait
Officers of THe Judge Advocate General's Corps

In the foregoing case of Captain Burt A. Sturdevan (0-495766), 24th Infantry Division, Military Police Platoon, the sentence is confirmed and will be carried into execution upon the concurrence of The Judge Advocate General.

Franklin P. Shaw

Franklin P. Shaw, Brig Gen, JAGC

C.B. Mickelwait

C.B. Micklewait, Colonel, JAGC

E.M. Brannon

E. M. Brannon, Brig Gen, JAGC
Chairman

10 May 1949

I concur in the foregoing action.

Thomas H. Green

THOMAS H. GREEN
Major General
The Judge Advocate General

11 May 1949.

(GCMO 29, May 16, 1949).

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

(131)

JUN 9 1949

CSJAGV CM 335486

UNITED STATES v. Recruit BERT C. PARIS (US 39474192), Headquarters Detachment, 6006 Area Service Unit (Post Operating Company), Fort Lewis, Washington.	2D INFANTRY DIVISION Trial by G.C.M., convened at Fort Lewis, Washington, 17 February 1949. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
SKINNER, CHAMBERS and SPRINGSTON
Officers of the Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Recruit Bert C. Paris, Headquarters Detachment, 6006 Area Service Unit, (Post Operating Company), Fort Lewis, Washington, then Private Bert C. Paris, Company B, 94th Infantry Training Battalion, Camp Roberts, California, did, at Camp Roberts, California, on or about 11 August 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Seattle, Washington, on or about 27 November 1948.

He pleaded not guilty to, and was found guilty of, the Charge and its Specification. No evidence of previous convictions was introduced. Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due; and to be confined at hard labor at such place as the reviewing authority may direct for five years. The reviewing authority approved the sentence, but reduced the period of confinement imposed to three years, designated The Branch United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50e.

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

CSJAGV CM 335486

4. The sentence imposed by the court, as pertains to forfeitures, provided that accused would forfeit all pay and allowances "due or to become due", following the form prescribed under the 1928 Manual for Courts-Martial. The instant case was tried on 17 February 1949, subsequent to the effective date of the 1949 Manual for Courts-Martial which, under Executive Order 10020, became effective on 1 February 1949. While Section 245 of Public Law 759, 80th Congress provides: "All offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the effective date of this title, under any law embraced in or modified, changed, or repealed by this title, may be prosecuted, punished, and enforced in the same manner and with the same effect as if this title had not been passed", this Act of Congress must be construed in relation to Article of War 16, Executive Order 10020 and the provisions of the 1949 Manual for Courts-Martial, as they implement and interpret the Act of Congress. The 16th Article of War provides that no defendant awaiting trial shall be made subject to punishment or penalties, other than confinement, prior to sentence on charges against him. The Executive Order invokes the provisions of the new Manual as of 1 February 1949 with respect to all court-martial processes taken on or after that date. The 1949 Manual for Courts-Martial, in paragraph 115 thereof, citing Article of War 16, provides that no accused shall, prior to the order directing execution of the approved sentence, be made subject to any punishment or penalties other than confinement. The prescribed forms of sentences to forfeitures in the new Manual (App. 9, pp. 364, 365, Forms 8, 9b, 17, 20) are worded "to become due after the date of the order directing execution of the sentence." There is no authority in the Articles of War or in the implementing provisions of 1949 Manual for Courts-Martial authorizing the imposition of the forfeiture of all pay and allowances due or to become due (CM 335803, Berry, decided May 1949). To this extent the forfeitures imposed in the instant case are illegal. (CM 335599, Woodruff, decided June 1949).

5. For the foregoing reasons the Board of Review holds the record of trial is legally sufficient to support the findings of guilty of the Specification and Charge, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for three (3) years.

E. D. Lippman J.A.G.C.
Laurel L. Chambers J.A.G.C.
George B. Springston J.A.G.C.

CSJAGV CM 335486 1st Ind.

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

To: Commanding General, 2d Infantry Division, Fort Lewis, Washington.

1. In the case of Recruit Bert C. Paris (US 39474192), Headquarters Detachment, 6006 Area Service Unit (Post Operating Company), Fort Lewis, Washington, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Specification and the Charge, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for three years. Under Article of War 50e this holding and my concurrence vacate so much of the sentence relating to forfeitures as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence. It is recommended that the general court-martial orders promulgating the proceedings contain an appropriate statement indicating the portion of the sentence thus vacated.

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

(335486).

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl:
Record of trial

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

CSJAGN-CM 335513

17 MAY 1949

UNITED STATES	)	YOKOHAMA COMMAND
v.	)	Trial by G.C.M., convened at APO 703, 1 February 1949. Learn: Dishonorable discharge (suspended) and confinement for two (2) years. Kinney: Dishonorable discharge (suspended) and confinement for thirty (30) months. Both: Disciplinary Barracks.
Private First Class HAROLD M. LEARN (RA 19248149), and Sergeant HAROLD R. KINNEY, JR. (RA 46048478), both of 835th Ordnance Base Depot Company, APO 181.	)	

HOLDING by the BOARD OF REVIEW
YOUNG, PITZER and GUIMOND
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 named above and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50(e).

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Sergeant Harold R. Kinney, Junior, 835th Ordnance Base Depot Company, Army Post Office 181, and Private First Class Harold M. Learn, 835th Ordnance Base Depot Company, Army Post Office 181, acting jointly and in pursuance of a common intent, did, at Tokyo Ordnance Center, Army Post Office 181, in the period from on or about 1 July 1948 to on or about 1 August 1948, feloniously take, steal and carry away about two hundred (200) yards of Target Cloth of the value of about fifty-eight dollars ($58.00), property of the United States furnished and intended for the military service thereof.

Specification 2: In that Sergeant Harold R. Kinney, Junior, 835th Ordnance Base Depot Company, Army Post Office 181, and Private First Class Harold M. Learn, 835th Ordnance Base Depot Company, Army Post Office 181, acting jointly and in pursuance of a common intent, did, at or in the vicinity of Itabashi-ku, Tokyo, Japan, in the period from on or about 1 July 1948 to on or about 1 August 1948, wrongfully and knowingly deliver to Jotaro Yoshikawa for the purpose of sale about two hundred (200) yards of Target Cloth of the value of about fifty-eight dollars ($58.00), property of the United States furnished and intended for the military service thereof.

(As to Kinney)
ADDITIONAL CHARGE I: Violation of the 94th Article of War.

Specification 1: In that Sergeant Harold R. Kinney, Junior, 835th Ordnance Base Depot Company, Army Post Office 181, did, at Tokyo Ordnance Center, take, steal and carry away, about one hundred (100) yards of Target Cloth of the value of about twenty-nine dollars ($29.00) property of the United States furnished and intended for the military service thereof.

Specification 2: In that Sergeant Harold R. Kinney, Junior, 835th Ordnance Base Depot Company, Army Post Office 181, did, at or in the vicinity of Itabashi-ku, Tokyo, Japan, on or about 10 March 1948, wrongfully and knowingly deliver to Jotaro Yoshikawa for the purpose of sale about one hundred (100) yards of Target Cloth of the value of about twenty-nine dollars ($29.00), property of the United States furnished and intended for the military service thereof.

(As to Learn)
ADDITIONAL CHARGE II: Violation of the 94th Article of War.

Specification 1: In that Private First Class Harold M. Learn, 835th Ordnance Base Depot Company, Army Post Office 181, did at Tokyo Ordnance Center, Army Post Office 181, on or about 15 August 1948, feloniously take, steal and carry away, about two hundred (200) yards of Target Cloth of the value of about fifty-eight dollars ($58.00) property of

the United States furnished and intended for the military service thereof.

Specification 2: In that Private First Class Harold M. Learn, 835th Ordnance Base Depot Company, Army Post Office 181, did, at or in the vicinity of Itabashi-ku, Tokyo, Japan, on or about 15 August 1948, wrongfully and knowingly sell to Jotaro Yoshikawa about two hundred (200) yards of Target Cloth of the value of about fifty-eight dollars ($58.00), property of the United States furnished and intended for the military service thereof.

At the first hearing, 23 December 1948, each accused pleaded not guilty, was found guilty as charged, and was sentenced to dishonorable discharge and total forfeitures; additionally, accused Kinney was sentenced to three years' confinement and accused Learn to two years' confinement. Because of errors during the trial, the reviewing authority disapproved those sentences and ordered rehearing. At the re-hearing, 1 February 1949, each accused pleaded not guilty to, and was found guilty of, the respective Charges and Specifications pertaining to him. Each accused was sentenced to be dishonorably discharged the service and to forfeit all pay and allowances due or to become due; additionally, accused Kinney was sentenced to be confined at hard labor for thirty months, and accused Learn was sentenced to be confined at hard labor for two years. The reviewing authority approved the sentences and ordered them executed, but suspended execution of the dishonorable discharges until the soldiers' release from confinement, and designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement. The result of trial was promulgated in General Court-Martial Orders Number 21, Headquarters, Yokohama Command, 7 March 1949.

3. The record of trial is legally sufficient to support the findings of guilty. The only question for consideration is the legality of the sentences insofar as they relate to forfeitures.

4. The effective trial of this case took place on 1 February 1949. The Manual for Courts-Martial, 1949, governs proceedings on and after that date, with certain exceptions not relevant here (E.O. 10020). Paragraph 116g, page 130 of that Manual provides that a forfeiture becomes legally effective on the date the sentence adjudging it is promulgated. The prescribed forms of sentences to forfeitures are worded "to become due after the date of the order directing execution of the sentence" (Forms 8, 9b, 17 and 20, App. 9, MCM, 1949, pp. 364, 365). There is no authority, in the Articles of War or in the implementing provisions of the Manual, for the

forfeiture of pay and allowances which are due at the time the sentence is adjudged or which become due on or before the date of the order promulgating the sentence (CM 335803, Berry, decided 11 May 1949; CM 335599, Woodruff, decided 15 June 1949). To this extent, the forfeitures imposed in the present case are illegal.

5. The Board of Review holds the record of trial legally sufficient to support the findings of guilty as to each accused and to support only so much of the sentence as to each accused as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and, in the case of Kinney, confinement at hard labor for thirty months, in the case of Learn, confinement at hard labor for two years.

Chas. L. Fleming, J. A. G. C.

J M Speiser, J. A. G. C.

J. A. Guimond, J. A. G. C.

JUN 24 194

CSJAGN-CM 335513 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Yokohama Command, APO 503, c/o Postmaster, San Francisco, California.

1. In the case of Private First Class Harold M. Learn (RA 19248149), and Sergeant Harold R. Kinney, Jr. (RA 46048478), both of 835th Ordnance Base Depot Company, APO 181, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Charge, both Additional Charges and all Specifications thereunder and legally sufficient to support only so much of the sentence as to each accused as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and, in the case of Kinney, confinement at hard labor for thirty months, and, in the case of Learn, confinement at hard labor for two years. Under Article of War 50e this holding and my concurrence vacate so much of the sentence relating to forfeitures as to each accused as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence.

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

3. When copies of the published order in this case are forwarded to this office, together with the record of trial, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows: (CM 335513).

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1 - Record of trial
2 - Draft of GCMO

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

CSJAGN-CM 335583

8 APR 1949

UNITED STATES v. Recruit JOHN DRAPER, JR. (34905751), Reception and Processing Detachment, 2128th Area Service Unit, Station Complement, Fort Knox, Kentucky.	)	HEADQUARTERS FORT KNOX, KENTUCKY Trial by G. C. M., convened at Fort Knox, Kentucky, 21 February 1949. Dishonorable discharge and confinement for six (6) months. Post Guardhouse.

HOLDING by the BOARD OF REVIEW
YOUNG, PITZER and GUIMOND
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 Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Recruit John Draper, Jr., Reception and Processing Detachment, 2128th Area Service Unit, Station Complement (Operating) Fort Knox, Kentucky, formerly of Company "B" 2d Battalion 1st Regiment Fort McClellan, Alabama, did at Fort McClellan, Alabama, on or about 4 March 1946 desert the service of the United States and did remain absent in desertion until he surrendered to Civil Authorities at Youngstown, Ohio, on or about 20 December 1948.

He pleaded not guilty to the Specification of the Charge, but guilty of the lesser included offense of absence without leave by exceptions and

substitutions, and not guilty to the Charge but guilty of a violation of the 61st Article of War. He was found guilty, by exceptions and substitutions, of absence without leave, in violation of Article of War 61. 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, at such place as proper authority might direct for six months. Two previous convictions were properly considered. The reviewing authority approved the sentence, designated the Post Guardhouse, Fort Knox, Kentucky, or elsewhere as the Secretary of the Army might direct, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50e.

3. Accused was arraigned and tried on 21 February 1949 for desertion alleged to have begun on 4 March 1946, and to have been terminated by surrender on 20 December 1948. By exceptions and substitutions the court found him guilty of the lesser included offense of absence without leave for the same period. Competent documentary evidence and sworn testimony of the accused, together with the plea, support the finding of an unauthorized absence for the period alleged. The meaning and effect of the plea were explained to the accused in substantially correct form as provided by paragraph 49g and Appendix 5, page 340, Manual for Courts-Martial, 1949. It does not appear that the court advised the accused of his right to raise the defense of the statute of limitations.

4. Since absence without leave, not being a continuing offense for the purpose of computing the time under the statute of limitations, is committed on the date the accused initially absented himself, it is apparent from the face of the record in the case under consideration that the statute of limitations could have been successfully asserted in bar of punishment (AW 39; par. 67, MCM, 1949). The only substantial question presented by the record of trial is whether fatal error was committed through failure of the court to advise the accused of his right to raise the defense of the statute. Paragraph 67, page 62, of the Manual for Courts-Martial, 1949, states:

> "If the accused pleads guilty to a lesser included offense against which the statute of limitations has apparently run, the court will advise the accused of his right to interpose the statute in bar of trial and punishment as to that offense." (Underscoring supplied).

The Manual further states, in paragraph 78a at page 75, that

> "If by exceptions and substitutions an accused is found guilty of a lesser included offense against which it appears that the statute of limitations (AW 39) has run, the court will advise him in open court of his right

to avail himself of the statute in bar of punishment if he so desires." (Underscoring supplied).

In this regard the Manual for Courts-Martial, 1928, in the same paragraphs, states that in such situations the court "may" advise the accused in open court of his right to raise the defense of the statute of limitations. The fact that "will" in the 1949 Manual has supplanted "may" in the 1928 Manual is significant. The phraseology employed in the 1928 Manual was, in a case involving a plea of guilty to absence without leave on a desertion charge, held to be directory only, the plea of guilty waiving the defense of the statute of limitations (CM 315219, Heare (Memorandum)); whereas the corresponding provision of the 1921 Manual, quoted below, was held to be mandatory. Failure to advise the accused of his right to assert the defense of the statute of limitations, in a case such as the instant one, was, until the 1928 Manual became effective, a fatal error (Dig. Ops. JAG, 1912-30, sec. 1261; CM 201537, Fouts, 5 BR 157, 245 et seq. and 251 et seq.). Paragraph 149(3)g, Manual for Courts-Martial, 1921, provided:

> "In each case tried by general court-martial in which, upon the face of the record, it appears that the accused might successfully plead the statute of limitations but in which he has not interposed such plea, it shall be made to appear of record that the president of the court, or the law member advised the accused of his legal rights in the premises, and such advice of the president or law member and the response of the accused thereto will appear in the record" (Underscoring supplied).

By departing from the directory language of the 1928 Manual, and employing phraseology similar to that appearing in the 1921 Manual, it is manifest that the intent was to revert to and adopt the interpretation given the 1921 Manual. The accused having pleaded guilty to absence without leave, it was then mandatory upon the court to advise him of his right to raise the defense of the statute of limitations, and failure to do so was fatal error.

6. For the foregoing reasons, the Board of Review holds the record of trial legally insufficient to sustain the findings of guilty and the sentence.

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

J. M. Hetes, J. A. G. C.

J. H. Gilmond, J. A. G. C.

14 APR 1949

CSJAGN-CM 335583 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Headquarters Fort Knox, Kentucky.

1. In the case of Recruit John Draper, Jr. (34905751), Reception and Processing Detachment, 2128th Area Service Unit, Station Complement, Fort Knox, Kentucky, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50e(3) this holding and my concurrence therein vacate the findings of guilty and the sentence.

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

(CM 335583).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(145)

CSJAGK - CM 335585

10 MAY 1949

UNITED STATES v. First Lieutenant WILLIAM J. BRIDGES (0-2026151), Company D, 2nd Infantry, Fort Jackson, South Carolina.	FORT JACKSON, SOUTH CAROLINA Trial by G.C.M., convened at Fort Jackson, South Carolina, 15 February 1949. Dismissal.

OPINION of the BOARD OF REVIEW
SILVERS, SHULL, and LEVIE
Officers of The Judge Advocate General's Corps

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 1st Lieutenant William J Bridges Company "D", Second Infantry, did at Columbia, South Carolina on or about 18 October 1948 with intent to defraud, wrongfully and unlawfully, make and utter to the Columbia Hotel, Columbia, South Carolina, a certain check in words and figures as follows, to wit:

Pioneer Bank No.
Chattanooga, Tennessee 18 October 1948

Pay to the Order of Columbia Hotel $200.00

Two Hundred and 00/100 Dollars

For Pd Bill /s/ William J Bridges
LK
1st Lt Inf 0-2026151

in payment of a hotel bill in the amount of one hundred eighty-five dollars and eighty-five cents ($185.85), and by means

See #2

thereof did fraudulently obtain from the said Columbia Hotel Fourteen dollars and Fifteen cents ($14.15), he the said 1st Lt William J Bridges, then well knowing that he did not have and not intending that he should have sufficient funds in the Pioneer Bank, Chattanooga, Tennessee for the payment of said check.

Specification 2: In that 1st Lt William J Bridges, *** did at Columbia, South Carolina on or about 26 October 1948 with intent to defraud, wrongfully and unlawfully make and utter to the Columbia Hotel, Columbia, South Carolina, a certain check in words and figures as follows, to wit:

Pioneer Bank No.
Chattanooga, Tennessee 26 October 1948

Pay to the Order of Columbia Hotel $63.00

Sixty-three and 00/100 Dollars

For /S/ William J Bridges

Pd Bill SH 1st Lt Inf 0-2026151

in payment of a hotel bill in the amount of sixty-two dollars and ninety cents ($62.90), and by means thereof did fraudulently obtain from the said Columbia Hotel ten cents ($.10), he the said 1st Lt William J Bridges, then well knowing that he did not have and not intending that he should have sufficient funds in the Pioneer Bank, Chattanooga, Tennessee for the payment of said check.

Specification 3: In that 1st Lt William J Bridges, *** did at Fort Jackson, South Carolina on or about 1 November 1948 with intent to defraud, wrongfully and unlawfully make and utter to the 2nd Infantry Officer's Club, a certain check in words and figures as follows, to wit:

Pioneer Bank
Chattanooga, Tennessee 1 November 1948 No.

Pay to the Order of 2nd Infantry Officer's Club $15.00

Fifteen and 00/100 Dollars

For /S/ William J Bridges

1st Lt Inf 0-2026151

and by means thereof did fraudulently obtain from the said 2nd Infantry Officer's Club Fifteen Dollars ($15.00), he the said 1st Lt William J Bridges, then well knowing that he did not have and not intending that he should have sufficient funds in the Pioneer Bank, Chattanooga, Tennessee for the payment of said check.

Specification 4: In that 1st Lt William J Bridges, *** did at Fort Jackson, South Carolina on or about 2 November 1948 with intent to defraud, wrongfully and unlawfully make and utter to 1st Lt George K Williams, a certain check in words and figures as follows, to wit:

Pioneer Bank
Chattanooga, Tennessee 2 November 1948 No.

Pay to the Order of Lt Geo K Williams $46.00

Forty-Six and 00/100 Dollars

For /S/ William J Bridges

1st Lt Inf 0-2026151

in payment of a debt, he the said 1st Lt William J Bridges, then well knowing that he did not have and not intending that he should have sufficient funds in the Pioneer Bank, Chattanooga, Tennessee for the payment of said check.

Specifications 5,6,7, and 8: These specifications vary materially from Specification 3 only as to the date of the offense and the date and amount of the check,as follows:

Spec.	Date of Offense	Date of Check	Amount
5	11/3/48	11/3/48	$25
6	11/6/48	11/6/48	25
7	11/10/48	11/10/48	25
8	11/13/48	11/13/48	35

He pleaded not guilty to the charge and all specifications. He was found guilty of the Charge and all of the specifications except Specification 4, as to which the court found him guilty except the words "with intent to defraud" in violation of Article of War 96. No evidence of any previous

convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the finding of guilty of Specification 1 as involved a finding of guilty of wrongfully and unlawfully making and uttering the described check with intent to defraud, in payment of a hotel bill, then well knowing that he did not have and not intending that he should have sufficient funds in the Pioneer Bank, Chattanooga, Tennessee, for the payment thereof. He approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

By deposition, Ernest B. Shadden, Comptroller of the Pioneer Bank of Chattanooga, Tennessee, testified that on 18 October 1948 the accused had a credit balance in his account in that bank in the amount of $4.41 and that no deposits were made during the period from 18 October 1948 to 31 (sic) November 1948. During that period twelve checks were drawn on the account, none of which were paid by the bank. The witness identified a document attached to the deposition as a statement of accused's account from 27 July 1948 to 18 December 1948. This statement corroborated the testimony previously given by the witness to the effect that at no time during the period in question did accused's account in the Pioneer Bank exceed $4.41. This account was of the "no minimum balance" type for which statements were only rendered when a ledger sheet was filled with entries or when the depositor requested a statement. It was the policy of the bank to so inform a depositor when an account was opened. The last statement of his account was mailed to the accused at the recruiting station in Chattanooga on 27 July 1948 (R 12, Pros Ex 1).

On 18 October 1948 the accused gave the manager of the Hotel Columbia a check (Pros Ex 3) in the amount of $200 in payment of his hotel account. The check was executed in the manager's presence. It was returned marked "insufficient funds." The check was not exactly the amount of the bill, "actually his bill had gone over the $200.00 mark when he gave me that, ***" (R 17-19).

On 26 October 1948 the accused gave the cashier of the Hotel Columbia a check (Pros Ex 4) in the amount of $63 in payment of his hotel account. The check was executed in the cashier's presence. "The bill was sixty-two something and just a few cents over. I gave him the difference in change." The described check shows on its face that it was returned marked "insufficient funds." (R 20).

Captain Norman E. Brown, the Mess and Club Officer of the 2nd Infantry, Fort Jackson, South Carolina, testified that he knew the accused; that on 1 November 1948 he cashed a $15 check (Pros Ex 5) for the accused; that on 3 November 1948 he cashed a $25 check (Pros Ex 6) for the accused; that on 6 November 1948 he cashed a $25 check (Pros Ex 7) for the accused; that on 13 November 1948 he cashed a $35 check (Pros Ex 8) for the accused. In addition, on 10 November 1948 he authorized the cashing of a $25 check (Pros Ex 10) drawn by the accused; and on 2 November 1948 he cashed a $46

check (Pros Ex 9) drawn by the accused which was presented by Lieutenant George K. Williams. All of these checks were dishonored by the bank on account of insufficient funds. Cash was given for the checks, they were not in payment of bills owed to the club (R 26-28).

Lieutenant George K. Williams testified that on 2 November 1948 the accused executed and gave him a check (Pros Ex 9) in the amount of $46 in payment of a pre-existing debt. Lieutenant Williams indorsed the check and cashed it at the 2nd Infantry Officers' Club (R 30-31).

Private Joseph A. Vitali testified that he was the Club Steward and that on 10 November 1948 he cashed a $25 check (Pros Ex 10) for the accused, giving cash therefor (R 33).

Lieutenant Colonel Frederick J. Dooley testified that he had been designated investigating officer under Article of War 70; that prior to interviewing accused he had duly advised the latter of his rights under Article of War 24; that the accused admitted having uttered the eight checks, Prosecution Exhibits 3 through 10, and not having made any deposits in his account during the period covered by the checks, but had stated that "he had a possible outside source of income, and he was under the impression that the outside source of income had made deposits to his account although he personally did not make any deposits." "At the time he wrote and uttered the checks in question *** he felt that the bank was in error and that he did have sufficient funds to cover the checks written although some checks were apparently returned." The accused had had checks returned prior to those referred to in the specifications. He had advised Colonel Dooley that the last deposit made by him was on about 2 September 1948 in the amount of $549; and he admitted having received value for all of the checks (R 34-39).

4. Evidence for the Defense

Captain John T. Vollentine testified that accused had given him a $6 check (Def Ex A) in payment of a debt. The check came back marked "Insufficient Funds." He notified accused who redeemed it within two weeks (R 39-42).

Colonel Dooley was called by the defense and testified that he had requested the bank to send him a statement of the accused's account, which it did during the latter part of December 1948. Inclosed with the statement were four cancelled checks, one of which, in the amount of $17, was dated 13 May 1948 and contained a stamp indicating that it had been paid on 15 May 1948 (Def Ex B). Although accused had been placed in administrative restriction to the limits of Fort Jackson, on the one occasion when he requested permission to seek legal counsel off the Post, such permission was granted. He also requested and received a few days leave during the Christmas holidays (R 42-48).

After having been duly advised of his rights under Article of War

24, accused elected to be sworn for the purpose of giving "limited testimony concerning his transfers from Chattanooga to Montgomery and from Montgomery to Fort Jackson and the circumstances surrounding his restriction." He testified that he was transferred from Chattanooga to Montgomery on 20 July 1948 and from Montgomery to Fort Jackson effective 15 August 1948. On 14 December 1948 he was restricted to the limits of Fort Jackson, which restriction was lifted from 0600 on 25 December to 0600 on 27 December. He asserted that "had these limits been enlarged or the restriction lifted during the past two months, restitution in full for the checks involved could have been made, had adequate time been afforded myself." Accused admitted that during his restriction he had had access to the post office, bank, and telegraph office located on the military reservation and that he had been paid during the period. He did not care to delegate to anyone else, including his wife, the authority to act as his agent in obtaining the necessary funds. He recalled that prior to the Christmas holidays his restriction had been lifted for four hours to enable him to consult a civilian attorney. He made another request to have the restriction lifted which was denied. Although he did attempt to obtain the regular seven-day Christmas leave which was given to other personnel of the 2nd Infantry, he made no application for emergency leave for the purpose of taking care of the checks in question (R 50-53).

5. Discussion

Accused has been found guilty of wrongfully and unlawfully making and uttering the checks described in Specifications 1,2,3,5,6,7 and 8 with intent to defraud, then well knowing that he did not have and not intending that he should have sufficient funds on deposit with the drawee bank for the payment thereof in violation of Article of War 95; and of wrongfully and unlawfully making and uttering the check described in Specification 4, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for the payment thereof in violation of Article of War 96. The Manual for Courts-Martial, 1949, paragraph 182, page 254, lists, among other instances of violations of Article of War 95, "giving a check on a bank when he knows or reasonably should know there are no funds to meet it, and without intending that there should be." The utterance of checks by an officer without maintaining sufficient funds on deposit to provide for the payment thereof and with intent to defraud constitutes a violation of Article of War 95 (CM 226219, Rickards, 15 BR 27,35). Such utterance without proof of intent to defraud, as where a check is given for a past consideration, constitutes a violation of Article of War 96 (CM 321734, Creighton, 70 BR 355,359; CM 330282, Dodge, 78 BR 345,355).

Over a period of more than six weeks during which the balance in his account amounted to only a few dollars and during which he made no deposits whatsoever, accused uttered seven checks totaling $388, for each of which he received value at the time of the issuance thereof. Intent to defraud may properly be inferred from these facts. It is clear that the evidence established conduct unbecoming an officer and a gentleman in

violation of Article of War 95. And the uttering under these circumstances of the check referred to in Specification 4, for a past consideration, established conduct discreditable to the military service in violation of Article of War 96.

It appears that during the pre-trial investigation accused stated to Colonel Dooley, the investigating officer, that he was "under the impression" that undisclosed third parties were making deposits to the credit of his account. However, no such contention was urged at the trial. The defense there offered was that circumstances prevented accused from making restitution to the holders. Restitution, however, had it been established, would not constitute a defense to the charge and specifications alleged. Accordingly, the accused failed to produce any evidence which would have warranted a finding that his action in uttering the checks was the result of an honest mistake not caused by his own willful misconduct.

6. Records of the Department of the Army disclose that accused is 29 years of age, married, and the father of two sons. Representations made in his record show both that his education terminated when he completed high school and that he completed two years of college, majoring in accounting. He enlisted in the Regular Army on 24 November 1941 for three years and was commissioned a second lieutenant on 3 July 1942 after completing the course of instruction at The Officer Candidate School, Fort Benning, Georgia. On 28 September 1942, proceedings for his reclassification for misconduct were commenced and he submitted his resignation. On 26 October 1942 the Secretary of War ordered the acceptance of the resignation effective that date "under conditions other than honorable."

Accused was inducted into the Army on 31 March 1944. While serving in Germany he applied for a commission and was appointed a second lieutenant on 11 May 1945. It does not appear that in his application for this commission the accused made any disclosure concerning his resignation under conditions other than honorable. He has been awarded the Bronze Star Medal, the Combat Infantryman's Badge, and two battle stars. His adjectival efficiency ratings include two "Superior" and three "Excellent."

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

Chester D. Silvers, J.A.G.C.

Lewis S. Thiel, J.A.G.C.

Howard S. Levie, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 335585

THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant William J. Bridges, O-2026151, Company D, 2nd Infantry, Fort Jackson, South Carolina, with the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Franklin P. Shaw
Franklin P. Shaw, Brig Gen, JAGC

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

E.M. Brannon
31 May 1949
E.M. Brannon, Brig Gen, JAGC.

I concur in the foregoing action.

Thomas H. Green
THOMAS H. GREEN
Major General
The Judge Advocate General

2 June 1949

(GCMO 36, June 10, 1949).

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

MAY 4 1949

CSJAGH CM 335586

UNITED STATES v. First Lieutenant JOHN ALLEN WILKINS, 02032984, Company C, 371st Infantry Battalion (Separate), APO 800.	))))))))	UNITED STATES ARMY, EUROPE Trial by G.C.M., convened at Kitzingen, Germany, 17,18,19, 23 February 1949. Dismissal, total forfeitures, and confinement for two (2) years.

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

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

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

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

Specification 1: In that First Lieutenant John A Wilkins, Company "C", 371st Infantry Battalion (Separate), did, at Grafenwohr, Germany, on or about 5 October 1948, feloniously embezzle by fraudulently converting to his own use certain Military Payment Certificates of the value of about one hundred dollars ($100.00) the property of Private First Class Linzy Brooks, entrusted to him by the said Private First Class Linzy Brooks, for the purchase of a money order.

Specification 2: In that First Lieutenant John A. Wilkins, Company "C", 371st Infantry Battalion (Separate), did, at Kitzingen, Germany, on or about 20 November 1948, feloniously take, steal, and carry away certain Military Payment Certificates of the value of about fourteen dollars ($14.00), the property of Corporal Warren H. Smallwood.

Specification 3: (Finding of not guilty).

Specification 4: (Finding of not guilty).

Specification 5: In that First Lieutenant John A. Wilkins, Company "C", 371st Infantry Battalion (Separate), did, at Nurnberg, Germany, on or about 7 May 1948, feloniously embezzle by fraudulently converting to his own use certain Military Payment Certificates of the value of about two hundred and fifty dollars ($250.00), the property of Private First Class Nationiel C. Alleyne, entrusted to him by the said Private First Class Nathaniel C. Alleyne for deposit in his (Private First Class Nathaniel C. Alleyne's) Soldiers deposit account.

Specification 6: In that First Lieutenant John A. Wilkins, Company "C", 371st Infantry Battalion (Separate), did, at Nurnberg, Germany, on or about 5 June 1948, feloniously embezzle by fraudulently converting to his own use certain Military Payment Certificates of the value of about eighty dollars ($80.00), the property of Private First Class Nathaniel C. Alleyne, entrusted to him by the said Private First Class Nathaniel C. Alleyne for deposit in his (Private First Class Nathaniel C. Alleyne's) Soldiers deposit account.

Specification 7: In that First Lieutenant John A. Wilkins, Company "C", 371st Infantry Battalion (Separate), did, at Nurnberg, Germany, on or about 9 July 1948, feloniously embezzle by fraudulently converting to his own use certain Military Payment Certificates of the value of about one hundred and ten dollars ($110.00), the property of Private First Class Nathaniel C. Alleyne, entrusted to him by the said Private First Class Nathaniel C. Alleyne for deposit in his (Private First Class Nathaniel C. Alleyne's) Soldiers deposit account.

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

Specification: In that First Lieutenant John A. Wilkins, Company "C", 371st Infantry Battalion (Separate), being indebted to Private First Class Theodore Thornton in the sum of two-hundred and eighty ($280.00) for a personal loan, which amount became due and payable on or about 1 November 1948 to on or about 15 November 1948, did, at Kitzingen, Germany, from on or about 15 November 1948 to 5 January 1949, dishonorably fail and neglect to pay said debt.

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

Specification: (Finding of not guilty).

He pleaded not guilty to Charges I and II and the Specifications thereof. He stood mute as to Charge III and its Specification and the trial proceeded after the law member entered a plea of not guilty for the accused as to Charge III and its Specification. He was found guilty of Specifications 1, 2, 5, 6 and 7 of Charge I and Charge I, and of the Specification of Charge II and Charge II. He was found not guilty of Specifications 3 and 4 of Charge I, and the Specification of Charge III and Charge III. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for five years. The reviewing authority approved the sentence, but reduced the period of confinement to two years, and forwarded the record of trial for action under Article of War 48.

3. The evidence adduced at accused's trial pertinent to the findings of guilty is summarized as follows:

a. Evidence for the prosecution.

From February to August 1948, Company C, 371st Infantry Battalion (Separate) was stationed at Nurnberg, Germany. During this period accused was its personnel officer and Private First Class Nathaniel C. Alleyne was a member thereof. In May 1948, accused accepted from Alleyne the sum of $250.00 in military payment certificates for deposit in Alleyne's Soldiers' Deposits account. In June 1948, Alleyne brought $80.00 in military payment certificates to accused's office for deposit in Soldiers' Deposits. In accused's presence, Alleyne handed the military payment certificates to accused's clerk who, at the accused's direction, prepared and signed a receipt therefor and gave it to Alleyne. In July 1948, at a time when accused was absent, Alleyne again came to accused's office. Alleyne gave accused's clerk the sum of $110.00 in military payment certificates for deposit in his Soldiers' Deposits account. The clerk thereupon prepared and signed a receipt for said sum and handed it to Alleyne. Each of the receipts furnished Alleyne for his June and July deposits were subscribed by the clerk with his own name under that of accused and respectively bore the dates 3 June 1948 and 1 July 1948 (R 110-114; Pros Exs 9,10,11).

Alleyne was transferred to the 558th Infantry Rifle Company in August 1948 where it was discovered that his Soldiers' Deposits card was not among his accompanying records. At Alleyne's request, a letter from his new organization was directed to Company C in November 1948 asking that a search be instituted for the missing Soldiers' Deposits

card (R 110). A search was thereupon conducted by First Lieutenant Tolbert Harris, Jr., the Commanding Officer of Company C. The search revealed, however, that no Soldiers' Deposits cards were in the files of Company C. Inquiry as to their whereabouts was then made of accused who stated that he had them in his billet. He was directed to "get the cards." When he did so, it was discovered that Alleyne's card was not among those produced by him. Thereafter, accused and Lieutenant Harris again searched for Alleyne's Soldiers' Deposits card in the files of Company C, and also in Alleyne's 201 file at Battalion Headquarters but without success. A day or so later, however, accused handed Alleyne's Soldiers' Deposit card to Lieutenant Harris, stating that he had "found it." (R 132-135).

Lieutenant Harris noted that all columns relating to the last three deposit entries on Alleyne's Soldiers' Deposit card were complete with the exception that the required finance officer's written signature was not above his typed name on those entries. This absence of signature was interpreted by Lieutenant Harris to mean that the deposits made by Alleyne with accused had not been deposited by accused with the finance officer. Lieutenant Harris thereupon questioned accused about these apparent discrepancies. In reply to this interrogation accused stated that Alleyne's card "was in order" and that the money represented on the card as having been deposited had been deposited in the finance office in Nurnberg (R 136,137; Pros Ex 4).

Alleyne's Soldiers' Deposits card showed deposit entries as follows: 7 May 1948, $250.00; 5 June 1948, $80.00 and 9 July 1948, $110.00. As to each of said entries the column which provided space for attestation by the organization commander was signed by accused over his typed name, but in the column which provided space for the acknowledgment of receipt of the indicated deposits by the Finance Officer, there appeared only the typed name of "W. L. VIERS, MAJ FD," Finance Officer, Nurnberg Military Post, without written signature (Pros Ex 4; R 22,23). Thereafter, searches of the records of the Finance Office of Nurnberg Military Post were conducted for vouchers which would show that deposits to Alleyne's Soldiers' Deposits account had been made for the months of May, June and July 1948, but the records of that office failed to indicate that said deposits had been made (R 24,25,137,138). None of the money left with accused for Soldiers' Deposits by Alleyne during the months of May, June and July 1948, as above set forth, had been returned to him (R 110).

At Grafenwohr, Germany, on 2 October 1948, accused solicited the loan of some money from Private First Class Theodore Thornton. Thornton was an enlisted man of the same organization in which accused was an

officer. When asked by Thornton how much he wanted, accused asked him how much he had. Thornton informed accused that he could lend him $300.00 and together they went to Sergeant Wheeler with whom Thornton had placed for safekeeping on the previous day the sum of $330.00 in military payment certificates. There, at Thornton's direction, Wheeler handed accused $300.00 of Thornton's military payment certificates. Accused then and there promised Thornton that he would make repayment of the loan on 1 November or 15 November 1948.

On 20 November 1948 accused came to Thornton and stated that he was unable to make repayment of the loan because he lacked the funds. Accused further stated to Thornton that he had sent home to the United States for the money, and upon its arrival he would repay Thornton. On or about 27 November 1948, Thornton made a request of accused for repayment of the money owed to him. Accused thereupon paid Thornton $20.00 on account of the loan, reaffirmed his expectation of receipt of money from the United States and asserted that he would pay Thornton the balance due him upon the arrival of the money (R 116-120).

On 5 October 1948, at Grafenwohr, Germany, Private First Class Linzy Brooks, an enlisted man in the same military organization as accused, handed accused the sum of $100.00 in military payment certificates and requested that accused purchase a money order for him in that amount. Accused accepted the money and gave Brooks a receipt therefor. The next day, Brooks asked accused if his money order had been purchased. Accused replied that he had given the money to another officer who would get the money order and that Brooks would receive it in several days. During the remainder of October 1948 Brooks made several more requests for his money order of accused, and on each occasion accused told Brooks that he had not yet obtained the money order. On or about 1 November 1948, Brooks again asked accused for the money order. On the occasion of this last request, accused stated to Brooks that he had only $45.00 left of his pay and wanted to wait until he could pay Brooks the entire $100.00. Shortly thereafter, Brooks related the foregoing facts to Lieutenant Tolbert Harris, Jr., executive officer of his company (Pros Ex 12; R 114-115). Lieutenant Harris then spoke to accused about the matter on or about 20 November 1948, at which time accused admitted to Harris that he owed Brooks $100.00 and would make repayment as soon as he could get some money (R 144). On the day of trial, Private First Class Brooks had not received either the money order or the $100.00 from accused (Pros Ex 12; R 114).

On Saturday afternoon, 20 November 1948, accused came to Company C, 371st Infantry Battalion at Kitzingen, Germany. Private First Class William C. Brown was working at the unoccupied desk of the company clerk, Sergeant Warren H. Smallwood (then Corporal), who was then absent on

pass. Accused stated to Brown that he was looking for a "special privilege pass." Despite being informed by Brown that there were no "special privilege passes" in Smallwood's desk, accused, nevertheless, without prior permission from Smallwood, began searching through the desk. In the course of accused's search of Smallwood's desk, Brown observed that accused had opened a drawer which previously had been locked and that accused had "his hand around some money in the corner of the drawer." After accused's departure, Brown inspected the desk drawer and found that it was again locked.

Smallwood returned from pass on Monday, 22 November 1948. He found that $14.50 in military payment currency, representing monies collected by him from the authorized sale of raffle tickets, which he had locked in the drawer of his desk prior to going on pass was missing. Upon discovery of his loss, Smallwood was informed by Brown that accused had searched his desk on the previous Saturday. Smallwood then asked accused if he had taken the missing money. Accused admitted that he had taken the money "for security purposes" and would repay Smallwood "as soon as he could get some money from the States." (R 120-128). About a week later, Smallwood discussed his loss with Lieutenant Harris, the company commander. Lieutenant Harris then spoke to accused about the matter and accused told him that he had borrowed $14.00 from Smallwood (R 128,146).

On the morning of 7 December 1948, Lieutenant Harris looked for accused at Kitzingen. When he could not find accused, he telephoned to the Criminal Investigation Division at Nurnberg and requested that accused be taken into custody (R 47). Agents Ashlock and Ward of the 9th Criminal Investigation Detachment went to a German residence in Furth, a suburb of Nurnberg, where they found accused (R 14). At Ashlock's request, accused accompanied the agents to the CID office in Nurnberg and there waited for Captain William R. Royston and Lieutenant Harris who arrived from Kitzingen at about seven o'clock that evening (R 15). Accused took a wad of currency from his trouser pocket and extracted additional bills from his wallet and turned them over to Captain Royston. This money totaled $1065.95. Captain Royston, Lieutenant Harris and accused then returned to Kitzingen, where accused and the money he had given Captain Royston were turned over to the battalion commander (R 83,85,86; Pros Ex 17).

On or about 13 December 1948, Agents Elmer and Albright of the "5th C.I.D." questioned accused at the CID office in Wurzburg. Accused, after first being warned of his rights under the 24th Article of War (R 152) stated that he had removed money from the desk of an enlisted man [Smallwood] "to keep it from being stolen out of the desk drawer"

and claimed that the money given to him by an enlisted man [Brooks] for the purchase of a money order "had been stolen from him" (R 160). Accused further admitted having borrowed money from "a certain enlisted man" "to supplant other money he had used" and that he had the sum of $1065.95 in his possession when he was taken into custody "around Nurnberg" (R 161). Accused was also interrogated with reference to $2000.00 of "Soldiers' Deposits which had not been deposited" (R 167). After referring to a notebook which he took out of his pocket, he denied that the amount which had not been deposited was $2000.00 and stated that it was approximately $1400.00. Examination of the notebook showed that it contained, inter alia, the following entry:

"* * * *
ALLEYNE, NATHANIEL 440." (Pros Ex 19; R 168-170).

b. Evidence for the defense.

Accused, having been fully apprised by the court of his rights as a witness, stated that he desired "to take the stand and be sworn as a witness as to specifications 3 and 4 of Charge I, and the Charge." He was, thereupon, sworn as a witness and testified in his own behalf (R 189-190). His judicial statement, in pertinent part, was to the effect that in the early morning of 7 December 1948 he journeyed by train from Kitzingen to the home, in Furth, Germany, of a young lady named Elizabeth Spitzenberg. His reason for making the trip was to get $1000.00 which he had been keeping there in a foot locker for some time past. His intention was to return to Kitzingen on the 4.44 train the same morning. Upon arrival at the young lady's home in Furth, he went to sleep and did not awaken until 0945 hours. At that time, he had the young lady determine for him that the next train to Kitzingen would not leave until 1:55 p.m. At approximately 1:30 p.m., as he was preparing to leave to catch this train, CID Agent Ashlock knocked and entered the house. He accompanied Ashlock to the "Nurnberg CID," where he turned over the sum of $1065.95 to Captain Royston (R 196-200,209). Accused described with particularity the sources and the manner in which he had accumulated the $1000.00. These sources in the main were exclusive of his military pay, $800.00 from the sale of his automobile in June 1948, $495.00 from the State of Michigan for Veterans' Bonus in July 1948, and $375.00 remaining from a cable transfer of $800.00 after he had purchased air transport tickets for his wife at a cost of $425.00 (R 200-201).

On cross-examination, accused admitted that periodically, between 1 January 1948 and 7 December 1948, he had given Miss Spitzenberg sums of Deutchemarks (R 216); that he had presented her with PX items

occasionally; (R 217), and that he gambled at cards and dice "quite occasionally." He, however, could not say whether he did or did not usually lose and denied that he had sold his automobile to pay a gambling debt or that he had so stated to Miss Spitzenberg (R 218-220).

Elizabeth Spitzenberg, a female German National, residing at 22 Maxstrasse, Furth, Germany, corroborated accused's testimony in so far as it related to his arrival and oversleeping at her home in Furth on the morning of 7 December 1948. She stated that accused's visit was for the purpose of getting some of his clothes and money that he was keeping there preparatory to going on leave; that she had known him for one and one-half years; and that he had given her inexpensive gifts during this period. She remembered the time that accused sold his automobile, but had seen him gambling on but one occasion in June and had no knowledge of his gambling debts. Although Miss Spitzenberg had not seen accused take his money on 7 December 1948, the receptacle in which he kept it was open after his departure (R 226-229).

On cross-examination, she admitted that after January 1948 she saw accused "most every week. Every weekend for sure, if he were not on duty"; that since January 1948 he had supplied her with all her necessities except food and shelter and had given her between 100 and 150 Deutchemarks each month (R 230). She denied, however, that she had knowledge that accused had sold his automobile to pay a gambling debt (R 231).

On recross-examination Miss Spitzenberg asserted that accused had been keeping money in his footlocker at her home since "June or August," but she could not state how much he kept there or when or how often he went to the footlocker (R 237-238).

c. Rebuttal evidence.

Lieutenant Tolbert Harris, Jr., was recalled and testified that he had observed accused gambling on innumerable occasions prior to 7 December 1948. He stated that he had never seen accused win and knew that he lost "all the time," and that after each loss accused would attempt to borrow money from the witness "and the other fellows." (R 248-249).

4. Other evidence introduced by the prosecution and defense, pertaining solely to offenses upon which there were findings of not guilty and which was wholly unrelated to the offenses of which accused was found guilty, is purposely omitted.

In accordance with his oral election to the court, accused proffered testimony in his own behalf which testimony was limited to

the denial of the allegations contained in specifications 3 and 4 of Charge I. In so far as this testimony was exculpatory in character, it related wholly to these specifications, and accused was ultimately found not guilty. Thus, the evidence of record in support of the findings of guilty was neither contradicted nor denied by accused, and standing unopposed as it does, the principal problem posed in the instant case is whether the competent evidence of record adequately establishes each element of the offenses of which accused has been found guilty.

5. a. Considering the offenses in the chronological order of their alleged commission, specifications 5, 6 and 7 of Charge I allege that accused did, at Nurnberg, Germany, on each of the dates set forth in the specifications, feloniously embezzle by fraudulently converting to his own use, certain military payment certificates of a value of $250.00, $80.00 and $110.00, respectively, the property of Private First Class Nathaniel C. Alleyne, entrusted in each instance to the accused by Alleyne for deposit in Alleyne's Soldiers' Deposits account.

The offense of embezzlement is defined and discussed in the Manual for Courts-Martial, U. S. Army (1928) as follows:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come (Moore v. U.S., 160 U.S. 268).
>
> "The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied, or arising by operation of law. The offense exists where the property has been taken or received by virtue of such relationship.
>
> "Property includes not only things possessing intrinsic value, but also bank notes and other forms of paper money and commercial paper and other writings which represent value.
>
> "Proof.--(a) That accused was intrusted with certain money or property of value by or for a certain person, as alleged; (b) that he fraudulently converted or appropriated such money or property; and (c) the facts and circumstances showing that such conversion or appropriation was with fraudulent intent." (pp 173-174)

The competent evidence of record adduced by the prosecution in support of the above-mentioned specifications of Charge I shows that at the place and at the times alleged, accused was the personnel officer

of Company C, 371st Infantry Battalion (Separate) and that Private First Class Alleyne was an enlisted man in the same organization. In May, June and July 1948, Alleyne came to accused's office and there turned over $250.00, $80.00 and $110.00, respectively, in military payment certificates. Accused was to deposit these sums of money for Alleyne in Alleyne's Soldiers' Deposits account. Alleyne's May deposit was personally accepted by accused. The money brought by Alleyne in June was accepted by accused's clerk in accused's presence and accused directed that his clerk prepare and furnish Alleyne with a receipt therefor. When Alleyne made his deposit in July, accused was absent but, nevertheless, accused's clerk accepted the money and gave Alleyne a receipt which was subscribed by the clerk under accused's name. Upon discovery that his Soldiers' Deposit Card did not accompany him when he was transferred, Alleyne's new organization commander, by letter, requested that his old organization commander make a search for the missing Soldiers' Deposit card. After a search which disclosed that no Soldiers' Deposits Cards were in Company C's files, accused was asked about their whereabouts and stated that he had them in his billet. Accused was directed to produce them and when he did so, Alleyne's card was not among those produced. A day or so later, after another search had been made for Alleyne's card, which included searching the Battalion's 201 files, the accused handed a card purporting to be Alleyne's to Lieutenant Harris stating that he had "found" it. The Soldiers' Deposit card produced by accused bore the name and army serial number of Pfc Alleyne. It showed, inter alia, entries of deposits on 7 May, 5 June and 9 July 1948 for $250.00, $80.00 and $110.00 attested by signature over accused's typed name. The column which should have contained the acknowledgement of receipt by the finance officer of the deposits indicated, however, contained only the typewritten name "W. L. VIERS, MAJOR, F.D." but no written signature of that person. Accused was requested to explain the absence of the finance officer's signature, and asserted that the card was "in order" and that Alleyne's money had been deposited in the finance office in Nurnberg. Thereafter, searches of the records of the Finance Office, Nurnberg Military Post, failed to substantiate accused's assertion with respect to the deposit there of Alleyne's money and during an interrogation by C.I.D. agents at Wurzburg, on or about 13 December 1948, accused admitted that approximately $1400.00 of Soldiers' Deposits money had not been deposited. He made this admission after he referred to a notebook which he took out of his pocket. This notebook contained entries of names with figures following them. The figures totaled $1430.00 and among the entries was Pfc Alleyne's name followed by the figure "440."

The evidence thus establishes that accused personally accepted Alleyne's May and June Soldiers' Deposits. From the proof of the entry of Alleyne's July deposits on the Soldiers' Deposit card bearing his

name and serial number, which was in accused's possession and bore accused's signature in attestation of the deposit entry, the inference is compelling that the July deposit also was turned over to accused by his clerk and accepted by him for the purpose intended by the depositor. Accused's acceptance of Alleyne's monies, while serving as personnel officer of Company C, 371st Infantry Battalion, created a relationship of trust between accused and Alleyne whereby it became accused's duty to deposit or cause to be deposited, with the finance officer, the money Alleyne had turned in for that purpose on the three separate occasions. That the accused did not perform the acts required of him by reason of his fiduciary relationship with Alleyne is amply proven by the inference arising from the Soldiers' Deposit card lacking the finance officer's signature acknowledging receipt (CM 334270, Stricklin,); the fact that a search of the records of the finance office in which accused claimed to have made the deposits failed to disclose that said deposits had been made, and that accused, after consultation with a notebook which was in his possession, admitted to the CID agents a failure on his part to deposit approximately $1400.00 in Soldiers' Deposit monies. Parenthetically, it is noted that inclusion of the figure "440" noted alongside Alleyne's name, with the other figures in the notebook results in a total of "1430." Such a showing of proof when the allegations of embezzlement are not denied or explained by the accused is legally sufficient to sustain the findings of guilty of the alleged offenses (CM 323764, Mangum, 72 BR 397,403).

b. Specification 1 of Charge I alleges that on 5 October 1948, at Grafenwohr, Germany, accused did "feloniously embezzle by fraudulently converting to his own use certain Military Payment Certificates of the value of about one hundred dollars ($100.00) the property of Private First Class Linzy Brooks, entrusted to him by the said Private First Class Linzy Brooks, for the purchase of a money order."

The proof adduced by the prosecution in support of this specification, too, is neither denied nor opposed by accused, nor does the defense affirmatively or otherwise attempt to explain away the prosecution's proof or neutralize its effect. This proof shows that on 5 October 1948, at Grafenwohr, Germany, accused received the sum of $100.00 from an enlisted member of his company, Private First Class Brooks, and gave Brooks a receipt; that when Brooks gave the money to accused, Brooks asked accused to purchase a $100.00 money order for him; that on several occasions during October and November 1948, Brooks asked accused for the money order; that on one occasion when Brooks requested his money order accused deferred delivery by stating to Brooks that another officer had the money and would get the money order

in several days; that on another occasion accused stated to Brooks that he, accused, wanted to wait until he had the entire $100.00 to pay to Brooks; that accused extrajudicially admitted to Lieutenant Harris that he "owed" Brooks $100.00 which sum he would repay as soon as he could get some money; and that at the time of trial (17-23 February 1948) Brooks had neither received the money order which he had requested accused to purchase for him nor had Brooks $100.00 been returned to him.

From such a body of evidence it is clear that accused was properly found guilty of the specification. It shows that he accepted money in trust to buy a money order for Brooks and that he failed to do so. From his initial statement to Brooks that he had given the $100.00 to another officer who would get the money order in several days and his later statement to Brooks that he wanted to wait to pay him until he had the entire $100.00 must be inferred that he fraudulently converted the money to his own use with felonious intent. Such inference is strengthened by accused's out of court admission to Lieutenant Harris that he owed Brooks $100.00 and would repay it as soon as he could get some money. Thus, the fiduciary relationship and the breach thereof which constitutes the offense of embezzlement is shown. Accused's intention to repay Brooks does not exculpate him of the offense charged since the offense of embezzlement in the instant case became completed at the moment that accused applied Brooks' property to his own use (CM 276435, Meyer, 48 BR 331,338).

c. By specification 2 of Charge I it is alleged that on or about 20 November 1948 at Kitzingen, Germany, accused did "feloniously take, steal, and carry away * * * fourteen dollars ($14.00), the property of Corporal Warren Smallwood."

The uncontraverted evidence of record shows that on 20 November 1948, Sergeant Warren H. Smallwood (then Corporal) was company clerk of Company C, 371st Infantry Battalion, and was absent on pass from his organization at Kitzingen, Germany. In a drawer in Smallwood's locked desk was $14.00 which he had realized from the sale of raffle tickets, an endeavor which was being conducted to raise funds for a German Youth Organization. On the afternoon of that day accused went to Smallwood's desk without Smallwood's permission in quest of "special privilege passes." He was seen with his hand around some money in an open drawer of the desk. When Smallwood returned to duty on 22 November 1948, he discovered that the money he had left in his locked desk was not there. Shortly thereafter, accused entered and Smallwood asked him if he had taken the missing money. Accused stated that he had taken it "for security purposes" and would make repayment "as soon as he could get some money from the States." About a week later,

accused admitted to Lieutenant Harris that he had borrowed $14.00 from Smallwood, and when subsequently questioned by CID agents in Wurzburg, the accused stated that he had removed the money from Smallwood's desk "to keep it from being stolen."

Larceny is defined in the Manual for Courts-Martial, 1928, as "the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein. (Clark)" (Par 149g, p.171). This definition, when applied to the evidence contained in the record of trial relating to accused's alleged larceny from Smallwood, to test its legal sufficiency to support the findings of guilty, raises two questions, namely, was accused's taking and carrying away of Smallwood's $14.00 trespassory and did accused intend permanently to deprive Smallwood of his property therein. We are of the opinion that the taking by trespass and the requisite intent were amply established by the evidence so as to legally justify the court's finding of guilty of the specification.

The basis for our conclusion becomes apparent when the evidence of record is examined. It shows that accused without the permission or consent of Sergeant Smallwood opened a locked drawer of Smallwood's desk under the pretense of searching for a "special privilege pass." This he did after he was informed that there were none. He subsequently admitted the taking of the money which Smallwood had locked in the drawer. Although he claimed two days later, when asked about the missing money, that he had taken it with the praiseworthy intention of safeguarding it, he, nevertheless could not return it until he received money from the States.

Such proof of the circumstances surrounding the taking is not conducive to any conclusion other than that the taking was a wrongful and unlawful taking by trespass, for surely if accused's purpose at the time of the taking was the honorable one of protecting from loss the property of one of the enlisted men of his organization, he would not have removed the money furtively and clandestinely. On the contrary he would normally have been expected to have advised Private Brown, who was then present and in charge, in Sergeant Smallwood's absence, that he was taking the money. Thus, there was sufficient evidence before the court both in quality and in quantity upon which to base the inference that the taking was by trespass.

Accused's intent to deprive Smallwood permanently of his property in the money, is also legally inferable from the record. As had been pointed out, the taking was not open and without concealment. Such a

circumstance when coupled with his inability to return the specific money taken by him at the termination of necessity for his belatedly self-proclaimed stewardship compels the conclusion that the original taking by trespass was accompanied by a larcenous intent. There is, therefore, nothing in the record which suggests to us a result dissimilar to the approved finding of the court. The instant case is distinguishable in law and on the facts from CM 330733, Moran, 73 BR 151, where a contrary final result was reached.

d. Charge II and its specification alleges that, in violation of Article of War 95, the accused, between 1 November and 15 November 1948, dishonorably failed and neglected to pay a just debt which he owed to Private First Class Theodore Thornton.

The evidence in support of the court's findings of guilty of this specification and charge shows that on 2 October 1948 accused solicited and received from Private Thornton the loan of $300.00, at which time accused promised to repay Thornton on 1 November or 15 November 1948; that Thornton requested repayment from accused on two occasions subsequent to the date on which accused had promised to pay him; that accused obtained deferment of repayment by stating that he lacked funds and that he would pay when he received funds which he had requested from home; and that by accused's own judicial admissions he possessed funds substantially in excess of the amount he owed Thornton at the time he told Thornton that he did not have the funds with which to pay him.

In CM 232882, Koford, 19 BR 229, at page 242 it has been stated:

> "Neglect to pay debts does not violate the 95th Article of War unless the attendant circumstances are such as to make such neglect dishonorable (par 151 M.C.M. 1928). Failure to discharge a financial obligation is dishonorable and constitutes conduct unbecoming an officer and a gentleman, if it is characterized by fraud, deceit, evasion, and false promises and is of such a nature as to bring dishonor upon the military service (Winthrop's Military Law and Precedents, Reprint, Footnote 42, p. 715; CM 213993, Casseday; CM 218970 Hendrickson)."

In our opinion, the record of trial provides ample evidence that accused's neglect and failure to repay to Thornton the money Thornton had loaned him at the time he had promised to do so was characterized by deceit. Proof of this deceit was supplied by accused in his judicial statement upon direct examination by his own counsel. This testimony showed that accused at a time when his debt to Thornton was past due, owned and had access to funds in excess of the amount of the past due debt; and that despite the ownership and accessibility of such funds

accused falsely stated to Thornton, when Thornton requested repayment of the money due, that he was without funds to pay the debt. Under such circumstances, an officer's failure and neglect to pay a just debt is deceitful and constitutes conduct unbecoming an officer and gentleman.

We are not unmindful that the proof which establishes accused's conduct as a violation of Article of War 95 was supplied by accused in the course of his giving testimony in defense of other violations to which he expressly limited his testimony and of which offenses he was found not guilty.

It is our opinion that testimony voluntarily offered by an accused as a witness in his own behalf for the limited purpose of defending against certain offenses on the merits is competent admissible evidence as to any other offense or offenses, if the testimony relates and is material to accused's guilt or innocence of the other offense or offenses. An accused who is being tried by a court-martial cannot be compelled to incriminate himself (AW 24, MCM 1928 and 1949). In the instant case, however, the accused voluntarily, without compulsion and by his own election became a witness and testified. His testimony, while exculpating him of the offenses against which he elected to defend, was relevant and in fact supplied some of the proof necessary to convict him of another offense with which he was charged. This is not compulsory self-incrimination. By consenting to become a witness in his own behalf, and by testifying concerning matters then in issue but outside of the announced limitation of his testimony, he waived the privilege which protected him from self-incrimination and his testimony could be considered in respect to any other offense with which he was charged if it was relevant thereto. If such testimony resulted in injury to a different aspect of his cause, as it did, it was primarily due to, and the direct result of, his own voluntary act of becoming a witness and giving testimony, and he has no reason to complain. To hold otherwise would afford an accused the rights, privileges and benefits of becoming a witness without subjecting him to all the duties, obligations and liabilities that such a status entails.

6. Records of the Department of the Army show that accused is 30 years of age, married and the father of two children. He is a high school graduate. Until he was inducted into the Army on 3 June 1943, he was employed by the Department of Street Railways, Detroit, Michigan, in a clerical capacity. He has been overseas continuously since 27 February 1944 with the exception of the period 5 January 1946 to 26 April 1946. While in an enlisted status, he attained the grade of First Sergeant. After completing the Company Grade Officer's Course, at Seckenheim, Germany, on 31 October 1946, he was appointed a Second Lieutenant, AUS, on 1 November 1946. He was promoted to First Lieutenant in November 1948. His three known efficiency ratings include two (2) of Excellent and one (1) of Very Satisfactory.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed 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 mandatory upon conviction of a violation of Article of War 95. A sentence to dismissal, total forfeitures, and confinement at hard labor for two years is authorized upon conviction of a violation of Article of War 93. Confinement in a penitentiary is authorized by Article of War 42 upon a conviction of the offense of embezzlement of property of a value of fifty ($50.00) dollars or more.

Wilmot R. Vaughn, J.A.G.C.

Charles J. Berkowitz, J.A.G.C.

[illegible], J.A.G.C.

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL

CM 335586

THE JUDICIAL COUNCIL

Brannon and Shaw
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant John Allen Wilkins (02032984), Company C, 371st Infantry Battalion (Separate), APO 800, with 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.

E.M. Brannon

E.M. Brannon, Brig Gen, JAGC

Franklin P. Shaw

Franklin P. Shaw, Brig Gen, JAGC

27 May 1949.

Brigadier General James L. Harbaugh, Jr. having acted as Staff Judge Advocate to the reviewing authority, took no part in the consideration and action in this case by The Judicial Council.

I concur in the foregoing action

Thomas H. Green

THOMAS H. GREEN
Major General
The Judge Advocate General

2 JUNE 1949.

(GCMO 38, June 16, 1949)

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

JUN 2 1 1949

CSJAGQ - CM 335594

UNITED STATES v. Recruits DAVID SMITH, JR. (RA 18276821) and ERTHAN SIMS (RA 18314644), both of Transient Det. A, Hq. & Hq. Co., 7871 Training & Education Group, then Transient Det. A, Hq. 370th Infantry Battalion (Separate).	UNITED STATES ARMY, EUROPE Trial by G.C.M., convened at Kitzingen, Germany, 9, 15-16 February 1949. Both: Dishonorable discharge. Smith: Confinement for eighteen (18) months. Sims: Confinement for twelve (12) months. Both: Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
GOFF, WHIPPLE and SHULL
Officers of the Judge Advocate General's Corps

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

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

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

Specification: "In that Recruit David Smith, Jr., Transient Detachment 'A', Headquarters & Headquarters Company, 7871st Training & Education Group, then Transient Detachment 'A', Headquarters 370th Infantry Battalion (Separate), and Recruit Erthan Sims, Transient Detachment 'A', Headquarters & Headquarters Company, 7871st Training & Education Group, then Transient Detachment A, Headquarters 370th Infantry Battalion (Separate), acting jointly, and in pursuance of a common intent, did, at Kitzingen, Germany, on or about 10 December 1948, unlawfully enter the dwelling of Frau Johanna Klinge."

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

Specification 1: In that Recruit David Smith, Jr. Transient Detachment "A", Headquarters and Headquarters Company, 7871 Training and Education Group, then Transient Detachment "A" Headquarters 370th Infantry Battalion (Sep), did at Kitzingen, Germany on or about 10 December 1948 wrongfully strike Frau Johanna Klinge in the face with his hand.

Specification 2: In that Recruit David Smith, Jr., Transient Detachment "A", Headquarters and Headquarters Company, 7871 Training and Education Group, then Transient Detachment "A" Headquarters 370th Infantry Battalion (Sep), did at Kitzingen, Germany on or about 10 December 1948 wrongfully strike Fraulein Hannelore Klinge in the face with his hand.

Specification 3: In that Recruit Erthan Sims, Transient Detachment "A", Headquarters and Headquarters Company, 7871 Training and Education Group, then Transient Detachment "A" Headquarters 370th Infantry Battalion (Sep), did at Kitzingen, Germany on or about 10 December 1948, wrongfully choke Fraulein Hannelore Klinge by the throat with his hands.

Each accused pleaded not guilty to all Charges and Specifications. Accused Smith was found guilty of Charge I and its Specification, guilty of Charge II and Specifications 1 and 2 thereunder, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for eighteen months. Accused Sims was found guilty of Charge I and its Specification, and Charge II and Specification 3 thereunder and was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for twelve months. There was no evidence of previous convictions as to accused Smith and evidence of three previous convictions as to accused Sims. With respect to accused Smith the reviewing authority approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence and confinement at hard labor for eighteen months, and as to accused Sims, only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence and confinement at hard labor for twelve months. The Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, was designated as the place of confinement as to each accused. Pursuant to Article of War 50e the orders directing execution of the sentences were withheld.

3. Accused Smith was convicted of three specifications under Article of War 96, two of which alleged assault and battery, and one

of which alleged unlawful entry. Accused Sims was convicted of two specifications under Article of War 96, one alleging assault and battery and the other, unlawful entry. In the case of Smith these offenses amounted to no more than two assaults and batteries, the punishment for each one of which is limited by the Table of Maximum Punishments, Manual for Courts-Martial, 1949, to six months confinement and partial forfeiture for six months (par. 117c, p. 138, MCM 1949) and an unlawful entry, the punishment for which is limited by the Table of Maximum Punishments to six months confinement and bad conduct discharge. Accused Sims was convicted of two specifications under Article of War 96, one of which alleges assault and battery and the punishment for which is limited to six months confinement and partial forfeitures for six months, supra. He was also convicted of unlawful entry. The 1928 Manual for Courts-Martial (Par. 104c) did not fix the maximum punishment for breaking and entering a dwelling house without the consent of the lawful occupant, but the analogous offense of entering a private dwelling without lawful authority against the will of the lawful occupant as denounced by Section 22-3102, District of Columbia Code, 1940, is punishable by confinement for not more than six months (CM 220805, Peavy, 13 BR 73, 79).

The Manual for Courts-Martial, 1928, states:

> "If an accused be found guilty by the court of two or more offenses for none of which dishonorable discharge is authorized, the fact that the authorized confinement without substitution for such offenses is six months or more, will authorize dishonorable discharge and total forfeitures." (MCM 1928, par.104c, p. 102).

It follows that under the 1928 Manual the accused could have received dishonorable discharges. The Manual for Courts-Martial, 1949 limits the punishment of unlawful entry to six months confinement and a bad conduct discharge. The accused were tried after February 1, 1949 and the Table of Maximum Punishments in the Manual for Courts-Martial, 1949 applies. It follows, therefore, that the dishonorable discharge adjudged against each accused was not authorized (Executive Order 10020, 7 Dec. 1948). (CM 336493, Fry, 26 May 1949).

4. For the reasons stated, the Board of Review holds that the record is legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentences as involves bad conduct discharges, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentences and confinement at hard labor for eighteen months for accused Smith and twelve months for accused Sims.

Abe McGregor Goff, J.A.G.C.
Edward H. Whipple, J.A.G.C.
Lewis E. Shull, J.A.G.C.

CSJAGQ - CM 335594 1st Ind 21 JUL 1949

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

TO: Commanding General, United States Army, Europe, APO 403, c/o Postmaster, New York, New York

1. In the case of Recruits David Smith, Jr. (RA 18276821) and Erthan Sims (RA 18314644), both of Transient Detachment A, Headquarters and Headquarters Company, 7871st Training and Education Group, then Transient Detachment A, Headquarters, 370th Infantry Battalion (Separate), 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 as to each accused and legally sufficient to support only so much of the sentence as to each accused as involves bad conduct discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence and, as to the accused Smith, confinement at hard labor for eighteen months, and as to the accused Sims, confinement at hard labor for twelve months. Under Article of War 50e(3) this holding and my concurrence vacate so much of the sentence as to each accused as is in excess of bad conduct 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, in the case of Smith for eighteen months and, in the case of Sims, for twelve months. Under Article of War 50 you now have authority to order execution of the sentences, modified in accordance with this holding.

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

(CM 335594)

1 Incl.
R/T

THOMAS H. GREEN
Major General
The Judge Advocate General

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

MAY 12 1949

CSJAGV CM 335599

UNITED STATES v. Private ROY WOODRUFF, JR. (RA 18340037), Enlisted Detachment, 4011th Area Service Unit, Station Complement, Fort Sill, Oklahoma.	)	THE ARTILLERY CENTER Trial by G.C.M., convened at Fort Sill, Oklahoma, 16 February 1949. Dishonorable discharge (suspended) and confinement for ten (10) months. Disciplinary Barracks.

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

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Roy Woodruff, Junior, Enlisted Detachment, 4011th Area Service Unit, Station Complement, Fort Sill, Oklahoma, did, at Fort Lawton, Washington, on or about 12 July 1948, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Red Oak, Oklahoma, on or about 16 December 1948.

He pleaded "To the specification: Guilty, except the words, 'desert' and 'in desertion' substituting therefor respectively the words 'absent himself without leave from' and 'without leave.' Of the excepted words, not guilty; of the substituted words, guilty. To the Charge: Not Guilty, but Guilty of a violation of the 61st Article of War." He was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Accused was sentenced to "be dishonorably discharged the service, to forfeit all pay and allowances due or to become due after the date of the order directing execution of the sentence, and to be confined at hard labor, at such place as proper authority may direct for one (1) year." The reviewing authority approved the sentence, remitted two (2) months of the confinement imposed, ordered the sentence executed but suspended execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or elsewhere as the Secretary of the Army may direct, as the

place of confinement. The result of the trial was promulgated in General Court Martial Orders No. 51, Headquarters, The Artillery Center, Fort Sill, Oklahoma, 15 March 1949.

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

The Manual for Courts-Martial, 1949, became effective on 1 February 1949 (Executive Order No. 10020). Paragraph 116g, page 130, thereof, provides that a forfeiture becomes legally effective on the date the sentence adjudging it is promulgated. The prescribed forms of sentences to forfeitures (Appendix 9, pp 364-365, Forms 8, 9b, 17, 20, MCM, 1949) are worded "to become due after the date of the order directing execution of the sentence." There is no authority, in the Articles of War or in the implementing provisions of the Manual, authorizing the imposition of the forfeiture of pay and allowances due (CM 335803, Berry, decided 11 May 1949). To this extent the forfeitures imposed are illegal.

4. For the foregoing reasons the Board of Review holds the record of trial is legally sufficient to support the findings of guilty of the Specification and Charge, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for ten (10) months.

Carlos E. McAfee J.A.G.C.
Laurel L. Chambers J.A.G.C.
George B. Springston J.A.G.C.

CSJAGV CM 335599 1st Ind.

JAGO, Department of the Army, Washington 25, D. C. JUN 15 1949

To: Commanding Officer, The Artillery Center, Fort Sill, Oklahoma.

1. In the case of Private Roy Woodruff, Jr. (RA 18340037), Enlisted Detachment, 4011th Area Service Unit, Station Complement, Fort Sill, Oklahoma, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Specification and the Charge, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for ten months. Under Article of War 50e this holding and my concurrence vacate so much of the sentence relating to forfeitures as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence.

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

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

(CM 335599).

Incls:
Record of trial
Draft GCMO

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

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

MAY 17 1949

CSJAGQ - CM 335622

UNITED STATES v. Private RAY LEE GRIFFITH (RA 19056803), 2nd Signal Company, 2nd Infantry Division, Fort Lewis, Washington.	)	2D INFANTRY DIVISION Trial by G.C.M., convened at Fort Lewis, Washington, 17 February 1949. Dishonorable discharge (suspended), forfeiture of all pay and allowances due or to become due and confinement for six (6) months. Post Stockade.

HOLDING by the BOARD OF REVIEW
GOFF, SKINNER and CURRIER
Officers of The Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Ray L. Griffith, Second Signal Company, Second Infantry Division, Fort Lewis, Washington, did, at Fort Lewis, Washington, on or about 6 March 1948, desert the service of the United States and did remain absent in desertion until he was apprehended at Lordsburg, New Mexico, on or about 15 November 1948.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Accused was sentenced to "be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for one (1) year." The reviewing authority approved the sentence, reduced the period of confinement to six (6) months, ordered the sentence executed but suspended execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement and designated the Post Stockade, Fort Lewis, Washington, or elsewhere as the Secretary of the Army may direct, as the place of confinement. The result of trial

was promulgated in General Court-Martial Orders No. 43, Headquarters 2d Infantry Division, Fort Lewis, Washington, 18 March 1949.

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

Article of War 16, in part, provides:

> "nor shall any defendant awaiting trial be made subject to punishment or penalties other than confinement prior to sentence on charges against him" (Underscoring supplied).

Executive Order No. 10020, promulgating the Manual for Courts-Martial, 1949, provides that it shall be in force and effect on and after 1 February 1949 with respect to all court-martial processes taken on or after that date. Paragraph 115, page 126, Manual for Courts-Martial, 1949, citing Article of War 16, provides that no accused shall, prior to the order directing execution of the approved sentence, be made subject to any punishment or penalties other than confinement. Paragraph 116g, page 130, provides that a forfeiture becomes legally effective on the date the sentence adjudging it is promulgated.

In CM 335803, Berry, decided 11 May 1949, the Board of Review in a similar case stated:

> "The prescribed forms of sentences to forfeitures (Appendix 9, pp 364-365, Forms 8, 9b, 17, 20, MCM, 1949) are worded 'to become due after the date of the order directing execution of the sentence.' These forms are an integral part of the Manual promulgated by the Executive Order. There is no authority in Article 16 nor in the implementing provisions of the Manual which warrants the forfeiture of pay and allowances due at the date of the order executing the sentence nor does authority exist for forfeitures to become due at the date of the order executing the sentence. And to further clarify appropriate imposable sentences there is no authority in law to impose a forfeiture of all pay and allowances due or to become due after the date of the order directing execution of the sentence. The sentence should be clear and unambiguous, which may be accomplished by observing the approved forms set out in the Manual."

It is the opinion of the Board of Review in the instant case that the forfeiture of all pay and allowances is illegal as to all pay and allowances except those accruing after the date of the order directing the execution of the sentence.

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

Ole McGregor Goff, JAGC

[illegible], JAGC

Roger St. Ouvier, JAGC

CSJAGQ - CM 335622 1st Ind 15 JUN 1943

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

TO: Commanding General, 2d Infantry Division,
Fort Lewis, Washington

1. In the case of Private Ray Lee Griffith (19056803), 2nd Signal Company, 2nd Infantry Division, Fort Lewis, Washington, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Specification and the Charge, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for six months. Under Article of War 50a this holding and my concurrence vacate so much of the sentence relating to forfeitures as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence.

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

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

(CM 335622).

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

2 Incls.
Record of Trial
Drft GCMO

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

MAY 17 1949

CSJAGV CM 335632

UNITED STATES v. Corporal DAVID S. REED (RA 18042184), Private MILTON C. JACOBS (RA 15264565), Private JESSE E. PATTON (RA 18293582), of the 9204 Technical Service Unit, Transportation Corps, Military Police Detachment; Corporal DAN A. MARTIN (RA 14242299), Corporal ANGELO SABELLA (RA 18276367), and Recruit JAMES R. McINTOSH (RA 38732147), of the 4106 Army Service Unit, Fourth Army Detachment, Headquarters Detachment; all of New Orleans Personnel Center, Camp Leroy Johnson, Louisiana.	HEADQUARTERS NEW ORLEANS PORT OF EMBARKATION Trial by G.C.M., convened at New Orleans Port of Embarkation, 10 February 1949, 11 February 1949. REED - Dishonorable discharge and confinement for five (5) years. PATTON and McINTOSH - both dishonorable discharge and confinement for four (4) years. JACOBS - Dishonorable discharge (suspended) and confinement for one (1) year. SABELLA - Dishonorable discharge (suspended) and confinement for two (2) years. MARTIN - Dishonorable discharge (suspended) and confinement for three (3) years. All in Disciplinary Barracks.

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

1. The Board of Review has examined the record of trial in the case of the soldiers named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 94th Article of War.

Specification: In that Corporal David S. Reed, 9204 Technical Service Unit, Transportation Corps, Military Police Detachment, Private Milton C. Jacobs, 9204 Technical Service Unit, Transportation Corps, Military Police Detachment, Private Jesse E. Patton, 9204 Technical Service Unit, Transportation Corps, Military Police Detachment, Corporal Dan A. Martin, 4106 Army Service Unit, Fourth Army Detachment, Headquarters Detachment, Corporal Angelo Sabella, 4106 Army Service Unit, Fourth Army Detachment, Headquarters Detachment, and Recruit James R. McIntosh, 4106

Army Service Unit, Fourth Army Detachment, Headquarters Detachment, acting jointly, and in pursuance of a common intent, did, at Texas Pacific and Missouri Pacific Railroad wharf, Westwego, Louisiana, on or about 7 December 1948, knowingly and willfully misappropriate gloves, shell leather; jackets, field, olive drab M 1943; and boots, service combat; of a value in excess of $50.00, property of the United States furnished and intended for the military service thereof.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction was introduced as to the accused James R. McIntosh. 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 the execution of the sentence, the accused Corporals David S. Reed, Dan A. Martin, Private Jesse E. Patton and Recruit James R. McIntosh were each sentenced to be confined at hard labor at such place as the reviewing authority may direct for five years and the accused Corporal Angelo Sabella and Private Milton C. Jacobs were each sentenced to be confined at hard labor at such place as the reviewing authority may direct for a period of four years. The reviewing authority approved the sentences and ordered them executed as to each accused but reduced the period of confinement at hard labor as to Private Jesse E. Patton to four years, as to Recruit James R. McIntosh to four years, as to Corporal Dan A. Martin to three years, as to Corporal Angelo Sabella to two years and as to Private Milton C. Jacobs to one year. He approved the sentence as to the accused Corporal David S. Reed and ordered it executed. He suspended the execution of that portion of the sentence adjudging dishonorable discharge as to Corporals Dan A. Martin, Angelo Sabella and Private Milton C. Jacobs until, as to each, their release from confinement. He designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or such other place as the Secretary of the Army may direct as the place of confinement as to each accused and withheld the order directing execution of the sentences pursuant to Article of War 50e.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentences as to the accused Dan A. Martin, Angelo Sabella and James R. McIntosh.

4. Evidence.

The only questions presented by the record of trial are the propriety of the court's rulings in admitting in evidence certain extra judicial confessions of David S. Reed, Jesse E. Patton and Milton C. Jacobs and, in the case of Reed, the effect of a ruling whereby the court refused to permit a witness for him to testify in his behalf, and whether such rulings thereby vitiated the findings and sentences as to each of these accused. For these reasons the evidence set forth herein will be limited to that which relates to the above matters.

Captain John T. Scott identified a sworn pretrial statement dated 21 December 1948 made by the accused Jesse E. Patton and testified:

"A. (Witness examined document handed to him by prosecution) This is a sworn statement of Private Jesse E. Patton, sworn to before me as summary court. My signature is attached thereto.

Q. Captain Scott, again, was Patton advised of his rights under the 24th Article of War?

A. Private Patton was advised of his rights under the 24th Article of War prior to his signing this statement. I cannot say whether he was advised of his rights prior to the taking of his statement because I was not there at the time. His rights were explained to him prior to the signing of the statement." (R 80)

The prosecution then offered this statement in evidence as prosecution's exhibit 3. The defense objected to the introduction of this statement because it was not voluntarily made and the accused Patton took the witness stand to testify concerning the circumstances under which the statement was made. He testified:

"A. I gave two statements, one on the 16th and one later.

Q. We are only concerned with the second statement.

A. I was told a lot of stuff when I gave the first statement.

Q. Is this your statement? (Hands document to witness)

A. This is my statement.

Q. Will you explain to the court how this statement was taken, in what manner?

A. This statement was taken by Corporal Sweatt, telling me I was going to be tried for perjury if I did not make another statement.

* * * * *

Q. Were there any threats made against you or any members of your family?

A. They said they were going to get my wife and question her. They threatened me with being tried for perjury if I did not make this.

Q. You made a statement after they had threatened your wife.

Which statement was that?

A. The first one.

Q. Was that given back to you?

A. Yes, sir.

Q. When the second statement was made they said that you would be punished for perjury. Is that right?

A. Yes, sir. Corporal Sweatt told me that.

Q. Did they promise you anything at all?

A. Well, sir, he promised me if I would make a statement it would go easier on me.

Q. Just what did he mean?

A. I took it that he meant that he thought I was not too much in it and he wanted to get all the other guys who were more in the deal. He wanted me, more or less, to put the finger on them.

Q. And that if you would make a statement it would go easier on you?

A. Yes, sir, help me personally.

* * * * *

Q. Would you explain to the court what threats were used against you, if any, concerning your wife?

A. They first told me that Corporal Reed had taken off AWOL and left, trying to leave myself and Martin and McIntosh with the whole outfit. They said that he had gone, skipped the country, and they threatened me that if I did not make a statement my wife would be picked up and questioned." (R 81-83)

Prosecution's exhibit 3 was then received in evidence over the objection of the defense (R 86). This pretrial statement was an extra judicial confession wherein Patton acknowledged participation in the offense charged.

Captain Scott was recalled to the witness stand and identified a sworn statement made by the accused Milton C. Jacobs and testified:

"Q. Captain Scott, to your knowledge, did Private Jacobs make this statement after being duly advised of his rights under

the 24th Article of War, and did he make this statement without any fear of threat, use of force or coercion, or promises of reward or immunity?

A. The only testimony that I can give in this statement was that when I swore the man to it I asked him if he had been advised of his rights and if he understood his rights under the 24th Article of War, and he gave me the impression that he did, and then he voluntarily signed it. I was not present at the taking of the statement. I only attended to swearing the man to the statement." (R 86, 87)

The prosecution offered the statement of Jacobs in evidence as exhibit 4. The accused Jacobs objected to the introduction of this statement and testified concerning the method in which the statement was obtained from him. He testified that on 15 December 1948 he had been on continuous duty for about seventy two hours. He was a driver at the motor pool and had voluntarily taken two other men's tour of duty (R 88, 89). About 4:30 a.m. on 16 December 1948 Corporal Sweatt came to his (Jacobs) house and took him to the Provost Marshall's office where he was questioned about some bales of clothing which had been taken from Westwego Wharf on the night of 6-7 December 1948. On this occasion Jacobs testified that Corporal Sweatt told him that "if I did not tell the truth he was going to have my wife locked up until I did tell the truth." On 21 December 1948 Jacobs made another statement to Corporal Sweatt. Prior to making this statement he had been driving all night and had nothing to eat and no sleep and was under a "strain". He asked for something to eat and Sweatt "would not let me, and told me I would have to make a statement first" (R 95). Sweatt also told him that if he did not sign the second statement he would be tried for perjury (R 90, 93, 95). When the second statement was signed the statement made on 16 December 1948 was burned in Captain Scott's office (R 89). He did not read the second statement and Captain Scott did not swear him to the statement. "Captain Scott walked in and just bent over the desk and signed it and my name was also on it" (R 96). The 24th Article of War was never read or explained to him at any time. "I don't even know it" (R 90). Prosecution's exhibit 4 was then received in evidence over the objection of the defense (R 97). This statement was an extra judicial confession wherein Jacobs admitted participating in the offense charged.

Charles C. Gordon, Special Agent, Criminal Investigation Division and Captain John T. Scott both testified concerning a statement made by the accused Reed. Each testified that prior to the time Reed made the statement he was advised of his rights under the 24th Article of War and that no threats, coercion or promises of reward or immunity were made to him in order to obtain the statement (R 65-68, 73, 76). During the time Reed was being questioned his wife was "picked up" by civilian authorities upon the request of Captain Scott. Mrs. Reed was questioned by the military authorities and escorted home. Reed knew that his wife had been

brought in for questioning. Captain Scott testified:

"Q. During the course of the procurement of this statement from accused Reed, did you at any time intimate to him or intimate in any way that if he was to sign that statement his wife would be released by the civil authorities?

A. I had Reed's wife picked up to find out whether or not she had any knowledge of the case. I don't recall making any statement to Reed, but perhaps something I said might have been construed by him to mean that. However, Mrs. Reed was not charged by the civil authorities. She was questioned by members of my organization and then was escorted home. I don't recall making any statement to Reed. However, Reed knew that his wife was there, and to the best of my knowledge - unless Reed misconstrued something with reference to his wife being picked up by the civil authorities which I thought it necessary to complete the investigation - I cannot say that anything that I said might have been misconstrued because I don't remember." (R 77, 78)

Reed's statement was offered in evidence as prosecution's exhibit 2. The defense objected to the admission of this exhibit and Reed testified relative to the circumstances under which the statement was made. Reed testified that on the 16th of December 1948 he was taken to the Provost Marshall's office and questioned by Corporal Sweatt. He made a statement at that time. He was questioned the following day by Captain Scott, Sergeant Gordon, Corporal Sweatt and others. After about two hours of questioning Captain Scott called the city police department and had Mrs. Reed arrested and brought to the office. Reed further testified:

"Q. Did they make any threats against her?

A. Not that I know of, other than having her put in jail, but they made it to me.

Q. In what way?

A. That they were going to have my wife arrested and put in jail.

Q. Did they promise you anything if you made that statement or signed the statement?

A. No, sir. I don't think they came out and made a direct promise, but Sweatt let me understand that they were not interested in my wife if I signed the statement myself.

* * * * *

Q. Corporal Reed, did I understand you to say that it was after they had your wife arrested and you knew she had been arrested that you felt you had better sign and make a statement?

A. Yes, sir.

Q. Out of fear as to what might happen to your wife.

A. Yes, sir. That's right.

* * * * *

Q. Did they promise you anything?

A. No, sir. Not directly.

Q. How did they go about it?

A. I took it from Captain Scott that if I signed the statement my wife would be turned loose.

* * * * *

Q. But you went ahead and voluntarily signed the statement?

A. On account of my wife being arrested that's the reason I signed this statement.

* * * * *

Q. Was your wife brought down on the first statement?

A. No, sir. I was promised that if I made that statement I would be able to talk to my wife.

* * * * *

Q. Why did you sign the statment?

A. The reason I signed the statement was because they had my wife in custody out in the next room.

Q. Did they tell you directly or indirectly that if you signed the statement she would be liberated, or did you sign the statement because you believed if you signed the statement she would be liberated?

A. I signed the statement because I was sure they would liberate her.

Q. What made you feel that way?

A. Just the way Captain Scott talked. I don't know the words he used, but by the way he talked, that if I signed the statement she would go free, and she did go.

Q. You are testifying now that he implied to you that if you signed the statement she would be liberated?

A. Yes, sir.

Q. Prior to the time you signed this statement, after your wife was taken into custody, did it ever occur to you that in the event you made a full confession that it would clear your wife and they would have to turn her loose?

A. Yes, sir." (R 70-72)

The defense then attempted to call Mrs. Reed as a witness stating:

"Defense: Defense would like at this time, although it would be a little improper and although she has heard this testimony and I know it is not in keeping for witnesses to be in the courtroom, I would like to have her brought on the stand under oath to show what happened.
Law Member: What do you hope to show by her testimony?
Defense: That after Reed signed this statement he was allowed to go home with his wife and she was immediately released. I wish to show that although the statement was voluntarily made, he was influenced.
Law Member: I don't see how this has any bearing in the case. I don't believe that she should be permitted to take the stand." (R 77)

Prosecution's exhibit 2 was then received in evidence over the objection of the defense (R 80). This statement was an extra judicial confession wherein Reed admitted participating in the offense charged.

4. Discussion.

A confession is not admissible in evidence unless it is affirmatively shown that it is voluntary (paragraph 127a, MCM, 1949, page 157).

In CM 316986, Boykin, the Board of Review considered a confession which had been challenged as being involuntary and said:

"The confession having been challenged as being involuntarily procured and the defense having offered evidence in support of its objections, it then became incumbent upon the prosecution to adduce evidence showing the voluntary nature of the confession".

In the instant case the accused Jacobs and Patton each testified that the pretrial statement (confession) made by him was involuntary in that the statement was made as a result of threats and promises made by one Corporal Sweatt. Corporal Sweatt did not testify in the case and the testimony by Jacobs and Patton concerning the making of the statement stands uncontradicted in the record of trial. The only evidence adduced by the prosecution which tends to show that the statements were voluntarily made is the testimony of Captain Scott who testified that he was not present at the time the statements were made and that he did not know whether any threats or promises were made in securing the confessions. He swore each accused to his confession after advising each accused as to his rights under the 24th Article of War. This testimony relates to events occuring after the statements were made and is wholly insufficient to establish the voluntary nature of the confessions.

The Board of Review concludes that the confessions of Jacobs and Patton were not shown to have been voluntarily made and were therefore erroneously received in evidence and that this error is prejudicial to the rights of Jacobs and Patton (CM 329162, Sliger, 77 B. R. 361 and cases cited therein).

A different situation is presented as to the accused Reed. The voluntary nature of Reed's confession was in sharp dispute. During the interrogation of Reed, Mrs. Reed was arrested by civil authorities and brought to the military post at the request of Captain Scott. Reed had testified that his wife had been arrested and that the persons questioning him had threatened to put his wife in jail. He was given to understand by Corporal Sweatt that she would be released if he signed the confession. He further testified that he received a similar impression from what Captain Scott said to him. In an attempt to bolster this testimony by Reed the defense stated that it desired to place Mrs. Reed on the witness stand to show that the accused had been influenced in making the statement. It also appeared that Mrs. Reed had been present in the court room during the trial. The law member refused to permit Mrs. Reed to testify. The wife of an accused is a competent witness in his behalf (paragraph 134d, MCM, 1949, page 175).

A witness is not disqualified to testify merely because he or she has been present in the court room and has heard the testimony of other witnesses concerning matters upon which the witness is to testify. Such facts may however be considered by the court in determining the weight and credit to be given to the witness' testimony (Winthrop's Military Law and Precedents 1920 Reprint, page 284, paragraph 135, MCM, 1949, page 176).

The inquiry into the circumstances of the making of the statement by Reed was the pertinent issue before the court. When the defense requested permission to call Mrs. Reed as a witness to show that the accused Reed had been "influenced" into making the statement the law member ruled:

> "I don't see how this has any bearing on the case. I don't believe that she should be permitted to take the stand." (R 77)

This ruling by the law member was manifest error. It deprived the defense of the vital right to develop the involuntary nature of the confession.

In CM 306090, Koehler & Skillin, 8 B.R. 249, 254 the Board of Review said:

> "With respect to accused Skillin, it does not affirmatively appear that there was held out to him any inducement to confess, as in the case of Koehler, and he was warned that whatever he said might be used against him, though not specifically warned as to his right to remain silent. But the evidence, to say the least, did not exclude the possibility that inducements similar to those offered Koehler were in fact held out to Skillin, and the defense, though it urged its desire to do so, was denied the opportunity fully to develop the circumstances under which the Skillin confession was made. The court in announcing its decision to admit the confessions in evidence, foreclosed the defense from any cross-examination upon the subject matter in question of the witness whose knowledge of the circumstances under which the confession was made was most complete. Its reception of the confession, without any intimation that the admission thereof was tentative or subject to further examination or the introduction of other pertinent evidence, in the face of the objections by the defense, was of such finality that the defense had no apparent alternative other than to assume that further insistence on its right to cross-examine would be futile. The action of the court in denying to the defense the elementary and vital right of cross-examination and the right otherwise to seek to develop the involuntary nature of the confession, was manifest error. Alford v. United States, 282 U. S. 687, 694. In view of it, the Board cannot escape the conclusion that the admission in evidence of Skillin's confession was erroneous and highly prejudicial."

Had Mrs. Reed's testimony been received in evidence, the court may have refused to give it credence, or believing it, may have nevertheless decided upon all the evidence that Reed's confession was in fact, voluntary and admissible in evidence. On the other hand, however, the court may well have chosen to accept such testimony as sufficient to establish that Reed's confession was in fact involuntary and therefore inadmissible in evidence. In any event the court should have been given an opportunity to consider her testimony.

In CM 315523, Huntington, the Board of Review said:

> "There are numerous decisions to the effect that a verdict of guilty in a criminal case should not be permitted to stand where an accused is deprived of the benefit of important and material evidence which might reasonably have caused the triers of fact to return a different verdict (People v. Schulman, 299 Ill. 125, 132 N.E. 530, 24 ALR 1022; People v. Nitti, 312 Ill. 73, 143 N.E. 448; Sanchez v. State, 199 Ind. 235, 157 N.E. 1, Cornwell v. State, 106 Ohio St 626, 140 N.E. 363; State v. Jones, 12 Mo App 93; State v. Gunter, 30 La Ann 536; 64 ALR 436). Since, as has been pointed out above, the court in the instant case may well have entertained a reasonable doubt of accused's guilt had his claim of alibi been fortified by the testimony of Sergeant Krill, it is obvious that the failure to place before the court such evidence of vital import to accused, under circumstances clearly indicating that Sergeant Krill's testimony was readily available in an admissible form, presents a juridical situation in which it would be impossible for those charged with the appellate review of this record under Article of War 50½ to conclude that accused was accorded a fair trial. Accordingly, we must hold that the findings of guilty and the sentence herein should be set aside."

The Board of Review concludes that the court committed prejudicial error in refusing to permit Mrs. Reed to testify relative to the voluntary nature of Reed's confession and therefore Reed's confession was erroneously received in evidence. The erroneous admission of the confessions of Jacobs, Patton and Reed in evidence constituted prejudicial error as to these accused regardless of the other evidence introduced in the case (CM 329162, Sliger, 77 B.R. 361; CM 334790, Cruz).

We are not to be understood as holding that the pretrial statements of Jacobs, Patton and Reed were in fact involuntary. It may be that when all the evidence surrounding the taking of these statements is fully shown the court would be justified in admitting them into evidence.

6. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentences as to the accused Jacobs, Patton and Reed.

CSJAGV CM 335632

7. The court was legally constituted and had jurisdiction of the accused and of the offense. No errors injuriously affecting the substantial rights of the accused Martin, McIntosh and Sabella were committed during the trial. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentences as approved by the reviewing authority as to the accused Martin, McIntosh and Sabella.

Carlos E. McAfee, J.A.G.C.
Laurel L Chambers J.A.G.C.
George B. Springsteen, J.A.G.C.

JUN 21 1949

CSJAGV CM 335632 1st Ind

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

TO: Commanding Officer, New Orleans Port of Embarkation, New Orleans 12, Louisiana.

1. In the case of Corporal David S. Reed (RA 18042184), Private Milton C. Jacobs (RA 15264565), Private Jesse E. Patton (RA 18293582), of the 9204 Technical Service Unit, Transportation Corps, Military Police Detachment; Corporal Dan A. Martin (RA 14242299), and Recruit James R. McIntosh (RA 38732147), Corporal Angelo Sabella (RA 18276367), of the 4106 Army Service Unit, Fourth Army Detachment, Headquarters Detachment; all of New Orleans Personnel Center, Camp Leroy Johnson, Louisiana, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentences as to the accused Jacobs, Patton and Reed. Under Article of War 50e(3) this holding and my concurrence therein vacate the findings of guilty and the sentences as to accused Jacobs, Patton and Reed. You are authorized to direct a rehearing as to either or all of these accused.

With reference 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 sentences, as approved by the reviewing authority, as to the accused Martin, McIntosh and Sabella, confirming action is not by The Judge Advocate General or the Board of Review deemed necessary. Under Article of War 50, you now have authority to order the execution of the sentences as to the accused Martin, McIntosh and Sabella.

2. When copies of the published orders in this case are forwarded to this office, together with the record of trial and of any rehearings that are had, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference please place the file number of the record in brackets at the end of the published orders, as follows:

(CM 335632).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JUN 3 0 1949

CSJAGQ - CM 335635

UNITED STATES v. Recruit DONALD L. INGRAM (RA 19239171), Medical Detachment, 9952 Technical Service Unit, Surgeon General's Office, Madigan General Hospital, Tacoma, Washington.	2D INFANTRY DIVISION Trial by G.C.M., convened at Fort Lewis, Washington, 25 February 1949. Dishonorable discharge, forfeiture of all pay and allowances due or to become due. Confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
GOFF, SHULL and WOLF
Officers of The Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Recruit Donald L. Ingram, Medical Detachment, 9952 Technical Service Unit-Surgeon General's Office, Madigan General Hospital, Tacoma, Washington, did, at Madigan General Hospital, Tacoma, Washington, on or about 11 November 1947, desert the service of the United States and did remain absent in desertion until he was apprehended at Portland, Oregon, on or about 20 January 1949.

He pleaded not guilty to and was found guilty of the Charge and Specification. There was evidence of one previous conviction by special court-martial and three by summary courts-martial. Accused was sentenced "to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due; and to be confined at hard labor at such place as the reviewing authority may direct for two and one-half years". The reviewing authority approved the sentence but the period of confinement was reduced to one (1) year. The Branch United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army may direct, was designated as the place of confinement. Pursuant to Article of War 50e, the order directing the execution of the sentence was withheld.

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

Article of War 16, in part, provides:

> "nor shall any defendant awaiting trial be made subject to punishment or penalties other than confinement prior to sentence on charges against him" (Underscoring supplied).

Executive Order No. 10020, promulgating the Manual for Courts-Martial, 1949, provides that it shall be in force and effect on and after 1 February 1949 with respect to all court-martial processes taken on or after that date. Paragraph 115, page 126, Manual for Courts-Martial, 1949, citing Article of War 16, provides that no accused shall, prior to the order directing execution of the approved sentence, be made subject to any punishment or penalties other than confinement. Paragraph 116g, page 130, thereof, provides that a forfeiture becomes legally effective on the date the sentence adjudging it is promulgated. The prescribed forms of sentences to forfeitures (Appendix 9, pp. 364-365, Forms 8, 9b, 17, 20, MCM, 1949) are worded "to become due after the date of the order directing execution of the sentence." There is no authority, in the Articles of War or in the implementing provisions of the Manual, for the imposition of the forfeitures of pay and allowances due at the date of the order directing execution of the sentence, to become due at that date, or due or to become due after that date (CM 335803, Berry, 11 May 1949). To the extent the forfeitures imposed exceed the limits indicated in the above quoted forms they are illegal.

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

Abe McGregor Goff, JAGC.
Lewis B. Hull, JAGC
Samuel S. Lyons, JAGC

CSJAGQ - CM 335635 1st Ind JUL 7 1949

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

TO: Commanding General, 2d Infantry Division, Fort Lewis, Washington.

1. In the case of Recruit Donald L. Ingram (RA 19239171), Medical Detachment, 9952 Technical Service Unit, Surgeon General's Office, Madigan General Hospital, Tacoma, Washington, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Specification and the Charge, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for one year. Under Article of War 50e this holding and my concurrence vacate so much of the sentence relating to forfeitures as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence. Under Article of War 50 you now have authority to order execution of the sentence modified in accordance with this 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 335635).

1 Incl
Record of Trial

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

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

CSJAGK - CM 335671

12 MAY 1949

UNITED STATES v. Second Lieutenant MARSHALL G. WEST (0-949664), Student Training Regiment, The Infantry School, Fort Benning, Georgia.	THE INFANTRY CENTER Trial by G.C.M., convened at Fort Benning, Georgia, 20 January 1949. Dismissal.

OPINION of the BOARD OF REVIEW
SILVERS, SHULL, and LEVIE
Officers of The Judge Advocate General's Corps

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

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

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

Specification 1: (Finding of guilty disapproved by reviewing authority).

Specification 2: In that Second Lieutenant Marshall G. West, Headquarters and Headquarters Company, Student Training Regiment, The Infantry School, did, at Fort Benning, Georgia, on or about 22October 1948, with intent to deceive Captain Howard B. Wells, officially state to the said Captain Howard B. Wells, that he (Second Lieutenant West) had not been placed under any restraint by his Unit Commander, which statement was known by the said Second Lieutenant West to be untrue.

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

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

Specification: In that Second Lieutenant Marshall G. West, ***, did, without proper leave, absent himself from his organization and station at Fort Benning, Georgia, from on or about 24 October 1948 to on or about 1 November 1948.

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

See #2

Specification: In that Second Lieutenant Marshall G. West, ***, having been duly placed in arrest at Fort Benning, Georgia, on or about 23 October 1948, did, at Fort Benning, Georgia, on or about 24 October 1948, break his said arrest before he was set at liberty by proper authority.

CHARGE IV: Violation of the 96th Article of War

Specification 1: In that Second Lieutenant Marshall G. West, ***, having been restricted to the limits of the post of Fort Benning, Georgia, did, at Fort Benning, Georgia, on or about 22 October 1948, break said restriction by going to Phenix City, Alabama.

Specification 2: In that Second Lieutenant Marshall G. West, ***, did, at Fort Benning, Georgia, on or about 22 October 1948, with intent to deceive Captain Howard B. Wells, officially state to the said Captain Howard B. Wells, that he (Second Lieutenant West) had not been placed under any restraint by his Unit Commander, which statement was known by the said Second Lieutenant West to be untrue.

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. The reviewing authority disapproved the findings of guilty of Specifications 1 and 3 of Charge I, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

The evidence in support of the approved findings of guilty is substantially as follows:

Lieutenant Colonel Ray E. Marshall, accused's battalion commander, testified that on 22 October 1948, pursuant to an order from regimental headquarters, he placed the accused in restriction to the Post at Fort Benning. He subsequently told the accused that he would be held at Fort Benning until the provost marshal took him to answer a civil warrant. The accused asked Colonel Marshall if it would be wise to contact civil authorities with reference to the warrant and Colonel Marshall told him any such contact should be by telephone. The defense, prosecution and accused stipulated that the latter was properly placed in restriction (R 8-11). Colonel Marshall's conversation with accused was corroborated by Captain Bailey, the battalion adjutant (R 26).

Captain Francis Griffin, assistant executive in accused's battalion, testified that on the morning of 23 October accused told him that he had been in Phenix City the night before and had been picked up by the Phenix City police on a reckless driving charge and released on a $300.00 bond. The accused stated he went to Phenix City with a civilian in an attempt to

resolve a difficulty arising out of an accident (R 12-15).

Captain Howard B. Wells, assistant provost marshal, testified that at about 2200 hours on 22 October the accused and a civilian, Mr. Harold Griggs, came to his office. The accused stated he wanted Captain Wells to notarize some papers. Mr. Griggs stated that he had sworn out a warrant for the accused's arrest but that he was going to withdraw it. Mr. Griggs and the accused were very friendly and the latter said he was going to town if he could have Captain Wells' permission. Captain Wells stated further -

> "*** I cautioned him at that time if he left the reservation or the military jurisdiction that he was subject to immediate arrest by civil authorities in view of the fact that a warrant had been sworn out for his arrest; and although Mr. Griggs wanted to withdraw it, that it would have to be up to the court to withdraw it. I also remembered some conversation that I had had with his battalion commander, and I asked him whether he was in restriction or in arrest, and he told me at that time that he was not in arrest or restriction. I then attempted to locate his battalion commander to confirm that. I couldn't contact him; so I told him in the name of his commanding officer I would give him an order to report to the Provost Marshal's Office the next morning for the purpose of consummating this warrant." (R 17)

Captain Wells testified further that he had the responsibility of delivering the accused to civil authorities and did so at 8 o'clock the next morning (R 19).

Lieutenant Colonel Marshall testified further that at about noon on 23 October, pursuant to orders of the regimental commander, he placed the accused in arrest of quarters, restricting him to the lower floor of Building 1301, the mess hall of the Student Training Regiment, and informing him further that the Officer of the Day would take him to and from meals, and that he could not leave those quarters unless he had permission from the regimental commander. Captain Bailey corroborated Colonel Marshall's testimony as to the limits of the arrest imposed on accused (R 23-26).

Second Lieutenant Harry M. Williams testified that he was Officer of the Day of the Student Training Regiment on 23 and 24 October. On 24 October he endeavored to find the accused in order to escort him to breakfast. He searched the building to which accused had been restricted, the mess hall and the headquarters building and was unable to locate accused. He went to accused's quarters several times during the day to see if he had returned. He did not see accused for several weeks (R 27-29).

The accused's company commander, Captain Joseph L. Echols, testified

from his personal knowledge that accused was in arrest in quarters on 23 October 1948, and absent without leave from 24 to 31 October 1948, inclusive (R 44).

4. Evidence for the Defense

A morning report of the First Company, Student Training Regiment, dated 22 October 1948 containing an entry pertaining to accused and signed by Captain Joseph L. Echols was received in evidence over objection by the prosecution (R 45, Def Ex 1). The prosecution objected on the ground that the morning report was obviously erroneous. An extract copy of the morning report of First Company, Student Training Regiment, pertaining to an entry of 11 January 1949 relating to entries of 23 and 24 October was received in evidence as Defense Exhibit 2, with the law member stating the court would consider it as hearsay but in connection with Captain Echols' testimony.

An extract copy of the morning report of First Company, Student Training Regiment, for 11 January 1949 was received in evidence as Defense Exhibit 3.

An extract of Special Orders No. 141, Department of the Army, dated 13 July 1948 pertaining to accused was received in evidence as Defense Exhibit 4.

A copy of leave orders, Headquarters Fort Jackson, South Carolina, dated 18 October 1948, addressed to accused was received in evidence as Defense Exhibit 5. These orders purported to grant the accused leave for ten days on or about 24 October 1948.

After being apprised of his rights accused elected to testify in his own behalf. He stated that on 11 October 1948 he had been involved in a car accident. A warrant had been issued for him and he was placed in restriction by Colonel Marshall on 22 October in order to insure his delivery to the civilian authorities the next morning. The accused asked Colonel Marshall if "it would be all right if I got it straightened out" and he answered, "I would be glad if you would do that." The accused then returned to his company and phoned Mr. Griggs relative to settling his claim. Mr. Griggs came to see the accused at the latter's barracks. After some discussion they went to the provost marshal's office where they saw Captain Wells. In response to the question of what he had told Captain Wells the accused answered as follows:

> "I told him I had been placed in restriction but had gotten permission to go out and get this thing straightened out, and he tried to contact Colonel Marshall, but he couldn't get in touch with him, and he gave me an order in the name of the Commanding General to be back at 0730 the next morning.

"Q. Tell me what you thought Colonel Marshall meant when he said you could get this thing straightened out.

"A. I thought the restriction had been lifted. In fact, I told other officers in the company that it had, and I was happy about the whole thing.

"Q. Did you think it had been lifted entirely?

"A. Yes, sir, and the only thing I understood I was to be back at the Provost Marshal's Office. Colonel Marshall told me that about 5:00 o'clock on October the 22nd.

"Q. Did Colonel Marshall qualify his statement by saying that you must do it by telephone?

"A. He did not, sir.

"Q. Do you have any recollection of him saying that?

"A. No, sir, I have no recollection of it at all.

"Q. After you left Captain Wells where did you go?

"A. We went to Phenix City Police Station.

"Q. Who is we?

"A. Mr. Harold Griggs and I.

"Q. Why did you go there?

"A. To get the warrant signed and settle it.

"Q. What happened there?

"A. They immediately nabbed me and put me in jail." (R 51-52)

The accused testified further that he remained in jail for about two hours and was released after giving bond "on his car." He returned to camp and saw Captain Griffin the next morning in the mess hall where he explained what had happened. He then went to the provost marshal's office where transportation to Phenix City had been arranged for him. In Phenix City court he was tried on a charge of reckless driving and fined $25.00. His car was attached. Upon returning to camp he saw Colonel Marshall. He left the post the next day, 24 October 1948. The accused stated he did not know why he left. He explained that he was the postmaster at Guyan, West Virginia, and his wife had not been able to properly take care of the post office and their two children. Further, one of his children was in the hospital in Morgantown, West Virginia. The accused had obtained leave orders in order to effectuate a transfer of the post office to his mother. There was further testimony relative to accused's Army assignments which it is not necessary to discuss herein (R 47-62).

Captain John B. DeMarcus, Headquarters and Headquarters Company, Student Training Regiment, Fort Benning, Georgia, testified that he had known accused for two months while the accused was a platoon leader in his company. The accused always executed his orders in a very efficient manner, had never given him any occasion to worry, and he would desire to have the accused as an officer in his company (R 62-63).

5. Discussion

Specification 2 of Charge I alleges that with intent to deceive the

accused officially stated to Captain Wells that he, the accused, "had not been placed under any restraint by his unit commander, which statement was known by the said Second Lieutenant West to be untrue." The evidence discloses that accused had been duly placed in restriction by proper authority at about 1600 hours on 22 October. At about 2200 hours on the same day, in answer to a direct question propounded to him by Captain Wells, the Assistant Provost Marshal, accused stated that he was not in arrest or restriction. The statement was obviously false. It is noted that the statement proved to have been made is in a different tense from that appearing in the specification; however, no material variance resulted therefrom inasmuch as the old doctrine of requiring proof of the words precisely as laid in the declaration has long since been exploded; and it is now uniformly held that proof of the substance of the words is sufficient (2 AIR 395). The substance of the specification charged herein is the making of a false official statement; and whether that be conveyed in the present or the past tense the violation is equally imputed, and the allusion sufficiently certain.

Specification 2 of Charge I and Specification 2 of Charge IV are identical and allege the same false statement. This is not an illegal multiplicity as the same facts and circumstances may give rise to two or more offenses, and an officer may be charged with and found guilty of violations of the 95th and 96th Articles of War, although the separate offenses stem from the same set of facts (CM 281663, Hindmarch, 22 BR (ETO) 223,229). (See also Note under Article of War 95, Manual for Courts-Martial, 1949, page 298.)

With reference to the Specification of Charge II, violation of the 61st Article of War, there were a number of amended morning reports concerning accused placed in evidence by the defense. Although these morning reports reflect some erroneous entries and a general misunderstanding as to accused's parent organization there is sufficient independent evidence in the record of trial to establish the fact that accused was absent without leave on the dates alleged. The accused could not be found on the morning of 24 October 1948, nor could he be located anywhere on the Post. Captain Echols, accused's company commander, testified from personal knowledge that the accused was absent without leave from 24 to 31 October 1948, inclusive. The accused testified on the stand that he did not know why he had left the post on 24 October 1948. He stated further that he was apprehended and jailed several days later in Guyan, West Virginia.

The direct testimony of the accused's company commander coupled with the testimony of other witnesses, including the accused, establish beyond a reasonable doubt that the accused was absent without leave on the dates alleged.

With respect to the Specification of Charge III the evidence established that accused was duly placed in arrest on the morning of 23 October by order of his regimental commander, and, without having been released, he departed

from the Post on 24 October going to his home in Guyan, West Virginia. Orders issued by Headquarters, Fort Jackson, South Carolina, purporting to grant leave to the accused on or about 24 October 1948 never became operative because accused had been placed in arrest while under the jurisdiction of the Infantry School. Consequently these orders do not constitute a defense to either the breach of arrest or the absence without leave charge.

With reference to Specification 1 of Charge IV, alleging a breach of restriction, the evidence, including accused's statement on the witness stand, shows that after being restricted to the Post he went to Phenix City on the night of 22 October. The court elected not to believe the accused's assertions that the terms of his original restriction had been extended to permit his leaving the Post in order to arrange a settlement of his difficulties with civilian authorities. The evidence amply supports the court's findings in this regard.

6. Records of the Department of the Army show the accused to be about 25-1/2 years of age, married, with two children. He served as an enlisted man from 3 June 1942 to November 1945, attaining the grade of staff sergeant. He received a ROTC commission as a second lieutenant 23 May 1948 from the University of West Virginia. He was ordered to active duty on 25 July 1948. He was reprimanded under Article of War 104 for misconduct while at the school.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon a conviction of a violation of Articles of War 61, 69 and 96.

Charles H. Silver, J.A.G.C.

Lewis F. Shull, J.A.G.C.

Howard S. Levie, J.A.G.C.

(208)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 335671

THE JUDICIAL COUNCIL

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

In the foregoing case of Second Lieutenant Marshall G. West (0-949664), Student Training Regiment, The Infantry School, Fort Benning, Georgia, with the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Franklin P. Shaw, Brig Gen, JAGC

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

E. M. Brannon, Brig Gen, JAGC
Chairman

20 June 1949

I concur in the foregoing action.

THOMAS H. GREEN
Major General
The Judge Advocate General

14 July 1949

(GCMO 45, July 19, 1949).

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

APR 20 1949

CSJAGH CM 335672

UNITED STATES	)	THE INFANTRY CENTER
	)	
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, 19 January 1949. Dismissal.
	)	
First Lieutenant JOHN W. HOLTON, 01177458, 665th Transportation Truck Company, 204th Transportation Truck Battalion, Fort Benning, Georgia.	)	

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

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

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

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

Specification: In that First Lieutenant John W. Holton, 665th Transportation Truck Company, 204th Transportation Truck Battalion, Fort Benning, Georgia, while on Temporary Duty at 3540 Army Service Unit, did, without proper leave, absent himself from his organization at Atlanta General Distribution Depot, Atlanta, Georgia, from about 0700 hours, on or about 1 September 1948 to about 2000 hours, on or about 3 September 1948.

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

Specification: (Finding of not guilty).

CHARGE III: Violation of the 95th Article of War. (Disapproved by the reviewing authority).

Specification 1: (Finding of not guilty).

Specifications 2, 3 and 4: (Disapproved by the reviewing authority).

Incl # 2

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

Specification 1: In that 1st Lieutenant John W. Holton, 665th Transportation Truck Company, 204th Transportation Truck Battalion, did, at Fort Benning, Georgia, on or about 21 July 1948, with intent to defraud, wrongfully and unlawfully make and utter to The Officers Club, Fort Benning, Georgia, a certain check in words and figures as follows, to wit:

HB July 21, 1948
BANK Bank of America, Rideout Br
(Write name of bank on this line)
CITY AND STATE Marysville Calif
PAY TO
ORDER OF THE OFFICER'S CLUB, FORT BENNING, GEORGIA $20.00
Twenty Dollars and no/100----------DOLLARS
For value received I claim that the above amount is on deposit in said bank in my name subject to this check, and is hereby assigned to payee or holder hereof.
CLUB NO. Co "A" ISD /s/ John W. Holton Lt FA
01177458
INDORSED ON THE BACK THEREOF: PAY TO THE ORDER OF
COLUMBUS BANK & TRUST CO
COLUMBUS, GEORGIA
FOR DEPOSIT ONLY
OFFICER'S CLUB, FORT BENNING, GA
OFFICERS MESS, FORT BENNING, GA
and other unintelligible indorsements

and by means thereof, did fraudulently obtain from The Officer's Club, Fort Benning, Georgia, twenty dollars ($20.00), he, the said 1st Lieutenant John W. Holton, then well knowing that he did not have and not intending to have sufficient funds in the Bank of America, Rideout Branch, for the payment of said check.

Specification 2: (Same as Specification 1 except "CLUB NO. Co 'B' ISD."

Specification 3: (Same as Specification 1 except "CLUB NO. Co 'B' ISD."

Specification 4: (Finding of not guilty).

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

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

He pleaded guilty to Charge I and its Specification, and not guilty to all other Charges and Specifications. He was found guilty of Charge I and its Specification. He was found not guilty of Charge II and its Specification; not guilty of the Additional Charge and its Specifications; and not guilty of Specification 1, Charge III, and of Specification 4, Charge IV. He was found guilty of Charge III and Specifications 2, 3 and 4 thereunder, with exceptions and substitutions, and guilty of Charge IV and Specifications 1, 2 and 3 thereunder, with the following exceptions and substitutions as to each specification: "Guilty, except the words 'with intent to defraud, wrongfully and unlawfully make and utter to the Officers Club, Fort Benning, Georgia, a certain check' and 'by means thereof, did fraudulently obtain from The Officers' Club, Fort Benning, Georgia, twenty dollars ($20.00), he, the said 1st Lieutenant John W. Holton, then well knowing that he did not have and not intending to have sufficient funds in the Bank of America, Rideout Branch, for the payment of said check,' substituting therefor the words 'without having sufficient funds on deposit to pay it, wrongfully issue a check' and 'by means thereof, did obtain from The Officers' Club, Fort Benning, Georgia, twenty dollars ($20.00),' of the excepted words Not guilty, and of the substituted words, Guilty." No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specifications 2, 3 and 4 of Charge III and of Charge III, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

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

On 30 June 1948 accused's bank balance in the Rideout Branch, Bank of America, Marysville, California, was $668.20. A statement of his account was mailed to accused on that date to his address of record.

A deposition of the Assistant Cashier of the above-named bank and the bank's statement of accused's account with said bank for the month of July 1948, which deponent had certified and attached thereto as a part thereof, were admitted in evidence without objection. The deposition of the Assistant Cashier showed that accused's balance in the bank on 21 July 1948 was $2.28, and that by telegram, dated 28 July 1948, accused requested a loan of $300.00 from the bank which was refused, since he had been granted a loan in the same amount in June (Pros Exs 9,10; R 35)

Ralph E. Tibbets, Colonel, United States Army, Retired, Secretary of the Officers' Club, Fort Benning, Georgia, identified Prosecution Exhibits 2, 3 and 4 as three unpaid checks which he saw in the club office on 6 August (R 9). The checks were identical with the checks set forth in specifications 2, 3 and 4, Charge IV, each being dated 21 July 1948, payable to the Officers' Club, Fort Benning, Georgia, in the amount of $20.00, drawn upon the Bank of America, Rideout Branch, and bearing the purported signature of accused. A report was made to "Headquarters The Infantry Center" that the checks had been returned by "the bank." Subsequently, correspondence was initiated by Headquarters, The Infantry Center, and the Club received a money order dated 12 August 1948 in the amount of the face value of the checks, from the accused (R 10). Colonel Tibbets testified that he had seen a copy but not the original correspondence with which the money order was inclosed. Subsequently, after Colonel Tibbets was excused as a witness, the following colloquy took place between the prosecution, defense, and law member:

"Prosecution: If it please the court, the assistant trial judge advocate has gotten the original correspondence referred to with reference to the checks and the money order sent to the Club. I have the original basic, the first indorsement and the second indorsement, signed by Lieutenant Holton, or at least that is a signature, which refers to the inclosed money order.

Law Member: Perhaps you can stipulate to it.

Prosecution: Well, what I would like to do, rather than stipulate to it, is offer it in evidence and have it marked Prosecution Exhibit 8 and withdraw the original at the end of the trial and send a copy for the record.

Defense: Sir, we agree that that is Lieutenant Holton's signature and the correspondence talked about in Colonel Tibbets' testimony.

The trial judge advocate then read aloud the exhibit.

Prosecution: It has been offered in evidence, the two pages, as Prosecution Exhibit 8 with a request to withdraw the original and substitute a copy thereof for the record." (R 34,35).

Doctor C. J. Rehling, a qualified handwriting expert, not having made a prior comparison, was unable to render an opinion as to the similarity of the signature "John W. Holton" appearing on Prosecution Exhibit 8 and the signature "John W. Holton" appearing on Prosecution Exhibits 2, 3 and 4 (R 52). Thereafter, the following discussion ensued between the court, prosecution, defense, and accused:

"Defense: Excuse me, sir, if it will help any, the accused will admit that is the signature of John W. Holton.

Prosecution: You are referring to Exhibits 2, 3 and 4. Will you, also, admit that is his signature on Prosecution Exhibit 8?

Defense: I am willing to, and the accused is willing to admit that that is his signature on Prosecution Exhibits 2, 3 and 4, only.

Law Member: The accused admits the signature on Exhibits 2, 3 and 4 is his signature.

Defense: Yes, sir.

Law Member, to accused: Do you admit that, Lieutenant Holton?

Accused: Yes, sir." (R 53)

A duly authenticated extract copy of morning report of the 3540 ASU, Atlanta General Distribution Depot, Atlanta, Georgia, was introduced in evidence without objection. It contains the following entries pertaining to accused:

"1 September 1948

Holton John W 0 1177458 1stLt
Atchd Dy to AWOL eff 0700

* * *

3 September 1948

Holton John W 0 1177458 1stLt
AWOL to Dy eff 2000

* * *." (Pros Ex 1)

4. Evidence for the defense.

After being apprised of his rights, accused elected to testify in his own behalf. His testimony with reference to the offenses of which he was found guilty is as follows: He had left the European Theater on the 10th and arrived in New York on 31 May 1948, and as of 21 July he had not seen a bank statement for three months. He admitted that on 21 July he cashed three checks in the amount of $20.00 each at the Officers' Club, Fort Benning, Georgia, although at the time he was not too certain that he had sufficient funds in the bank. On the 20th, however, he had written to the bank for an additional loan, and on 26 July in anticipation of

securing the loan he increased his allotment from $80.00 to $150.00 a month (R 66; Def Ex 6). On 28 July he sent a telegram to the bank with reference to the loan requested (R 65,67). On 12 August his commanding officer showed him "a communication and three checks which he owed at the Officers' Club at Fort Benning." The following morning he had "the typist type the indorsement, * * signed it, and sent it out with the money order" (R 62,63).

Accused also testified that he had foreign service in the European Theater for eighteen months with the 775th Field Artillery Battalion, and that he served in combat "from August until the end of the war" as a forward observer and aerial observer. He received the "Bronze Star" and Air Medal with two Oak Leaf Clusters. He had not been convicted of any offense in either civil or military life (R 70,71).

Other evidence introduced by the defense pertained to offenses upon which there were findings of not guilty, or findings of guilty disapproved by the reviewing authority, and therefore, will not be set forth.

5. (Charge IV, Specifications 1, 2 and 3)

The record of trial shows that on 21 July 1948 accused cashed three checks at the Officers' Club, Fort Benning, Georgia. Subsequently, on 6 August 1948, there were received from "the bank" at the Officers' Club three checks drawn upon the Bank of America, Rideout Branch, each in the amount of $20.00, each dated 21 July 1948, and each bearing the purported signature of accused. That the signatures were accused's was conceded by the defense counsel with the oral acquiescence of accused. In effect, there was a stipulation of fact that the signatures on the three checks were written by accused. The record compels the conclusion that the three checks received by the Club from the bank on 6 August were the same checks which accused had cashed at the Club on 21 July 1948, on which date accused's balance in the bank upon which the checks were drawn was in an amount insufficient to pay any of the checks in question.

Although there was no evidence that the checks in question were presented to the bank, there is evidence that the bank had refused a loan to accused. Further, the circumstance that restitution was made by accused for the checks is a recognition by him that presentment of the checks would have resulted in the checks being dishonored. Under the circumstances, it being shown that the checks were worthless, the failure to show that the checks were presented for payment and dishonored, is immaterial (CM 318727, Hoffman, 68 BR 1,14). The evidence thus sustains the findings of the court that accused, without having sufficient funds on deposit to pay them, wrongfully issued the checks in question and by means thereof obtained the face amount of the checks from the Officers' Club, Fort Benning, Georgia. We consider

the phrase used in the findings of guilty pertinent to the checks in question, viz: "issue * * check(s), * * * and by means thereof, did obtain from the Officers' Club, Fort Benning, Georgia," to be sufficiently synonymous in meaning, in the context used herein, to the phrase "utter to the Officers Club, Fort Benning, Georgia, a certain check * * and by means thereof, did * * obtain from The Officer's Club, Fort Benning, Georgia." The offense of uttering (or of "issuing" as above) a check without sufficient funds on deposit to pay it, is lesser and included within the offense charged; i.e., with intent to defraud, making and uttering a check with insufficient funds and thereby fraudulently receiving money (CM 251451, Monaghan, 33 BR 243).

(Charge I, Specification)

The uncontradicted evidence and accused's plea of guilty establish that accused was absent without leave for the period, and under the circumstances alleged, in violation of Article of War 61.

6. Accused is 36 years of age, married, and is the father of one child, apparently by a prior marriage. He is a high school graduate, and in civilian life was employed in clerical positions. He had enlisted service from March 1942 to February 1943 when he was commissioned as a second lieutenant. He was promoted to first lieutenant on 16 February 1945. He had foreign service in the European Theater from July 1944 to November 1945 and from August 1946 to May 1948. During hostilities he served in combat as an aerial observer, and was awarded the Bronze Star Medal and the Air Medal, and two Oak Leaf Clusters thereto. His efficiency ratings of record are as follows: Superior (4); Excellent (4); Very Satisfactory (2); and Satisfactory (1).

On 28 July 1946 he was punished under Article of War 104 for a traffic violation committed at Fort Bragg, North Carolina.

7. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of the accused 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, as approved by the reviewing authority, and the sentence, and to warrant confirmation of the sentence. A sentence to be dismissed the service is authorized upon conviction of violations of Articles of War 61 and 96.

Wilmot T. Baughn, J.A.G.C.

Charles J. Berkowitz, J.A.G.C.

[illegible], J.A.G.C.

(216)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
THE JUDICIAL COUNCIL
Brannon , Shaw, and Mickelwait
Officers of The Judge Advocate General's Corps

CM 335672

In the foregoing case of First Lieutenant John W. Holton, O1177458, 665th Transportation Truck Company, 204th Transportation Truck Battalion, Fort Benning, Georgia, the sentence is confirmed and will be carried into execution upon the concurrence of The Judge Advocate General.

Franklin P. Shaw

Franklin P. Shaw, Brig Gen, JAGC

C.B. Miclelwait

C.B. Miclelwait, Colonel , JAGC

E.M. Brannon

May 10, 1949

E. M. Brannon, Brig Gen, JAGC
Chairman

I concur in the foregoing action

THOMAS H. GREEN

THOMAS H. GREEN
Major General
The Judge Advocate General

May 27, 1949

(GCMO 34, June 7, 1949).

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

CSJAGK - CM 335673

2 MAY 1949

UNITED STATES v. Second Lieutenant ROBERT B. DETTMAR (0-1693133), Company F, Airborne Battalion, Student Training Regiment, The Infantry School.	THE INFANTRY CENTER Trial by G.C.M., convened at Fort Benning, Georgia, 27 January 1949. Dismissal and to pay a fine of five hundred dollars ($500).

OPINION of the BOARD OF REVIEW
SILVERS, SHULL, and LEVIE
Officers of The Judge Advocate General's Corps

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Robert B. Dettmar, Company F, Airborne Battalion, Student Training Regiment, The Infantry School, did, without proper leave, absent himself from his organization and station at Fort Benning, Georgia, from on or about 14 September 1948 to on or about 30 September 1948.

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

Specification 1: In that Second Lieutenant Robert B. Dettmar, ***, having been administratively restricted to the limits of Company F, Airborne Battalion, Student Training Regiment, Biglerville Officer's Mess and his quarters, did, at Fort Benning, Georgia, on or about 9 October 1948, break said restriction by going to Columbus, Georgia.

Specification 2: In that Second Lieutenant Robert B. Dettmar, ***, having been administratively restricted to the limits of Company F, Airborne Battalion, Student Training Regiment, Biglerville Officer's Mess and his quarters, did, at Fort Benning, Georgia, on or about 23 October 1948, break said restriction by going to Columbus, Georgia.

He pleaded guilty to the Charge and its specification but not guilty to the Additional Charge and its specifications. He was found guilty of all charges and specifications. He was sentenced to be dismissed the service and to pay to the United States a fine of five hundred dollars. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

Although the accused pleaded guilty to absence without leave for the period alleged in violation of Article of War 61 there were received in evidence without objection as Prosecution Exhibits 1 and 2 duly certified extract copies of the morning reports of his organization for 20 September 1948 and 1 October 1948. Prosecution Exhibit 1 contains the following entry with respect to accused:

"20 Sep 48
Dettmar Robert B (Inf) 01693133 2nd Lt
Dy to AWOL eff 0600 hrs 14 Sep 48
/s/ Raymond H Stem
/t/ Raymond H Stem
Capt., Inf."

Prosecution Exhibit 2 contains the following entry, also with respect to accused:

"1 Oct 48
Dettmar Robert B (Inf) 01693133 2nd Lt
AWOL to Dy apprehended by Mil Auth
this sta eff 1130 hrs 30 Sep 48
/s/ Raymond H Stem
/t/ RAYMOND H STEM
Capt., Inf." (R 7-8)

Lieutenant Colonel Shields Warren, Jr. testified that he was the commanding officer of the "Airborne Battalion" to which accused was assigned, that on 30 September 1948, pursuant to information he had received concerning accused's prior status, he called accused to his office, warned him of his rights under Article of War 24 and questioned him with respect to his reported unauthorized absence. As a result of this conference Colonel Warren instructed accused that "he was restricted to the barracks in which he was quartered, the mess in which he customarily ate, and to the company to which he was assigned for duty; also, that he could move about the Post on matters of official business; that any other breach of restriction he would have to get specific permission for." Colonel Warren stated that to the best of his knowledge he told accused that specific permission meant "my permission" (R 7-10).

Colonel Warren testified further that on about 10 October 1948 accused called him by phone and stated "that he had gone down town on business, and

that he was worried for fear that he had breached his restriction, and he told me that he wanted to know whether he had breached his restriction." Colonel Warren did not tell accused whether or not he had breached his restriction. He was not sure that accused was then under his jurisdiction. A week or more after this incident accused requested permission of Colonel Warren to attend an officers' club dance. The request was refused and Colonel Warren then told accused that he was still under restriction (R 10). It was established by the testimony of Mr. Henry B. Patterson, an employee of a car rental agency in Columbus, Georgia, that accused was in his office at Columbus on 9 October 1948 and again on 23 October 1948. Both of these instances related to the rental of an automobile by the accused (R 15-16).

Accused was hospitalized at the station hospital at Fort Benning several days prior to 9 October 1948 (R 20). First Lieutenant Charles I. Lahser, MC, the officer in charge of Ward 13, where accused was quartered, testified that on 9 October and 23 October he authorized accused to sign the Pass Book and leave the ward. This book was exhibited to the court. Lieutenant Lahser did not discuss with accused his proposed destination on either of the dates mentioned and the entries in the Pass Book did not reveal any destination. Lieutenant Lahser had not received any instructions from higher authority relative to accused's status or the privileges to be accorded him (R 21-29).

Captain Raymond H. Stem, Infantry, accused's company commander, was Officer of the Day on 23 October 1948. During the afternoon of the aforementioned date he received a telephone call from Mr. Patterson "at the U-Drive-It" and then talked to the accused asking him "what he was doing down town." Accused stated that he was "in the hospital." Captain Stem ordered him to return to the Post. A short time later the accused called back and said that he had just talked to Colonel Warren and that neither he nor the battalion commander was sure that he (accused) was in restriction. Captain Stem ordered accused to return to the Post by 4 o'clock. By that time he returned and reported to the Officer of the Day (R 17-20).

No witnesses were presented by the defense and the accused, having been advised as to his rights, elected to remain silent.

4. Comment

The accused pleaded guilty to the Charge and to the specification thereunder alleging absence without leave in violation of Article of War 61. Evidence to substantiate the court's finding of guilty of this charge and specification is contained in the record of trial.

There remains for consideration the question of whether the accused is guilty of a breach of restriction in violation of Article of War 96, as alleged in the Additional Charge and its two specifications.

The only commanding officers who may, in person or through other officers or by oral or written orders or communications, place an officer in arrest or confinement, or in restriction in lieu thereof, are those enumerated in paragraph 20, Manual for Courts-Martial, 1928, to wit: "the commanding officer of a garrison, fort, camp, or other place where troops are on duty and the commanding officer of a regiment, detached battalion, detached company, or other detachment, and their superiors." In this case it appears that the accused was placed in restriction by his battalion commander who is not one of the commanding officers designated in paragraph 20, Manual for Courts-Martial, 1928, since the battalion was a part of a regiment and not a "detached battalion" (CM 319857, Dingley, 69 BR 153, 176).

The record of trial reflects that the restriction of the accused was imposed in lieu of arrest or confinement under Article of War 69. Under the circumstances the restriction was improperly imposed. There could, therefore, have been no breach thereof in violation of Article of War 96.

5. Records of the Department of the Army show accused to be about 24 years of age and single. He graduated from high school in Kings Mountain, North Carolina. He was an officer candidate from 24 January 1947 to 18 December 1947, being appointed a second lieutenant on the latter date. His current tour of duty began on 19 December 1947.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. Except as noted, 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 insufficient to support the findings of guilty of the Additional Charge and its specifications, but legally sufficient to support the findings of guilty of the Charge and its specification, legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

Robert T. Wilson, J.A.G.C.

Lewis T. Shull, J.A.G.C.

Howard S. Levie, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 335673

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

In the foregoing case of Second Lieutenant Robert B. Dettmar (O-1693133), Company F, Airborne Battalion, Student Training Regiment, The Infantry School, subject to the concurrence of The Judge Advocate General, the findings of guilty of the Additional Charge and the specifications thereunder are disapproved. The sentence is confirmed and will be carried into execution.

Franklin P. Shaw, Brig Gen, JAGC

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

20 June 1949

E. M. Brannon, Brig Gen, JAGC
Chairman

I concur in the foregoing action.
By direction of the Secretary of
the Army the fine is remitted.

THOMAS H. GREEN
Major General
The Judge Advocate General

24 June 1949

(GCMO 46, July 21, 1949).

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

CSJAGK - CM 335699

8 JUL 1949

UNITED STATES v. Private JAMES HUNTER (RA 36910792), Headquarters Company, 9224 Technical Service Unit, Transportation Corps, and Private First Class RONALD W. JOHNSON (RA 37301918), 344th Transportation Harbor Craft Company.	FORT EUSTIS, VIRGINIA Trial by G.C.M., convened at Fort Eustis, Virginia, 2 and 3 March 1949. EACH: Confinement at hard labor for twelve (12) months and forfeiture of $35 pay per month for a like period. Post Stockade.

HOLDING by the BOARD OF REVIEW
McAFEE, LEVIE and CURRIER
Officers of The Judge Advocate General's Corps

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

2. The accused were tried on 2 and 3 March 1949 in a joint trial upon the following charge and amended specification:

CHARGE: Violation of the 94th Article of War.

Specification: In that Private First Class Ronald W. Johnson, 344th Transportation Harbor Craft Company and Private James Hunter, Headquarters Company, 9224th Technical Service Unit, Transportation Corps, did, acting in conjunction with Corporal Samuel L. Taylor, the accused who is not now to be tried, at Fort Eustis, Virginia, on or about 1 October 1948, agree and conspire to wrongfully, knowingly and without proper authority sell various items of subsistence of a total value in excess of $50.00, property of the United States, furnished and intended for the military service thereof.

Each accused pleaded not guilty to and was found guilty of the specification and charge. No evidence of any previous conviction was introduced as to the accused Johnson. Evidence of one previous conviction was introduced as to the accused Hunter. Each accused was sentenced to be confined at hard labor at such place as the proper authority might direct

for a period of twelve months and to forfeit $35.00 of his pay per month for a like period. The reviewing authority approved the sentences, ordered execution thereof, and designated the Post Stockade, Fort Eustis, Virginia, or elsewhere as the Secretary of the Army might direct, as the place of confinement. The results of the trial were published in General Court-Martial Orders No. 8, Headquarters, Fort Eustis, Virginia, 22 March 1949.

3. Evidence

Master Sergeant Joseph D. LaFleur testified that he had been the noncommissioned officer in charge of the Post Ration Breakdown at Fort Eustis, Virginia, since August 1947. In October 1948 there were about twenty messes on the Post. The unit mess sergeants would order rations five days a week, single rations being ordered on Mondays, Tuesdays and Fridays, and double rations on Wednesdays and Thursdays. Under the witness' supervision these orders were consolidated and the rations were then ordered in bulk from the sales commissary. The following day the men working in the Post Ration Breakdown warehouse would draw the rations in bulk from the sales commissary and bring them to the warehouse where they would be broken down physically into the number of messes which had to be supplied, order by order, and item by item. The breakdown would have previously been accomplished on paper in the office and the actual physical breakdown would be made in accordance therewith. Upon completion and verification of the breakdown the rations were loaded into trucks and delivered to the messes where the mess sergeant or first cook on duty would sign a receipt for them on a Field Memorandum Issue Slip, the original of which, with the signature, was kept by the Post Ration Breakdown, and a duplicate copy of which was given to the unit mess (R 9-10).

Both accused were assigned to the Post Ration Breakdown. In October 1948 accused Johnson worked in the warehouse, drawing rations from the sales commissary and "more or less" supervising the actual breakdown of the rations for the individual messes. Working under him were daily details assigned from the 7th Regiment and from the Post Complement Command, the men from the 7th Regiment usually being on a permanent detail and those from the Post Complement being changed daily, and sometimes twice daily. The warehouse was set up in two sections, one for dry stores and one for cold stores, and although no one was actually assigned in charge of either type of stores, in effect, the accused Johnson was in charge of the breakdown of cold stores. Since about 1 October 1948 the accused Hunter had assisted the witness with paper work in the office (R 10-11).

Certain types of rations were issued by the sales commissary only in the bulk units received by it. Thus potatoes, sugar, and flour were received in 100-pound bags, dry cereal in 200-pound bags, and eggs in crates of 30 dozen. Because of this, the sales commissary might make

an over-issue on an item to the Post Ration Breakdown on one day which would be balanced by an equalizing under-issue on a subsequent day. On the day of the over-issue the amount received in excess of the requisition would be left over in the breakdown warehouse after the ration breakdown had been completed. The only other way in which rations could be physically left over after the ration breakdown had been completed would be as a result of an error either in the paper breakdown or in the physical breakdown. This would be quickly discovered and immediately corrected. However, the witness admitted that except for "key" items the mess sergeants did not closely check the rations which they received, and that if anyone on the trucks wished to "short" the messes it was possible for him to remove items from the breakdown for a mess and thus have those items left on the truck after delivery had been completed. If key items were involved there would be complaints from the mess sergeants. If such a plan were followed the shortages on the actual deliveries would not show on the Ration Breakdown records. There were not, in those records, any figures which indicated a shortage (R 11-15).

In the case of over-issue by the sales commissary the overage was retained in the warehouse of the Post Ration Breakdown, issues to the messes being exactly the amount authorized. The Field Memorandum Issue Slip prepared for each mess was made out in pencil. On the few occasions when the witness had gone out on the ration truck he had observed that the mess sergeants checked only the key items such as eggs, butter, and meat. As to these items they made quite a thorough check (R 15-16).

The sergeant's office was located in the Post Ration Breakdown building and warehouse. He was there on duty all day except for the lunch period from 1130 to 1200 hours. Normally the ration trucks would leave the warehouse around 1300 hours and if there were no complaints of shortages they would be finished by 1500 or 1530 hours. If there was a shortage in the delivery made to any unit the mess sergeant would call the witness who would have the matter checked and make the necessary adjustments. Errors could occur because of the method of making the breakdown. In the warehouse there were racks built to separate the orders, with the company identification of each mess on the wall behind the rack. When a particular item was broken down it might happen that the man making the breakdown would put the amount authorized for issue to one company in the rack of a different company, with the result that one mess would receive an over-issue while another would receive an under-issue. When this occurred and the mess sergeant who was short called the witness the latter would have the other messes checked in order to ascertain which one had received the over-issue. There were not many complaints of this nature received and they were all promptly corrected. Both of the accused would occasionally go out with the ration trucks if they were working shorthanded (R 17-19).

The paper breakdown was first made on the master sheet and the figures were then transcribed in pencil to the unit Field Memorandum Issue Slip. The man in charge of breaking down the items in the warehouse worked from a buck sheet which consisted of a breakdown made item by item. It was possible for the man working from these buck sheets to short each of the messes a certain amount of rations (R 19-20).

Mr. William F. Elliott testified that he operated a grocery store in Newport News, Virginia, and that he knew the accused Johnson, although he did not know the latter's name. During the latter part of September 1948 he had a conversation with Johnson at the grocery store. Johnson was "partly" dressed in Army clothes. The witness never saw Johnson in full uniform. He bought from Johnson about 21 pounds of butter at 60¢ a pound and 12 to 14 pounds of bacon at 40¢ a pound. There were subsequent similar transactions involving a roll of block cheese, a roll of bologna, a box of bulk sausage, and additional bacon. The witness' total purchases from Johnson amounted to between $150 and $175. The witness did not buy anything from Johnson after 8 December 1948. He had never seen the accused Hunter (R 20-22).

The merchandise purchased from Johnson was no different from similar merchandise purchased from such wholesalers as Swift and Armour. The witness never asked Johnson the source of his supply and Johnson never volunteered any information in this regard. Johnson delivered the merchandise in a private automobile. At the time that the witness paid Johnson 40¢ a pound for bacon the wholesale price was 46¢ to 48¢, and at the time that he paid Johnson 60¢ a pound for butter the wholesale price was about 68¢. Johnson wore Army pants but the witness had not known that he was in the military service (R 22-23).

Mr. William C. Thornburg testified that he operated a market in Newport News, Virginia. He knew and had done business with the accused Johnson but he did not know the accused Hunter. He first saw Johnson when the latter came to his store around 1 November 1948 and wanted to sell him some bacon. Johnson was dressed in a leather jacket. During the month of November 1948 the witness bought a little over $50 worth of bacon from Johnson. On 1 December 1948 the witness bought about $18 worth of bacon from Johnson. There were no subsequent transactions. At no time did Johnson volunteer the information that he was in the Army nor did the witness know that he was. Mr. Thornburg paid Johnson 40¢ a pound for the bacon, the wholesale price of bacon at that time being anywhere from 45¢ to 48¢. Johnson usually made his deliveries in a passenger car on Thursday nights. The bacon was just slab bacon such as purchased from any wholesaler, several of the slabs bearing the Roberts and Hawks brand, which the witness had never used before. He had never bought bacon from any other dealer for as low as 40¢ a pound (R 23-25).

It having been shown that pre-trial confessions made by the accused were voluntary, that of the accused Johnson was received in evidence as Prosecution Exhibit 1 (R 40), and that of the accused Hunter was received in evidence as Prosecution Exhibit 2 (R 49).

The prosecution then rested. The defense moved for a dismissal of the specification and charge as to both accused (R 50), which motion was denied by the court (R 57). The defense then moved for a dismissal of the specification and charge as to the accused Hunter, which motion was likewise denied (R 57).

For reasons which will hereinafter appear, no review of the evidence adduced on behalf of the defense is deemed necessary.

4. Discussion

The specification alleges that the accused agreed and conspired with another soldier to wrongfully sell United States military property. It is apparent that this specification was drawn with a view to stating an offense under the eleventh subparagraph of Article of War 94. That subparagraph appears for the first time in the amendment to Article 94 found in Title II, Selective Service Act of 1948 (62 Stat 627), which amendment did not become effective until 1 February 1949. Since the subparagraph in question creates a new statutory offense, it can have no application with respect to an act committed prior to its effective date (Sp CM 9, McNeely, and cases therein cited). However, inasmuch as the specification does allege facts which are clearly of a nature prejudicial to good order and military discipline and which have an obvious tendency to bring discredit upon the military service in violation of Article of War 96 (CM 320681, Watcke, 70 BR 125,133, and cases therein cited), and inasmuch as a finding of guilty of a violation of the latter Article of War is permissible even though a violation of Article of War 94 is pleaded (CM 313830, Friedman, 63 BR 299,303), we will proceed to the discussion of a problem which is not so easy of solution.

Paragraph 127a, Manual for Courts-Martial, 1949, provides as follows:

"An accused cannot be legally convicted upon his uncorroborated confession. A court may not consider the confession of an accused as evidence against him unless there is in the record other evidence,

either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be substantial evidence of the corpus delicti other than the confession. Other confessions or admissions of the accused are not such corroborative evidence. Usually the corroborative evidence is introduced before evidence of the confession; but a court may in its discretion admit the confession in evidence upon the condition that it will be stricken and disregarded in the event that the above requirement as to evidence of the corpus delicti is not eventually met. This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense. ***"

(With a few differences in phraseology which are not here material this is the same provision as that which appeared in paragraph 114a, Manual for Courts-Martial, 1928.)

The foregoing provision of the Manual for Courts-Martial is but a restatement of the well-established rule of military jurisprudence that in order to support a conviction of an offense for which an accused has been brought to trial and to which he has confessed there must be adduced by way of corroboration of the confession substantial evidence of the corpus delicti, that is, it must appear by competent proof aliunde the confession that the particular offense in question has probably been committed (CM 325056, Balucanag, 74 BR 67,69,73; CM 325377, Sipalay, 74 BR 169,172; CM 330683, Snyder, 79 BR 121,126; CM 334918, Curry, March 1949).

What is the corpus delicti of the crime of conspiracy? In CM 328857, Cockerham, 77 BR 221,237, the Board of Review said:

"To establish a basis for consideration of accused's confession there must be some evidence which shows that the offense charged was probably committed and which in some measure corroborates the confession. In a conspiracy case the evidence outside the accused's confession must indicate the probability of the existence of a confederation or agreement between two or more persons for the purpose alleged (Tingle v. U.S., 38 F. 2d 573). Outside of accused's pre-trial statements there is not an iota of evidence establishing such a confederation or agreement, nor are there circumstances shown from which such a confederation or agreement may be inferred. *** It may be seen, therefore, that there was no evidence outside the confession which tended to establish the probability that two or more persons had entered into a confederation or agreement for the purpose alleged." (Underscoring supplied.)

The case of Tingle v. United States, 38 Fed (2d) 573 (C.C.A. 8, 1930), cited by the Board of Review in the Cookerham case, contains the following pertinent statement concerning the corpus delicti of the crime of conspiracy:

> "*** in conspiracy cases, the unlawful combination, confederacy, and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the corpus delicti charged. It is, therefore, primarily essential to establish the existence of a confederation or agreement between two or more persons before a conviction for conspiracy to commit an offense against the United States can be sustained. This statement requires no citation of authorities. It is equally true that 'extrajudicial confessions or admissions are not sufficient to authorize a conviction of crime, unless corroborated by independent evidence of the corpus delicti.' (Martin v. United States (C.C.A. 8) 264 F. 950. *** It is necessary, then, to determine whether there is in the record before us any substantial independent evidence of the corpus delicti, that is, the conspiracy charged, tending to corroborate the extrajudicial statements and admissions of appellant."

With regard to the degree of proof necessary to establish the confederation or agreement which constitutes the conspiracy the following statement may be found in CM 319857, Dingley, supra:

> "Although it is well settled that to prove a conspiracy it is not necessary to show a formal agreement between the parties to effect the object of the conspiracy (CM 262217, Williams, 1 BR (CBI) 153,159 /163/; CM 307097, Mellinger /60 BR 199,222/; Reavis vs. U.S., 106 Fed (2d) 989; U.S. vs. Manton, 107 Fed (2d) 834), nevertheless an actual or tacit meeting of the minds of the confederates to accomplish the common and unlawful design must be established by direct or circumstantial evidence (CM 262217, Williams, op cit; CM 273791, Gould, 47 BR 29, 66; CM 307097, Mellinger, op cit; Hoffman vs. U.S., 68 Fed (2d) 101; Marino vs. U.S. 91 Fed (2d) 691, 113 AIR 975; Marresh vs. U.S., 168 Fed 225; Graham vs. U.S., 15 Fed (2d) 740; Asgill vs. U.S., 60 Fed (2d) 780). In State vs. Hopkins, 68 Montana 504, 219 Pac 1106, it was stated that while it is not essential that the unlawful agreement be formal, it is necessary that the minds of the parties meet, so as to bring about an intelligent and deliberate agreement to do the acts."

The question, then, which must first be determined here is whether, apart from the confessions, the record of trial includes evidence, either direct or circumstantial, that the offense charged (conspiracy to wrongfully, knowingly, and without proper authority, sell property of the

United States, furnished and intended for the military service thereof) was probably committed, so as to permit the admission in evidence and the consideration by the court of the confessions made by the accused. We have reached the conclusion that this question must be answered in the negative.

Briefly stated, the prosecution established, apart from the confessions, that in October 1948, when the two accused allegedly reached their nefarious agreement to sell Government property, the accused Johnson worked in the warehouse of the Post Ration Breakdown and the accused Hunter worked in the office thereof; that at times both accused accompanied the ration trucks when deliveries were made to the unit messes; and that the accused Johnson had sold bacon, butter, cheese, bologna, and sausage to one civilian grocer, and bacon to another, in fairly large quantities, and at prices below the local wholesale market. We may assume without deciding, since we are not here called upon to decide, that there was sufficient evidence to permit a reasonable inference that the accused Johnson had wrongfully, knowingly, and without proper authority, sold property of the United States, furnished and intended for the military service thereof. However, nowhere in the foregoing is there even a scintilla of evidence of "a confederation or agreement between two or more persons" (CM 328857, Cockerham, supra; Tingle v. United States, supra), or of "an actual or tacit meeting of the minds of the confederates to accomplish the common and unlawful design" (CM 319857, Dingley, supra).

We are not unmindful of the principle of law that the corpus delicti does not include the agency of the accused (CM 325056, Balucanag, supra; CM 325377, Sipalay, supra; CM 301983, Young et al, 19 BR (ETO) 105,130), and that hence the fact that the accused Hunter was not personally incriminated by the evidence apart from his confession is not alone fatal to the findings of guilty. However, the application of this principle does not cure the basic defect in the record - its failure to include any evidence, however, circumstantial, of a meeting of the minds of two or more persons to accomplish a common and unlawful design.

We hold that the corpus delicti of the crime charged has not been established dehors the confessions and that the record of trial is, therefore, legally insufficient to support the findings of guilty of the Charge and its Specification.

For the purposes of the above discussion we have assumed that the evidence adduced by the prosecution was sufficient to permit a reasonable inference that accused Johnson had wrongfully, knowingly, and without proper authority, sold property of the United States, furnished and intended for the military service thereof. We have not deemed it necessary to reach a definite conclusion on this question inasmuch as

we do not consider that a wrongful sale by one accused of property of the United States, furnished and intended for the military service thereof, in violation of the ninth paragraph of Article of War 94, is a lesser included offense of the crime charged in the specification with which we are here concerned, wherein no such wrongful sale is alleged as an overt act.

In view of the holding concerning the failure of the prosecution to establish the corpus delicti of the offense charged, it is unnecessary to do more than advert to the fact that the record of trial does not disclose that the members of the court received the usual cautionary admonition that the pre-trial confessions of the two accused could not be considered as against each other (MCM, 1949, par. 127b, p. 160; CM 331592, Copeland, 80 BR 69,71; CM 325056, Balucanag, supra, at page 71; CM 334978, Canta, March 1949).

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

(On Leave of Absence), J.A.G.C.

Howard S. Levie, J.A.G.C.

Roger T. Cramer, J.A.G.C.

CSJAGK - CM 335699 1st Ind 17 AUG 1949

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

TO: Commanding General, Fort Eustis, Virginia

1. In the case of Private James Hunter (RA 36910792), Headquarters Company, 9224 Technical Service Unit, Transportation Corps, and Private First Class Ronald W. Johnson (RA 37301918), 344th Transportation Harbor Craft Company, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence as to each accused. Under Article of War 50(e) this holding and my concurrence vacate the findings of guilty and the sentence as to each accused. A rehearing is authorized on the present, or other appropriate, charges.

2. It is requested that you publish a general court-martial order in accordance with the said holding and this indorsement, restoring all rights, privileges and property of which the accused have been deprived by virtue of the findings and sentences so vacated. A draft of a general court-martial order designed to carry into effect the foregoing recommendation is attached. If a rehearing is directed the direction therefor should be noted in the body of the general court-martial order.

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

(CM 335699).

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

2 Incls
1. Record of trial
2. Draft of GCMO

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

MAY 31 1949

CSJAGH CM 335726

UNITED STATES	)	HEADQUARTERS FORT JACKSON, SOUTH CAROLINA
v.	)	
Captain DENNIS E. LEACH, 0339381, Dental Corps, 3431 ASU (Station Hospital), Fort Jackson, South Carolina.	)	Trial by G.C.M., convened at Fort Jackson, South Carolina, 28 January 1949. To pay to the United States a fine of Seven Hundred Fifty ($750.00) Dollars.

HOLDING BY THE BOARD OF REVIEW
BAUGHN, BERKOWITZ, and LYNCH
Officers of The Judge Advocate General's Corps

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

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Captain Dennis E. Leach, Dental Corps, Station Hospital, did, at Fort Jackson, South Carolina, on or about 31 October 1947, present for payment a claim against the United States, by presenting to Lt Colonel C. C. Neely, Finance Department, Finance Officer at Fort Jackson, South Carolina, an officer of the United States, duly authorized to pay such claims, in the amount of ninety dollars ($90.00), for rental allowance, for the period 1-31 October 1947, which claim was false and fraudulent in that the said Captain Dennis E. Leach, during the period 14-31 October 1947, was assigned and did occupy adequate quarters at his permanent station, to wit: Fort Jackson, South Carolina, and was then known by the said Captain Dennis E. Leach to be false and fraudulent.

Specifications 2 through 12, inclusive, the same as Specification 1, except the dates as follows:

Spec 2: 30 November 1947, 1-30 November 1947, 1-30 November 1947
Spec 3: 31 December 1947, 1-31 December 1947, 1-31 December 1947
Spec 4: 31 January 1948, 1-31 January 1948, 1-31 January 1948
Spec 5: 29 February 1948, 1-29 February 1948, 1-29 February 1948
Spec 6: 31 March 1948, 1-31 March 1948, 1-31 March 1948
Spec 7: 30 April 1948, 1-30 April 1948, 1-30 April 1948
Spec 8: 31 May 1948, 1-31 May 1948, 1-31 May 1948
Spec 9: 30 June 1948, 1-30 June 1948, 1-30 June 1948
Spec 10: 31 July 1948, 1-31 July 1948, 1-31 July 1948
Spec 11: 31 August 1948, 1-31 August 1948, 1-31 August 1948
Spec 12: 30 September 1948, 1-30 September 1948, 1-30 September 1948

Specifications 13 and 14, inclusive, the same as Specification 1, except the officer to whom the claim was presented "Lt. Colonel A. E. Williams," and the dates as follows:

Spec 13: 31 October 1948, 1-31 October 1948, 1-31 October 1948
Spec 14: 30 November 1948, 1-30 November 1948, 1-30 November 1948.

He pleaded not guilty to the Charge and Specifications, and was found guilty of the Charge and guilty of the Specifications except the following words common to each specification, "present for payment * claim(s) * * by presenting to * *, for rental allowance, for the period(s) (alleged), * * which claim(s) (were) false and fraudulent * * in that the said (accused) * *, during the period(s) (alleged) * * was assigned and did occupy adequate quarters at his permanent station, to wit: Fort Jackson, South Carolina, and (were) known by the said (accused) * * to be false and fraudulent," substituting therefor the words and figures, "wrongfully make * false official statement(s) in connection with the presentation of * claim(s) to * *, in the amount of * * for rental allowance(s), for the period(s) (alleged) * *, in that the said (accused) * * wrongfully certified in the said claim(s) that he did not occupy adequate quarters assigned to him without charge at Fort Jackson, South Carolina, when, in fact, the said (accused) did occupy said quarters without charge during the period(s) covered by said claim(s)." No evidence of previous convictions was introduced. He was sentenced to pay to the United States a fine of Seven Hundred Fifty Dollars. The reviewing authority approved only so much of the findings of guilty of the Charge and each Specification "* * as finds the accused guilty of wrongfully making a false official statement in connection with the presentation of a claim to the particular Finance Officer, duly authorized to pay such claim, as alleged, in the amount of Ninety ($90.00) Dollars each, for rental allowance, for the period alleged, in that the accused did occupy adequate quarters at Fort Jackson, South Carolina, during each of the periods alleged."

3. Since the Board of Review concludes that the findings of guilty as approved by the reviewing authority are not lesser and necessarily included in the offenses upon which arraignment of this accused was had, it is unnecessary to set forth the evidence.

Accused was charged with the presentment of fourteen false claims for rental allowance, which claims were alleged to be false by virtue of accused's occupancy of adequate government quarters during the periods for which rental allowances were claimed in violation of Article of War 94. By exceptions and substitutions he was found guilty of wrongfully making false official statements in connection with the presentation of claims for rental allowances for the periods alleged, by wrongfully certifying in these claims that he did not occupy adequate quarters assigned to him without charge at Fort Jackson, South Carolina, when, in fact, he did occupy such quarters without charge during the periods covered by said claims. The reviewing authority approved only so much of the findings of guilty as involved finding accused guilty of wrongfully making a false official statement in connection with the presentation of a claim to the particular finance officer, in the amount alleged in each instance, for rental allowance for the period stated, in that accused did occupy adequate quarters at Fort Jackson, South Carolina, during each of the periods alleged.

It may be seen that accused was charged with the presentation of false claims, was found guilty by the court of making specific false official statements in connection with the presentation of claims, and as approved by the reviewing authority was found guilty of making unspecified false official statements in connection with the presentation of claims which unspecified false statements were false in that accused did occupy adequate quarters.

In the findings in any given case one or more words or figures alleged 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 * * *." (Par 78c, MCM 1949, p.77). The offense found is of the same nature or identity of the offense charged if it is necessarily included in the offense charged. The test for determining if the offense found is necessarily included in that charged is set forth in Paragraph 78c, MCM 1949, p.77, as follows: "* * it is included only if it was necessary in proving the offense charged to prove all the elements of the offense found." The test thus enunciated is definitive of the test as it existed prior to the promulgation of the Manual for Courts-Martial 1949 (CM 330750, Pilgrim, 1st Indorsement, 79 BR 163,166; CM 316917, Morrison, 1st Indorsement, 66 BR 111,115; 6 Bull JAG 12; CM 334409, Hunt).

The elements of proof of the offense of presenting a false claim are as follows:

> "(a) That the accused presented or caused to be presented for approval or payment to a certain person in the civil or military service of the United States having authority to approve or pay it a certain claim against the United States as alleged; (b) that such claim was false or fraudulent in the particulars alleged; (c) that when the accused presented the claim or caused it to be presented he knew it was false or fraudulent in such particulars; and (d) the amount involved as alleged." (Par 150b, MCM 1928; Par 181b, MCM 1949).

When the test for determining if the offense found is necessarily included in the offense charged is applied to the proof outlined, it is clear that proof of making a false official statement in connection with a claim is not necessary to prove the presentation of a false claim. This result is consonant with those attained in the Federal Courts in construing statutes of content or context similar to the 94th Article of War (United States v. Coggin, 3 Fed 492, 9 Biss. 416; Dimmick v. United States, 116 Fed 825,828; United States v. Downey, 257 Fed 366,368). In United States v. Downey, the court, citing Dimmick v. United States as the applicable precedent, stated: "It is not essential that the bill, voucher, or other thing used as the basis for the claim should, in and of itself, contain fraudulent or fictitious statements, but whether the claim is genuine and honest must be determined in view of all the facts and circumstances surrounding it."

From the foregoing, it becomes evident that the proof of making a false statement or statements required to sustain the offenses of which the accused has been found guilty was not a necessary element of proof of the offenses with which he was charged. It follows then that the offenses found are not lesser and included in the offenses charged (Par 78c, MCM 1949).

We consider the instant case distinguishable from CM 296107, Savini, 58 BR 79. In the latter case the specifications alleged that accused presented false claims for approval and payment, and also alleged in each instance that accused stated in each claim that Joyce P. Savini was his lawful wife, which statement was then known by Savini to be false. In effect, each specification alleged in addition to the presentment of a false claim, the making of a false statement in connection with the claim. The Board of Review found that the record of trial failed to show that the claims presented were false as alleged, but did show that, as alleged, accused had made false statements in the

claims and held that the record of trial was legally sufficient to support only so much of the findings of guilty as involved the findings of guilty of making false official statements in connection with the claims. In attaining its result the Board stated:

> "* * * The Boards of Review have consistently held that where a specification alleges a felonious assault but the proof establishes nothing more than assault and battery, and the language in the specification descriptive of the assault also alleges a battery, findings of guilty of the offense of assault and battery will be sustained. Similarly, when a specification alleges the making of a false statement in addition to the presentation of a false claim and the proof establishes nothing more than the making of a false statement, then so much of the findings of guilty as involves the making of a false statement must be sustained. * * * Here the facts alleged in the specifications constitute the offense of making a false statement as well as presenting a false claim and the accused was fairly apprised thereof. Consequently, to sustain so much of the court's findings of guilty as involves the making of false statements does not injuriously affect any of accused's substantial rights. Accordingly, the record of trial is legally sufficient to sustain so much of the findings of guilty of Specifications 1, 2 and 3 of Charge II as involves the making of false statements, in violation of Article of War 94." (CM 296107, Savini, 58 BR 83,84)

The conclusion attained in the Savini case that the offenses of the making of the false official statements were necessarily included in the offenses charged, is based on the pleading in that case, wherein the false statements found were specifically charged, and hence a necessary element of proof.

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

Wilmot T. Baughn, J.A.G.C.

Charles J. Berkowitz, J.A.G.C.

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

CSJAGH CM 335726 1st Ind

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

TO: Commanding General, Fort Jackson, South Carolina

1. In the case of Captain Dennis E. Leach, 0339381, Dental Corps, 3431 ASU (Station Hospital), Fort Jackson, South Carolina, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under Article of War 50e(3) this holding and my concurrence therein vacate the findings of guilty and the sentence.

2. It is requested that you publish general court-martial orders in accordance with this holding and indorsement, restoring all rights, privileges and property of which the accused has been deprived by virtue of the findings and the sentence so vacated. A draft of the general court-martial orders designed to carry into effect the foregoing is attached. A trial upon new charges is authorized should you determine that the offenses of making false statements in connection with claims, which you approved but which were not charged here, warrant such action.

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

(CM 335726).

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

2 Incls
1 Record of trial
2 Draft GCMO

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

CSJAGK - CM 335727

MAY 1 7 1949

UNITED STATES v. Private First Class TEODORICO BALBASTRO (PS 10317742), 504th Medical Base Depot Company, APO 331, and PEDRO N. FONTANILLA (S-7-A), Department of the Army Civilian Employee, 37th General Hospital (PS), APO 331.	RYUKYUS COMMAND Trial by G.C.M., convened at APO 331, 24 February 1949. BALBASTRO: Dishonorable discharge and confinement for six (6) months. FONTANILLA: To be confined at hard labor for six (6) months. EACH: Stockade.

HOLDING by the BOARD OF REVIEW
SILVERS, SHULL, and LEVIE
Officers of The Judge Advocate General's Corps

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1. The record of trial in the case of the persons named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and the sentence as to accused Fontanilla. The record has now been examined by the Board of Review as to both accused and the Board submits this, its holding, to The Judge Advocate General.

2. Accused were tried on 24 February 1949 in a common trial upon the following charges and specifications:

PFC. TEODORICO BALBASTRO:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private First Class Teodorico Balbastro, 504th Medical Base Depot Company, APO 331, did, at Okinawa, APO 331, on or about 17 November 1948, have in his possession 27 vials, more or less, of a habit forming drug, to wit, Morphine Sulphate, said drug not having been ordered by a medical officer of the army.

MR. PEDRO N. FONTANILLA:

CHARGE: Violation of the 96th Article of War.

Specification: In that Pedro N. Fontanilla, a civilian employee of the Department of the Army, a person accompanying the armies of the United States without the territorial jurisdiction of the United States, did, at the 37th Station Hospital (PS), now the 37th General Hospital (PS), APO 331, on or about 17 November 1948, have in his possession forty-three (43) vials of tablets

and two (2) 1-oz. bottles, more or less, of a habit forming drug, to wit, morphine, said drug not having been ordered by a medical officer of the Army.

Each accused pleaded not guilty to and was found guilty of the applicable specification and charge. No evidence of any previous conviction was introduced. Balbastro 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 at such place as proper authority might direct for six months. Fontanilla was sentenced to be confined at hard labor at such place as proper authority might direct for six months. The reviewing authority approved the sentence as to Balbastro, designated The O'Donnell Division, General Prisoner Branch, PHILCOM Stockade as the place of confinement and withheld the order directing execution of the sentence pending action under Article of War 50. He approved and ordered executed the sentence as to Fontanilla and designated the RYCOM Military Stockade as the place of confinement. The results of trial as to Fontanilla were published in General Court-Martial Orders No. 8, Headquarters Ryukyus Command, APO 331, 7 March 1949.

3. Subsequent to the arraignment the prosecution called as its first witness the accused, Mr. Pedro N. Fontanilla. After being sworn and in response to appropriate questions witness stated his name, that he was a civilian employee of the United States Army assigned to the 37th General Hospital, APO 331, and that he knew Private First Class Balbastro whom he identified in the court room. The following colloquy then occurred between the trial judge advocate and the witness:

"Q. Mr. Fontanilla, I wish to warn you that inasmuch as this is a trial in common and you are one of the accused, you are not to give any evidence which will incriminate yourself. Don't give any evidence against yourself. Do you understand?

"A. Yes, sir.

"Q. In other words you only have to tell about those things you want to tell about, not evidence against yourself.

"A. Yes sir." (R 8)

The prosecution thereupon interrogated Fontanilla at length. Witness stated that at about 0710 hours on 17 November 1948 his friend, Balbastro, appeared at his quarters and placed a box and two bottles in his (Fontanilla's) footlocker. The box contained morphine but he did not touch the objects. In the afternoon of the same day military authorities searched his room and found the narcotics in his footlocker (R 9). Fontanilla identified Prosecution Exhibit 1 as being the box and Prosecution Exhibits 2 and 3 as being the bottles which Balbastro had placed in his footlocker (R10). Other evidence established that the box (Pros Ex 1) contained 43 vials of morphine sulphate and that the two one-ounce bottles (Pros Exs 2 and 3) contained the same substance (R 13). Witnesses for the prosecution testified that the bottles (Pros Exs 2 and 3) were removed from Fontanilla's left pocket as he attempted to flee from his room during the "shakedown" (R 17). The evidence tended to show that the narcotics had been removed, without authority, from the hospital and that they had not

been prescribed by a medical officer. Near the close of the case the law member explained to Fontanilla his rights as a witness and he elected to remain silent, but after further consideration he made an unsworn statement (R 33-34). Subsequently the court recalled Fontanilla and he was interrogated by the law member and the prosecution (R 35-36).

After having his rights as a witness duly explained to him, accused Balbastro elected to remain silent.

4. It is only necessary to consider the effect of the prosecution's calling of the accused Fontanilla as a witness. The record does not show that Fontanilla requested to be a witness. On the contrary, after he had given considerable sworn testimony, when the law member explained to him his rights he elected to remain silent. However, he later made an unsworn statement. With respect to accused Balbastro, the only evidence in the record tending to show that he wrongfully had in his possession the narcotics, as alleged, was that given by Fontanilla who stated that Balbastro brought the objects to his room and placed them in his footlocker.

The nonself-incrimination clause of the Fifth Amendment to the Constitution of the United States provides that: "No person *** shall be compelled in any criminal case to be a witness against himself." It has been generally held that the guarantee against compulsory self-incrimination precludes a person from being called by the prosecution as a witness in a trial which has for its object the determination of that person's guilt or innocence of a given offense (Boyd v. United States, 116 U.S. 616; Lees v. United States, 150 U.S. 476; Twining v. New Jersey, 211 U.S. 78; Wigmore on Evidence, 2d Ed., sec. 2268).

By the Act of March 16, 1878, 20 Stat. 30, the Congress provided that -

> "In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States Courts, Territorial Courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

The above act remained in full force and effect until 1 September 1948, the effective date of the new Title 18, United States Code, Crimes and Criminal Procedure. Section 3481 of the Code now provides that:

> "In trial of all persons charged with the commission of offenses against the United States and in all proceedings in

courts-martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

From the foregoing, it will be seen that the competency of an accused to testify or become a witness is conditioned upon his own request and he is therefore incompetent in the absence of such request. In keeping with the foregoing statutory provisions the Manual for Courts-Martial, 1928, paragraph 120d, and the Manual for Courts-Martial, 1949, paragraph 134d, each provides that, "the accused is at his own request, but not otherwise, a competent witness." In CM 273817, Johnson, Loper, 6 BR (ETO) 291, a common trial wherein each accused was, without his request, called as a witness for the prosecution, the Board of Review in an exhaustive opinion concluded that notwithstanding the fact that the rights of each was violated by being compelled to testify, such violation was not an error of which the accused against whom the evidence was offered could complain and hence no prejudice to Johnson's rights occurred when Loper testified against him, and no prejudice to Loper's rights occurred when Johnson appeared as a witness against him. The opinion concedes at page 306 that each accused, after being called by the prosecution gave highly inculpatory evidence against himself but reasons that, (1) applying the evidence of each to the other, and eliminating that which each gave respecting himself, the evidence of guilt was compelling; (2) voluntary pretrial confessions were introduced as to each; (3) after being duly advised of his rights each accused voluntarily testified at the trial subsequent to being called by the prosecution.

In CM 312517, Kosydar, Bailey, 62 BR 195, a common trial wherein the prosecution, without any request by Kosydar called him as a witness, "his testimony to be used only against Bailey," the Board of Review held that the error was prejudicial as to Kosydar, but since the privilege against self-incrimination is a right of a witness and not of an accused against whom he testifies, the error did not affect Bailey's substantial rights. It was said also that there was nothing in Kosydar's testimony which harmed Bailey. The record was held legally sufficient to support the findings and sentence as to Bailey and legally insufficient as to Kosydar.

In CM 317428, Satterwhite, Cunningham, 66 BR 339 (1947) the prosecution announced that inasmuch as the proceedings were in the nature of a common trial it desired to call each accused as a witness against the other, subject to his right to refuse to answer any question which might tend to incriminate him. Each accused was in turn called and interrogated by the prosecution. The Board of Review, after considering the opinions heretofore mentioned in the light of the Fifth Amendment to the Constitution and the provisions of Article of War 24 quoted the following from Winthrop's Military Law and Precedents (Reprint 1920), pages 335, 336:

"Co-Accused and Accomplices. Except when testifying at

his own instance under the Act of 1878, above cited, a defendant in a criminal case is not regularly competent as a witness for or against a co-defendant unless he has been discharged from the record, - as by the entry of a nolle prosequi, - or unless, having been accorded a separate trial, *** he has been duly acquitted or convicted. ***"

The Board concluded that the action of the trial judge advocate in calling the accused as witnesses for the prosecution to testify against each other was fatal error. The record was therefore held legally insufficient to support the findings and sentence as to each.

We think the reasoning in the Satterwhite case (supra) to be sound and in keeping with the mandate of the Fifth Amendment to the Constitution and the provisions of the Manual for Courts-Martial. Therefore, the contrary reasoning in CM 273817, Johnson, Loper, supra, should no longer be followed. In the present case Fontanilla did not request to become a witness. He was compelled to be a witness within the meaning of the law and subsequent warnings by the trial judge advocate and the law member did not cure the error. Being, under the circumstances, an incompetent witness, we are bound to conclude that Fontanilla's testimony was inadmissible for any purpose. There being no evidence in the record other than that given by Fontanilla sufficient to establish the guilt of Balbastro, the error is fatal to the conviction of each accused.

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

Robert D. Gilmore, J.A.G.C.

Lewis F. Thrill, J.A.G.C.

Howard S. Levie, J.A.G.C.

Ryukyus Command,

CSJAGK - CM 335727 1st Ind

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

TO: Commanding General, Ryukyus Command, APO 331, c/o Postmaster, San Francisco, California

1. In the case of Private First Class Teodorico Balbastro (PS 10317742), 504th Medical Base Depot Company, APO 331, and Pedro N. Fontanilla (S-7-A), Department of the Army Civilian Employee, 37th General Hospital (PS), APO 331, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence as to each accused. Under Article of War 50(e) this holding and my concurrence vacate the findings of guilty and the sentence as to each accused. A rehearing is authorized. It is suggested however that in determining whether a rehearing in both or either of the cases is to be directed, consideration be given to the punishment by confinement already served.

2. With respect to the accused Fontanilla, it is requested that you publish a general court-martial order in accordance with the said holding and this indorsement, restoring all rights, privileges and property of which Fontanilla has been deprived by virtue of the findings of guilty and sentence so vacated. A draft of a general court-martial order designed to carry into effect the foregoing recommendation is attached. If a rehearing is directed the directions should be noted in the body of the general court-martial order. It is recommended that the general court-martial order with respect to the accused Balbastro contain an appropriate statement indicating that the findings and sentence are vacated pursuant to Article of War 50(e)(3).

3. When copies of the published orders 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 335727).

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

2 Incls
1. Record of trial
2. Draft of GCMO

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

CSJAGH CM 335738

MAY 18 1949

UNITED STATES	)	THIRD ARMY
v.	)	Trial by G.C.M., convened at Atlanta, Georgia, 8,9 March 1949. Dismissal, total forfeitures and confinement for three (3) years.
Captain WILLIAM A. CARPENTER, 01110413, 3540 Army Service Unit, Atlanta General Depot, Atlanta, Georgia.	)	

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

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

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

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

Specification 1: In that Captain William A. Carpenter, 3540 Army Service Unit, Atlanta General Depot, Atlanta, Georgia did, at Atlanta General Depot, Atlanta, Georgia on or about 7 January 1949, with intent to defraud, willfully, unlawfully and feloniously forge an indorsement on a certain check in substantially the following words and figures, to wit:

Orchestra 30 Dec 48 No. 1457
Central Post Fund
Atlanta Ordnance Depot
Atlanta, Ga 27 December 1948

Pay
To The
Order Of Sam Smith $50.00
Fifty and No/100 - - - - - - - - Dollars

West End Branch
To The First National Bank
64-1 Atlanta, Georgia By James R. Nash, Capt, CE,
610 Custodian

Incl #2

by falsely writing on the back thereof, without authority, the name "Sam R. Smith," which said indorsement was a writing of a private nature which might operate to the prejudice of another.

Specification 2: (Same as Specification 1 except the date of the offense "4 February 1949" and the date upon the check "3 February 1949.")

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

Specification 1: In that Captain William A. Carpenter, 3540 Army Service Unit, Atlanta General Depot, Atlanta, Georgia did, at Atlanta General Depot, Atlanta, Georgia on or about 7 January 1949, with intent to defraud, willfully, unlawfully and feloniously pass as true and genuine a certain check in words and figures substantially as follows, to wit:

Orchestra 30 Dec 48 No. 1457
Central Post Fund
Atlanta Ordnance Depot
Atlanta, Ga 27 December 1948

Pay
To The
Order Of Sam Smith $50.00
Fifty and No/100 - - - - - - - - - Dollars

West End Branch
To The First National Bank
64-1 Atlanta, Georgia By James R. Nash, Capt, CE, Custodian
610

bearing on the back thereof an indorsement substantially as follows, to wit: "Sam R. Smith", a writing of a private nature which might operate to the prejudice of another, which indorsement was, as he, the said Captain Carpenter, then well knew, falsely made and forged.

Specification 2: (Same as Specification 1, except the date of the offense "4 February 1949," and the date upon the check "3 February 1949.")

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

Specification 1: In that Captain William A. Carpenter, 3540 Army Service Unit, Atlanta General Depot, Atlanta, Georgia

did, at Atlanta General Depot, Atlanta, Georgia on or about 27 December 1948, feloniously steal $65.00, lawful money of the United States, property of the United States, intended for the military service thereof.

Specification 2: (Same as Specification 1, except the date "7 February 1949," and the amount "$74.25.")

He pleaded not guilty to the Charges and Specifications, and was found guilty of Charges I and II and the Specifications thereunder; guilty of Specification 1, Charge III, "except the words and figures '$65.00' and 'intended for the military service thereof,' substituting therefor the words and figures 'about $31.35,' of the excepted words and figures, Not guilty, and of the substituted words and figures, Guilty."; guilty of Specification 2, Charge III, except the words "intended for the military service thereof" of the excepted words, not guilty; and not guilty of Charge III, but guilty of a violation of the 93d Article of War. 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 the reviewing authority may direct for a period of three years. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence for the prosecution.

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

Accused is a member of the 3540 Army Service Unit, Atlanta General Depot (R 32). Throughout the period extending from November 1948 through the first week of February 1949, accused served as special service officer. Funds for special services including the Service Club came from the Central Post Fund, Atlanta General Depot. One method by which special services and other functions were financed by the Central Post Fund was as follows: At the regular monthly meeting of the Central Post Fund Council, persons desiring to make expenditures would make requests for appropriations. If the appropriation were approved, the person making the request would subsequently submit a purchase order for the expenditure and a receiving report showing that the goods or service subject of the expenditure had been received. The purchase order would be signed by Captain James R. Nash, the custodian of the fund. A check would be drawn by G. C. Williamson, Jr., the bookkeeper of the fund, and signed by Captain Nash. This would

be forwarded to the person making the request together with a receipt for the check to be completed by the vendor of the goods or services (R 12,13). The receipt itself was in the form of a "petty cash voucher" which identified the particular transaction and upon which the vendor receipted for payment (R 14; Pros Ex 2).

Still another method of financing and defraying the cost of certain special service functions was through payments from a petty cash fund in the amount of $75.00 under the stewardship of the Special Service Officer. This fund would be replenished at the regular monthly meeting of the Council in the amount required to bring the fund up to $75.00. The Special Service Officer would, however, account for the cash expended prior thereto by receipts (R 20). Prosecution Exhibit 11 was identified as a certificate signed by accused in the office of the Post Engineer, on or about the date of the certificate, 29 September 1948 (R 34,36). Accused stated therein that he had in his possession "the sum of seventy-five ($75.00) or signed vouchers Petty Cash Fund for the Atlanta General Depot Central Post Fund."

Among the recurring expenses of special services were the weekly dances at the service club usually held on Thursday night.

G. C. Williamson, the bookkeeper previously mentioned, identified Prosecution Exhibit 1 as a Central Post Fund check dated 27 December which he had drawn for the sum of $50.00 in favor of Sam . Smith, payee, for orchestra services to be furnished on 30 December 1948 (R 13,32). The check was signed by Captain Nash and sent to accused through the message center (R 13,14,32). Subsequently, Williamson received "in the regular course of business" a petty cash voucher dated 30 December 1948 evidencing the payment of $50.00 to S. R. Smith for orchestra services provided at the service club 30 December 1948, and the receipt of payment over the signature "S. R. Smith" (R 14; Pros Ex 2). At about 1900 or 1930 hours, 7 January 1949, Lester M. Killebrew, Manager of the Post Exchange, who was working at the Exchange that night, received a call from accused at the service club. Accused inquired of Killebrew as to whether he would cash a check which accused would send down by an "MP" (R 39,40). At about 2100 hours the same night Private First Class Tracey H. Gould, an "MP", on motor patrol duty, was making his hourly spot check of the service club and saw accused in his office. Accused asked Gould to take a paper to the "PX" and obtain some money for him. Gould took the paper to the "PX" and gave the paper to the manager (R 38). Killebrew identified Prosecution Exhibit 1 as the paper which he received from Gould (R 40,42). Killebrew cashed the check and gave $50.00 to Gould to give to accused. Killebrew then called accused and told him that the "MP" was on his way back with the money (R 40). Gould returned to the service club and gave accused the money which he had received from the "PX" manager (R 38).

Williamson identified Prosecution Exhibit 3 as a Central Post Fund check which he had drawn on 1 February 1949 payable to Sam Smith in the amount of $50.00 for orchestra services to be rendered on 3 February 1949 (R 15). The check was signed by Captain Nash and was sent to accused (R 27,32,33). On a Friday, around the 5th or 6th of February 1949, accused brought the check to Killebrew, the exchange manager and asked him to cash it. At the time, accused stated that he had cashed the check for Smith, and needed the money since he owed money to Miss Tomasello for bingo prizes. Although accused had not endorsed the check, Williamson cashed it on the strength of the purported endorsement of the payee (R 41,42). On the Monday or Tuesday following 3 February, Williamson received a petty cash voucher showing the payment of $50.00 to S. R. Smith for orchestra services rendered on 3 February 1940, and acknowledging receipt of payment therefor over the signature "S. R. Smith" (R 16,30).

According to Mrs. Elizabeth C. Tomasello, hostess at the service club, the dances which were held at the service club on Thursday, 30 December 1948, and Thursday, 3 February 1949, were "juke box" dances, and no orchestra was present. It was the regular practice, however, to have an orchestra for the weekly dance held on Thursday nights (R 56).

Samuel R. Smith testified that he was employed as an engineer by the Southern Bell Company and that as a "hobby" he was an orchestra leader. Since October his orchestra had played consecutive Thursday nights at the service club with the exception of the nights of 30 December 1948 and 3 February 1949. He denied that the endorsements on the backs of Prosecution Exhibits 1 and 3 were executed by him. He admitted, however, that the signatures on Prosecution Exhibits 2 and 4 were his. He explained that when he was given a check for services he would sign a blank voucher. At first he was given but one blank voucher to sign but then accused began to have him sign two vouchers in blank when he was paid. Payment was usually made by check (R 70,71).

On 27 December 1948, a check of the Central Post Fund in the amount of $65.00 payable to the order of accused was drawn by Williamson and signed by Captain Nash. This check was issued to replenish the petty cash fund administered by accused by reimbursing it for certain expenditures accused had made from it (R 20,33; Pros Ex 10). In the regular course of the Central Post Fund's business, a "receiving report" dated 15-30 December 1948, purportedly signed by accused and acknowledging the receipt of $65.00 as reimbursement for the petty cash fund, came through to Williamson, the bookkeeper (R 16,17).

The appropriation by the Central Post Fund of the sum of $65.00 to replenish accused's petty cash fund was justified by two petty cash vouchers each dated 22 December 1948. One of these vouchers evidenced the payment of $33.00 to Southern Dairies for ice cream. Receipt of the sum of $33.00 was acknowledged on the voucher over the signature "H. H. SWENSON" under which appeared the identifying word "Driver" (R 18; Pros Ex 6). This voucher in turn was substantiated by an invoice of Southern

Dairies dated 22 December 1948 which showed the delivery of 20 gallons of ice cream to "Service Club - Capt. Carpenter" at a unit price of $1.65 and total price of $33.00. The invoice bore the notation "Pd. H.H.S." (R 18; Pros Ex 7). The other voucher showed the payment of $32.00 to General Novelty Co. for Christmas decorations ($10.00), New Years decorations ($10.00), noisemakers ($7.00), and confetti ($5.00). Receipt of the sum of $32.00 was acknowledged over the signature "Alma G. Crescent" under which appeared the legend "Cashier, General Novelty Co" (R 19; Pros Ex 8). This second voucher was substantiated by a sales slip dated 22 December 1948 which showed the sale to "Capt Wm Carpenter, Service Club, Conley, Ga" for $32.00, of the identical items appearing in the petty cash voucher. Also appearing on the sales slip was the notation "Pd A.G.C. General Novelty Co. Cashier" (R 19,20; Pros Ex 9).

Concerning the misplacement of certain vouchers, Williamson testified as follows on cross-examination:

"Q. Isn't it a fact that you did in some time between the dates of the 30th of December and the 3d of February call Captain Carpenter and ask him if he had certain vouchers which you had misplaced?
A. I did.

Q. And during the time that these vouchers were misplaced, did you know where they were?
A. I called Captain Carpenter and asked him if he had the petty cash vouchers, two petty cash vouchers, because I thought that I had received them and remembered seeing them. He said that he had them, that they had come back to him with some checks from me, so apparently I had placed them in with some checks going to him, going back to him, and he in turn returned them to me.

Q. And during the time that they were missing, you had no control over them whatsoever, did you?
A. Of those two vouchers?

Q. That's right.
A. No.

LAW MEMBER: To what two vouchers are you referring? Are they vouchers that have been introduced in evidence?

DEFENSE: That is correct.

LAW MEMBER: If they are, please refer to them by their exhibit numbers so we will know of what you are speaking.

DEFENSE: The vouchers that I am particularly calling to your attention are Prosecution Exhibits 7 and 8.

Q. Are those the vouchers to which you have testified?
A. Yes, there was two others supporting each of these." (R 25,26)

James Ivey, the assistant shipping supervisor of Southern Dairies, identified Prosecution Exhibits 7, 12, and 13 as an original shipping ticket and carbon copies thereof, respectively, made by him, and testified that the "three copies [were] made on the machine at the same time." The three exhibits each contained the following legend "No. IC 18969." It was routine to make an original shipping ticket and two copies thereof, and it was likewise routine to do this as soon as the order was ready to be shipped (R 69). Ivey added, however, that the original had been altered and stated that the contents of the original as drawn showed the following: "The gallonage was 1, the amount was $1.65, the total was $1.65, the date was 1-12 [49]." The content of the original, as set forth by Ivey was identical to the content of the copies.

According to Ivey his records failed to show that 20 gallons of ice cream were delivered to the service club on 22 December 1948, and had there been such a delivery he would have remembered it because "this is the only order that was shipped to this particular place." Ivey also testified that he had been working with the delivery drivers for over a year, knew all of them, and that there was no driver in the employ of Southern Dairies by the name of H. H. Swenson (R 66,68).

After Ivey had made the original invoice and identical carbon copies thereof, he gave the original and one copy to Henry H. Stewart, a special delivery man for Southern Dairies. According to the latter, he delivered a gallon of ice cream at the depot to a person who said he was accused. On receiving payment for the ice cream, Stewart placed the following notation on the original and copy "Pd H.H.S.", gave the original to the person representing himself as accused, and returned the copy to the office. Stewart identified Prosecution Exhibit 12 as the copy which he had been furnished for the transaction and had returned to the office (R 63-65,68).

On 7 February 1949, First Lieutenant Elmer H. Hatmaker received orders assigning him as Special Service Officer. The following morning Lieutenant Hatmaker met accused and Major Thomas G. Cassell at the service club. Major Cassell was there for the purpose of checking the Petty Cash Fund and witnessing its turnover to Lieutenant Hatmaker. Accused opened the safe in his office and brought out a cigar box which was supposed to contain the Petty Cash Fund. In the box were found one petty cash voucher for sixty-seven cents and eight pennies. Major Cassell asked accused if that was all of the $75.00. Accused's answer, if any, is unknown to the record (R 48,57).

On 7 February 1949, Captain James O. Lewis began an investigation of accused with reference to the checks hereinbefore designated as

"Exhibits 1 and 3." Accused was aware of the investigation, having been told of Captain Lewis' status in the case when he was placed under arrest (R 91,93).

On 14 February 1949, Major Bethune, the officer detailed to conduct the investigation under Article of War 70, accompanied by Captain Lewis, went to the Oliver General Hospital in Augusta, where accused was a patient in Ward 13. Lewis' mission was to obtain a specimen of accused's handwriting. Prior to interviewing accused, Lewis and Major Bethune talked to Major Sanford, who was in charge of accused's ward, stated their mission and asked his permission to talk to the accused. At the interview accused appeared to be in normal condition save for a slight nervous twitch. Major Bethune apprised accused of his rights in the presence of Lewis. In the presence of Major Bethune, Captain Lewis asked accused if he would sign his name and also sign the name "Sam R. Smith" twice (R 72-76). No offers of reward, promise, or threats were made by Captain Lewis to induce accused to accede to the request. Captain Lewis did not, however, explain to accused why he wanted the specimens of accused's handwriting. Accused wrote his own name on a paper and also the name "Sam R. Smith." Captain Lewis identified Prosecution Exhibit 14 as the specimens of handwriting which accused executed in his presence (R 90-92). As to accused's attitude in complying with the request, Captain Lewis testified as follows:

> "Q. Captain Lewis, was the accused reluctant at all? Did he demur in any way at the time that you requested the specimens of his handwriting?
>
> A. No, sir, he did not. He did, after he signed it twice, Sam R. Smith, he signed it twice, and I said, 'Well, will you sign it again?' He said, 'No, that's enough,' and I said, 'O.K.,' and that's where it dropped right there, I did not force him. I asked him if he would sign it twice. He signed it twice. I said, 'Will you sign it again?' And he said, 'No, that's enough,' and I said, 'All right,' that's all." (R 92)

Captain Lewis denied that he stated to accused "Here, sign it again. You can do better than that," but admitted that he said "Try to settle down and sign it the best you can. Maybe you could sign it a little better." Captain Lewis denied that he subsequently talked to accused concerning the incident (R 92).

Accused elected to testify concerning the voluntary character of the execution of the specimens of his handwriting. He testified that he was a patient in the locked ward for mental patients at the Oliver

General Hospital on 14 February when he executed the signatures requested by Captain Lewis. From what he could find out, he had been given sedatives for treatment and he could not think in his normal manner (R 98). Concerning his making of the handwriting specimens he testified:

> "The investigating officer told me he was finished with me, and Captain Lewis walked in and says, 'I want you to sign your name.' And I tried to sign it and I did finally, and he stated, 'Now, sign Sam R. Smith.' And I started to sign it and I quit because I was--couldn't write. Finally I wrote it and he says, 'You can do better than that. Sign it again.' And I signed it again and he says, 'Try one more time,' and I says, 'I'm all fogged up here.' I says, 'Just don't bother me.' I says, 'That's enough.' And he says, 'All right.'" (R 98)

On cross-examination he admitted knowing that Captain Lewis was investigating the case. He also testified that the only compulsion used by Captain Lewis was the statement, "Sign your name." (R 99).

Private Oscar G. Hollis, testified that he was one of accused's guards after accused's return to the Depot. Two or three days after accused's return, a time approximately two or three weeks prior to trial, Captain Lewis visited accused, and Hollis overheard their conversation which related to the time accused was in Oliver General Hospital. Hollis heard Captain Lewis tell accused that the latter, at the time, was "so doped up he was high as a kite, that he didn't know what he was doing." (R 94,95). Captain Lewis asked if accused had seen the signature he had put on the paper, and the accused replied that he had not (R 96).

In rebuttal to the testimony of Hollis, Captain Thomas M. Love testified that approximately two and one-half to three weeks prior to trial he and Captain Lewis visited accused. The estimated duration of this visit was fifteen minutes. The conversation had with accused concerned accused's status while in custody, but Captain Love also recalled that he had stated to accused that accused appeared to be in better spirits than when Love had seen him in the hospital. Captain Love could not remember Captain Lewis stating to accused, "You were higher than a kite when I saw you up at Oliver General Hospital and got your signature on the papers." Love could not recall with certainty who the guard was, but believed the guard to be Private Lakeman (R 100-102).

The specimens of accused's handwriting designated Prosecution Exhibit 14 were admitted in evidence over objection by the defense (R 77).

Lillie T. McWilliams testified that she was employed as a clerk typist at the service club, and that in that capacity she had typewritten letters for accused. On some occasions accused would write out the letters and give them to her to copy. She estimated that since November she had seen accused's signature and handwriting approximately one hundred or one hundred and fifty times. She identified Prosecution Exhibit 15 as a school work order for Automotive Ordnance School and testified that the handwriting thereon was that of accused. The Exhibit was admitted in evidence without objection (R 102-104).

Major Julius W. Toelken testified that he is Chief of the Scientific Investigations Laboratory attached to the Military Police School, Camp Gordon, Georgia. For seventeen years prior to his current tour of military service he was in charge of the Massachusetts State Police Laboratory. While there handwriting was one of the subjects under his direct control. When he retired from the Massachusetts State Police in March 1943, he became an instructor at the Provost Marshal General's School at Fort Custer. Major Toelken also had the duty of examining handwriting exhibits submitted by investigators. Since being in the Army he had prepared 500 handwriting exhibits, and had testified, in person, before approximately 35 general courts-martial, and had testified before other general courts-martial by deposition. Pursuant to a request by Captain Lewis, Major Toelken compared the handwriting appearing upon Prosecution Exhibit 14, and the signature appearing upon the reverse sides of Prosecution Exhibits 1 and 3 and concluded upon the basis of his comparison that signatures "Sam R. Smith" appearing in Prosecution Exhibits 1 and 3 were written by the same hand which wrote the signatures "Sam R. Smith" appearing upon Prosecution Exhibit 14 (R 80,81). After his initial appearance upon the witness stand, Major Toelken compared the handwriting upon Prosecution Exhibit 15 (work order) and the handwriting on the reverse sides of Prosecution Exhibits 1 and 3 and found such a strong similarity in characteristics that he was of the opinion they were in the same handwriting (R 106, 107). This opinion was conclusive although his examination was accomplished without optical equipment (R 107).

Upon examination by the court, Major Toelken was unable to state that the signature "William A. Carpenter" appearing on Prosecution Exhibit 11 (Accused's certificate of possession of Petty Cash Fund) was written by the same hand which wrote the signature "Sam R. Smith" appearing upon the reverse sides of Prosecution Exhibits 1 and 3, because of the dissimilarities of the letters of the signatures (R 119,120). Since the bodies of Prosecution Exhibits 2 and 6 (Petty cash vouchers for orchestra services and for ice cream) were hand

printed there was no basis for comparison with Prosecution Exhibit 11. Comparison of the signatures on Prosecution Exhibit 5 (Receiving report) with that in Prosecution Exhibit 11 showed "Salient Characteristics" which lead Major Toelken to the conclusion they were written in the same hand (R 120-121). Major Toelken was also of the opinion that the signatures upon Prosecution Exhibits 11 (certificate) and 15 (work order) were in the same handwriting (R 121). Major Toelken's opinions as set forth in this paragraph were rendered upon examination made on the witness stand, and no single examination exceeded two minutes in duration (R 122).

4. Evidence for the defense.

It was stipulated that if Colonel W. G. Skelton were present that he would testify that accused had worked as special service officer under his observation for about a year, and that accused had done a fine job. Prior to "the present incident" Colonel Skelton had no reason to doubt accused's honesty (R 109).

Lieutenant Colonel Kress R. Williams testified that he had known accused for seven months having lived in the same building as accused for that period. During his acquaintance with accused Colonel Williams had been able to observe his character and had no reason to say that it was other than excellent. He did not know anything derogatory concerning accused, and in his dealings with him had found him to be honest. Captain Grover C. Kistler had known accused for approximately twelve months and had similarly found his character to be excellent (R 110-111).

Captain Louis A. Allen, Jr., Special Service Officer at Fort McPherson, testified that he had known accused for fourteen months. Since accused was also a special service officer, Captain Allen had numerous dealings with accused and was impressed by the fine work accused was doing in special services. In Captain Allen's opinion, the accused was a fine officer both officially and socially (R 111-113).

Captain William A. Horton testified that he had known accused for fourteen months and was of the opinion that accused was a very honorable man and a good officer (R 113-114).

Mrs. J. W. Mitchell, proprietress of the Silver Court, testified that she had known accused for approximately a year, and that during that period she had employed accused as evening cashier and bartender at the Silver Court. She found accused to be competent and would be happy to employ him at the conclusion of the trial regardless of its outcome. There never had been any shortage while accused was working for her. Mrs. Mitchell was of the opinion that accused was a perfect gentleman.

A certificate of achievement awarded to accused for his work as Special Service Officer at the Atlanta Ordnance Depot was admitted in evidence without objection (R 117; Def Ex A).

Defense Exhibit B, Statement of Service for Longevity Pay, was admitted in evidence (R 117). It showed that accused had continuous service since June 1940.

After being apprised of his rights accused elected to remain silent. (R 118,119).

5. In support of the offenses of forgery and of uttering alleged under Charges I and II, the evidence thus shows that it was customary to hold weekly dances at the service club, Atlanta General Depot. The orchestra expenses for these dances were defrayed by the Central Post Fund. It was the usual practice prior to the dance to forward to accused, as Special Service Officer of the Depot, a check payable to the orchestra leader. When the check was given to the orchestra leader, a receipt in the form of a petty cash voucher would be obtained from him. Checks dated 27 December 1948 and 1 February 1949, each payable to Sam Smith in the amount of $50.00, drawn by Captain Nash, the custodian of the Central Post Fund, were forwarded to accused to pay for orchestra services for the nights of 30 December 1948 and 3 February 1949. On neither of these two occasions was an orchestra provided. Nevertheless, subsequent to each of the foregoing dates, petty cash vouchers signed "S. R. Smith" receipting for the sum of $50.00 for orchestra services were received by G. C. Williamson, Jr., bookkeeper of the Central Post Fund. On the evening of 7 January 1949, the accused, pursuant to a telephone conversation with Lester M. Killebrew, manager of the Post Exchange, sent the 27 December 1949 check payable to Sam Smith, to the Post Exchange, to be cashed. Killebrew cashed the check and sent the money therefor to accused. The check bore the endorsement "Sam R. Smith" on its reverse side. On or about 5 or 6 February 1949 accused personally cashed the 3 February check with Killebrew, this check similarly bearing the endorsement "Sam R. Smith." The orchestra leader who customarily furnished the orchestra for the weekly dances was named Sam R. Smith but he testified that his orchestra did not play at the service club on 30 December 1948 and 3 February 1949. He further stated that the endorsements on the two checks in question were not his. He admitted, however, that the signatures on the petty cash vouchers receipting for payment for orchestra services on those two dates, were his, but stated that he was accustomed to sign the petty cash vouchers in blank and that, on more than one occasion, the accused had him sign more than one blank petty cash voucher. Upon comparison of the specimen signature "Sam R. Smith," written by accused, with the endorsements "Sam R. Smith" on the two

checks in question, Major Julius W. Toelken, a qualified handwriting expert, found that the endorsements were written by the same hand which wrote the specimen. The circumstances negative any inference that accused or any other person was authorized to indorse the payee's signature to the checks in question.

Considering the evidence thus contained in the record in the light of the pertinent parts of the Manual for Courts-Martial, we observe that:

> "Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice." (Par 180i, MCM 1949), and

> "To constitute this offense [Uttering a forged instrument] there must be a knowledge that the instrument is a forgery, and there must be an intent to defraud. The intent to defraudmay be implied if knowledge of the falsity of the document is shown. It is not necessary that the instrument actually be passed. A mere offer coupled with a representation that it is good is a sufficient uttering." (Par 183c, MCM 1949, p.259).

Indorsements on instruments such as the checks in the instant case, if genuine, are of such character as might operate to the prejudice of another and hence are the subjects of forgery (Par 180i, MCM 1949). The uncontradicted evidence of record shows that accused cashed the two checks in question, each of which bore a forged indorsement. Without recourse to the testimony of Toelken, this evidence is sufficient to warrant an inference that accused was the author of the forgeries.

> "Possession of a forged instrument by one who utters or seeks to utter it or otherwise to realize on it or profit by it, without a reasonable explanation of how the possessor acquired it, warrants an inference that the possessor himself committed the forgery or was a guilty accessory to its commission." (State v. Early, 119 Kansas 446, 239 P.901; CM 334270, Stricklin).

The cashing of the two checks evidences the fraudulent intent requisite to the offenses of forgery and uttering (CM 247111, Grannell, 30 BR 255).

We accordingly conclude that the findings of guilty of forgery and uttering are established by the record of trial beyond any reasonable doubt.

Specifications 1 and 2 of Charge III, allege two offenses of feloniously stealing $65.00 on 27 December 1948 and $74.25 on 7 February 1949, respectively, lawful money of the United States, property of the United States, intended for the military service thereof in violation of the 94th Article of War. The court found the accused guilty of Specification 1 except the words and figures "$65.00" and "intended for the military service thereof" substituting therefor the words and figures "about $31.35". The court also found accused guilty of Specification 2 except the words "intended for the military service thereof." Accused was found not guilty of Charge III but guilty of a violation of the 93d Article of War.

Proof of the offenses of stealing alleged in the specifications of Charge III shows that accused as Special Service Officer was also custodian of a petty cash fund of $75.00 financed by the Central Post Fund, Atlanta General Depot. In September 1948, accused executed a certificate in which he acknowledged possession of $75.00 or the equivalent thereof in signed vouchers of the petty cash fund. Periodically, the fund was replenished by appropriations from the Central Post Fund. on the basis of a satisfactory showing by accused of his expenditures from the petty cash fund. The appropriations would be in amounts equal to his expenditures. On 27 December 1948 a check to replenish the petty cash fund was drawn to the order of accused in the amount of $65.00. This check, when admitted in evidence, bore accused's purported signature as an indorsement, and the perforated legend "PAID 1-4-49." In the regular course of business, Williamson received a receiving report dated "15 - 30 December 1948" acknowledging the receipt of $65.00 and bearing accused's purported signature as the signature of the receiving officer. From the known specimen of accused's signature in evidence, the court could properly find that the indorsement on the check payable to accused and the signature on the receiving report were in accused's handwriting.

It further appears from the evidence of record that accused, at the time he received the appropriation for $65.00 to replenish the petty cash fund, had not accounted to the Central Post Fund for his claimed expenditures according to the normal procedure, namely, the concurrent submitting of petty cash vouchers and supporting papers evidencing his claimed disbursements. Subsequent to accused's receipt of the $65.00, two such vouchers with attachments to support them were received by Williamson. No evidence was offered attacking the voucher of the General Novelty Company in the sum of $32.00 and it must therefore be assumed that the prosecution recognized and admitted that it represented a valid and bona fide expenditure by accused. The genuineness of the voucher which purported to evidence the payment by accused of $33.00

on 22 December 1948 to Southern Dairies, however, was successfully attacked by the prosecution. The voucher bore the signature "H. H. Swenson" acknowledging receipt of the payment of $33.00. Uncontradicted evidence showed that a person so named was not and had not been employed by Southern Dairies. In effect, the receipt was a forgery (Par 180i, MCM 1949). Supporting the voucher was a receipted invoice in the amount of $33.00 for ice cream delivered to the service club on 22 December 1948. Evidence similarly undisputed shows that this receipted invoice was also a forgery in that it had been altered from its original substance. In its original form, the invoice reflected the delivery of one gallon of ice cream to the service club on 12 January 1949 and the payment of $1.65 therefor. Other testimony established that the delivery reflected in the original invoice was the sole and only one ever made to the service club.

It was further shown that on 7 February 1949, when accused was relieved as Special Service Officer, all that he had to show of the petty cash fund was eight cents in coins and a voucher for sixty-seven cents leaving unaccounted for and unexplained the sum of $74.25.

A comprehensive definition of larceny or stealing and the elements of proof necessary to sustain a specification thereof is stated in the Manual for Courts-Martial, U. S. Army 1949, as follows:

> "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.
>
> * * *
>
> Proof.--(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." (Par 180g, MCM 1949).

Each unlawful appropriation alleged in the instant case consists of a conversion through breach of trust and is the equivalent of what was formerly termed embezzlement.

When we examined the evidence of record as it pertains to Specification 2 of Charge III, we find that it is legally sufficient to sustain the findings of guilty as expressed by the court. In this regard, the evidence shows that accused was entrusted with a petty cash fund in the sum of $75.00, the receipt of which he acknowledged by a certificate dated 29 September 1948; that when on 7 February 1949, he was relieved by Lieutenant Hatmaker as Special Service Officer, and consequently, as custodian of the petty cash fund, he was unable to account for $74.25 of the $75.00 fund. Such a showing of evidence, standing unopposed and unexplained as in the instant case, is legally adequate to provide competent proof of all the elements of the offense charged except element (b), supra, and has so been held by the Board of Review in the following language:

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

One discrepancy is noted between the proof of Specification 2, Charge III and the finding. It concerns the $1.65 expended by accused on 12 January 1949 for the purchase of one gallon of ice cream from Southern Dairies. The finding reflects that accused was not given credit by the court for this expenditure although it was proven that it was made by him. Thus, the amount found by the court to have been embezzled by accused from the fund should have been $72.60 rather than $74.25. The Board of Review, however, does not regard this as a material variance sufficient to merit the disturbance of the finding since the amount proven to have been embezzled was in any event, in excess of $50.00.

With respect to element (b), supra, accused was charged with stealing money, property of the United States, furnished and intended for the military service, and was found guilty of stealing money, property of the United States. There can be no doubt that the money was property chargeable as property of the United States. The record amply demonstrates that the petty cash fund from which the money was taken was an adjunct to the welfare activities of the Central Post Fund, a fund recognized and authorized by Paragraph 4b, AR 210-50, WD, 13 Dec 1945. The funds of the petty cash fund are quasi public in character in that they are held through an officer of the Army for benefit of Army personnel. Hence, the Government has a special property interest in such a fund, and the fund and its property may be properly alleged as property of the United States. The findings that the money involved was property of the United States is lesser and included in the allegation that the money was property of the United States, furnished and intended for the military service thereof (CM 199737, Taft, 4 BR 163). Thus element (b), supra, is property sustained by the evidence.

Analysis of the evidence adduced in support of the findings of guilty of Specification 1, Charge III, shows that accused received a check for $65.00 dated 27 December 1948 from the Central Post Fund, the purpose of which was to replenish the petty cash fund by reimbursing it for monies expended; that thereafter, accused submitted two petty cash vouchers with supporting papers totalling $65.00 in justification of the expenditures; and that one of these petty cash vouchers, that of the Southern Dairies for $33.00, was spurious in that it bore the signature of H. H. Swenson, a nonexistent person. Also shown was that on the invoice submitted to support the petty cash voucher, the date had been altered, and thus ante-dated, from 12 January 1949 to 22 December 1948, the amount of ice cream purported to have been delivered by it had been raised from one gallon to twenty gallons and the total cost of the ice cream represented as having been delivered had been changed from $1.65 to $33.00. Not shown, however, was how much money was in the petty cash fund when the $65.00 check had been issued to replenish it.

Despite the lack of showing of the amount of money in the petty cash fund at the time that accused received the check for $65.00 in replenishment thereof, we nevertheless find that the evidence of record is legally sufficient to sustain the court's expressed findings. Whatever amount was in the petty cash fund on 27 December 1948 is immaterial since there was undisputed proof that accused, as the custodian of the petty cash fund, received a check for $65.00 for that fund and that at a later date, a forged petty cash voucher and supporting invoice

for $33.00 had been submitted by accused to the Central Post Fund in partial justification of the $65.00 appropriation. From the evidence that the forged voucher and the forged invoice were delivered to Williamson by accused it may be inferred that he was the author of the forgeries to which he had resorted for the purpose of concealing his felonious stealing from the petty cash fund (Stricklin, supra).

Also sufficiently shown is that accused negotiated and received the proceeds of the $65.00 check. In the absence of testimony by officials of the bank upon which the check was drawn, we are confined to a determination of the competency of evidence intrinsic to the check as admitted in evidence. From examination of this evidence we find on the check the endorsement of accused and the perforated legend "PAID 1-4-49 64 1." The endorsement of accused according to the tenor of the check was a prerequisite to its negotiation, and the presence of his endorsement is, therefore, an indication that he negotiated it. With respect to the perforated stamp, we are entitled to take notice, judicially, of practices in the banking business which are matters of common knowledge (Stockyards National Bank v. First National Bank, 249 F 421; Texas & Pacific Ry. Co. v. Pottorff, 63 F2d 1; Baker v. Spokane Sav. Bank, 71 F2d 487; Ali v. Haff, 114 F2d 369,371). The court had the same authority. In this regard it is a matter of common knowledge that banks, in the regular course of business, make a notation of payment followed by the transit number of the paying bank upon checks when they are paid, and that it is the regular course of business to make such entries. The perforations under discussion are, therefore, business entries within the meaning of the Federal Shopbook Rule (28 U.S.C. 1732). The failure to object to the admissibility of the perforated stamp constituted a waiver of objection to its genuineness (Par 129b, MCM 1949).

This, in light of the evidence in the instant case which shows, inter alia, that accused's endorsement was the only endorsement on the check and that the check was paid by the bank upon which it was drawn, is sufficient, in the absence of anything to the contrary, to support the inference that accused received the proceeds of the check (Troup v. State, 26 SO 2d 611,620-621).

Colonel Winthrop in his "Military Law and Precedents", Reprint 1920, at page 705, has stated the following:

> "The fact of the fraudulent conversion in embezzlement may be evidenced by *** a deliberate falsification *** by the rendering of a false return or account *** in which a fictitious balance is made to appear, or which is otherwise

falsified or purposely misstated."

We are of the opinion that the statement above is applicable in the instant case. The evidence of the submission by accused of a forged petty cash voucher and invoice for $33.00 to justify part of an appropriation to a fund of which he was custodian, when coupled with proof that accused had prior to the submission of the forgeries received the proceeds of the appropriation, is evidence that he embezzled by fraudulently converting to his own use the amount represented by the forgeries.

Thus, it was probatively established that accused stole $33.00 of the petty cash fund entrusted to him.

The discussion, supra, with reference to Specification 2 of Charge III, that the United States had a special property interest in the petty cash fund and was therefore properly named as the owner thereof in the Specification, and that the findings that the money alleged to have been stolen was property of the United States is lesser and included in the allegation that the said money was property of the United States, furnished and intended for the military service thereof, is equally applicable to Specification 2 of Charge II.

It is noted that the court found by exception and substitution that accused on 27 December 1948 embezzled $31.35. This amount was obviously arrived at by the court by the mathematical process of subtracting from the sum of $65.00 the amount of the General Novelty Company's voucher and by allowing as a valid charge, the cost of one gallon of ice cream shown to have been delivered by Southern Dairies on 12 January 1949. Since the latter expenditure was not made until a date subsequent to that alleged in Specification 1, it is clear that it could not constitute a valid credit to the embezzlement alleged. This minor discrepancy, however, is not considered by us to constitute a material variance between proof and finding as the amount found was less than the amount proved.

6. There was admitted in evidence, over objection by the defense, an exhibit containing specimens of accused's handwriting. The basis for the defense objection was that accused was compelled to execute

the specimens, and hence he was compelled to be a witness against himself. Considering the record of trial in its entirety, we are unable to agree with the contention of the defense that compulsion was used in obtaining the specimens of accused's handwriting. To the contrary, we find that prior to executing the handwriting specimens, accused had been apprised of his rights under the 24th Article of War, and that, thereafter, no compulsion was employed to induce accused to execute the specimens. Accordingly, it is unnecessary for us to determine the legal effect of proof of compulsion upon the record of trial.

7. Records of the Department of the Army show that accused is 32 years of age and married. He was graduated from high school and then served for two and one-half years in the Civilian Conservation Corps. In civilian life he was employed as a glass blower. He had enlisted service from May 1940 until 18 February 1943 when he was commissioned a second lieutenant. He was promoted to first lieutenant on 14 December 1943 and to captain on 27 December 1945. He served in the European Theater with a combat engineer battalion from December 1944 to April 1945. He also served in the European Theater during 1946 and 1947. His efficiency ratings of record are as follows: Superior (11); Excellent (6); and Very Satisfactory (1).

8. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal, total forfeitures, and confinement at hard labor for three years is authorized upon conviction of violations of Articles of War 93 and 96. Confinement in a penitentiary is authorized by Article of War 42 upon conviction of the offenses of forgery, uttering a forged instrument, and the stealing of property of a value of more than fifty ($50.00) dollars.

Wilmot T. Baughn, J.A.G.C.

Charles J. Berkowitz, J.A.G.C.

[illegible], J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Captain William A. Carpenter, 01110413, 3540 Army Service Unit, Atlanta General Depot, Atlanta, Georgia, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. A United States Penitentiary is designated as the place of confinement.

Franklin P. Shaw, Brig Gen, JAGC

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

22 July 1949

E. M. Brannon, Brig Gen, JAGC
Chairman

CM 335738

I concur in the foregoing action.

THOMAS H. GREEN
Major General
The Judge Advocate General

1 August 1949

(GCMO 51, August 10, 1949).

Incl 1

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

CSJAGQ CM 335786

AUG 9 1949

UNITED STATES	)	FIRST ARMY
v.	)	Trial by G. C. M., convened at Fort Devens, Massachusetts, 1-2 March 1949. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.
Private HARVEY E. WELSH (RA 36867985), Headquarters and Headquarters and Service Company, 751st Heavy Tank Battalion.	)	

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

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

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

Specification 1: In that Private Harvey E. Welsh, Headquarters and Headquarters and Service Company, 751st Heavy Tank Battalion, did, without proper leave, absent himself from his station at Fort Devens, Massachusetts, from about 2 November 1948 to about 8 November 1948.

Specification 2: In that Private Harvey E. Welsh, Headquarters and Headquarters and Service Company, 751st Heavy Tank Battalion, did, without proper leave, absent himself from his station at Fort Devens, Massachusetts, from about 13 November 1948 to about 18 December 1948.

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

Specification 1: In that Private Harvey E. Welsh, Headquarters and Headquarters and Service Company, 751st Heavy Tank Battalion, having been restricted to the limits of his company area, did, at Fort Devens, Massachusetts, on or

about 13 November 1948 break restriction by going absent without leave from his organization.

Specification 2: In that Private Harvey E. Welsh, Headquarters and Headquarters and Service Company, 751st Heavy Tank Battalion, did, at Ayer, Massachusetts, on or about 9 October 1948, with intent to deceive, wrongfully and unlawfully make and utter to Lester W. Berry Jr., a certain check, in words and figures as follows, to wit:

Columbus, Ga. 9 Oct 1948 No. 9

FIRST NATIONAL BANK

Pay to the Order of - - - - - - - -Cash- - - - - - - - - - $21.50

Twenty-one and Fifty-Hundreds - - - - - - - - - - - - - Dollars

/S/ Harvey E. Welsh

and by means thereof did fraudulently obtain from Lester W. Berry Jr., twenty-One dollars and fifty cents ($21.50) in United States Currency, then knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Columbus, Georgia for payment of said check.

Specification 3: In that Private Harvey E. Welsh, Headquarters and Headquarters and Service Company, 751st Heavy Tank Battalion, did, at Ayer, Massachusetts, on or about 11 October 1948, with intent to deceive, wrongfully and unlawfully make and utter to Hyman Slarsky, a certain check in words and figures as follows, to wit:

Columbus, Ga. 11 Oct 48 No. 11

FIRST NATIONAL BANK

Pay to the Order of - - - - - - Cash - - - - - - - - - - $41.80

Forty one and Eighty Hundreds Dollars

For Rent and Groceries.

/S/ Harvey E. Welsh

and by means thereof did fraudulently obtain from Hyman Slarksy merchandise and money to the value of about Forty-One dollars and eighty cents ($41.80), then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Columbus, Georgia for payment of said check.

Specification 4: In that Private Harvey E. Welsh, Headquarters and Headquarters and Service Company, did, at Ayer, Massachusetts, on or about 11 October 1948, with intent to deceive,

wrongfully and unlawfully make and utter to Hyman Slarsky, a certain check in words and figures as follows, to wit:

Columbus, Ga. 11 October 1948 No. 10

FIRST NATIONAL BANK

Pay to the Order Of - - - - - - - Cash - - - - - - - -$53.20/100

Fifty-Three and twenty/Hundreds Dollars

/S/ Harvey E. Welsh

and by means thereof did fraudulently obtain from Hyman Slarsky merchandise and money of the value of about Fifty-Three dollars and twenty cents ($53.20), then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Columbus, Georgia for payment of said check.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and the Specifications thereunder; guilty of Charge II and Specifications 1 and 2 thereunder; guilty of Specification 3 of Charge II except for the words "Merchandise and money to the value of about $41.80", substituting therefor the words "$41.80 in United States currency", of the excepted words not guilty, of the substituted words guilty; and guilty of Specification 4 of Charge II except for the words "Merchandise and money to the value of about $53.20", substituting therefor the words "$53.20 in United States currency", of the excepted words not guilty, of the substituted words guilty. No evidence of previous convictions was introduced. Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor, at such place as the reviewing authority may direct for a period of two years and nine months. The reviewing authority approved the sentence but remitted nine (9) months of the confinement adjudged, designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, or elsewhere as the Secretary of the Army may direct, as the place of confinement, and forwarded the record of trial for action under Article of War 50e.

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

4. Specifications 2, 3, and 4 of Charge II allege that the accused did on certain dates, with intent to deceive, wrongfully and unlawfully make and utter to certain persons, checks in the amounts of $21.50, $41.80, and $53.20, and by means thereof did fraudulently

obtain those amounts, knowing that he did not have and not intending that he should have sufficient funds in the bank for payment thereof. The court-martial in arriving at the authorized maximum punishment apparently concluded that the Specifications alleged an intent to defraud for which the total authorized maximum confinement is 5 years. The table of maximum punishments list separate authorized maximum punishments for the offense of obtaining money by check without sufficient funds in the bank with intent to defraud and for the similar offense of obtaining money without intent to defraud (MCM, 1940, p. 140). The offenses alleged in the Specifications under consideration of obtaining money with "the intent to deceive" have been held to be offenses which are without intent to defraud (CM 329503, Frith, 78 BR 83, 89-90). Accordingly, since these Specifications allege only an intent to deceive, the authorized maximum period of confinement is four months for each offense, regardless of the amount involved.

The accused was found guilty of Specification 2 of Charge I which alleges that he did, without proper leave, absent himself from his station at Fort Devens, Massachusetts, from about 13 November 1948 to about 18 December 1948. The accused was also found guilty of Specification 1 of Charge II which alleges that he, having been restricted to the limits of his company area, did, at Fort Devens, Massachusetts, on or about 13 November 1948, break restriction by going absent without leave from his organization. Since both of these offenses arose out of and constitute different aspects of the same act, only one punishment may be imposed with reference to the act in its most serious aspect (MCM 1949, par 80a). The most important aspect of a criminal act is that for which the most severe punishment is authorized. The maximum confinement authorized by the Table of Maximum Punishments for thirty-five days absence without leave is one hundred five days and the maximum confinement authorized for breach of restriction is confinement for one month. (MCM 1949, par 117c). The offense of absence without leave constitutes, therefore, the more important aspect of the act of the accused, and punishment can be imposed only for it (CM 313544, Carson, 63 BR 137).

Furthermore, none of the offenses of which the accused was found guilty authorize a dishonorable or bad conduct discharge, (MCM, 1949, par 117c). The Manual provides, however, that,

> "If an accused be found guilty by a court of two or more offenses for none of which dishonorable or bad conduct discharge is authorized, the fact that the authorized confinement without substitution for such offenses is six months or more will authorize bad conduct discharge and forfeiture of all pay and allowances due after the order directing execution of the approved sentence." (MCM, 1949, p 143).

It follows, therefore, that the authorized maximum punishment in this case is a bad conduct discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the sentence

and confinement at hard labor for one year, four months and three days.

5. For the foregoing reasons the Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Specifications and Charges, and legally sufficient to support only so much of the sentence as provides for bad conduct discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for one year, four months and three days.

Oscar E. Lipscomb, J.A.G.C.
Francis T. Duell, J.A.G.C.
Samuel S. Wolf, J.A.G.

AUG 1949

CSJAGQ CM 335786 1st Ind

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

TO: Commanding General, First Army, Governors Island, New York 4, New York

1. In the case of Private Harvey E. Welsh (RA 36867985), Headquarters and Headquarters and Service Company, 751st Heavy Tank Battalion, Fort Devens, Massachusetts, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the charges and specifications, and legally sufficient to support only so much of the sentence as provides for bad conduct discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for one year, four months and three days. Under Article of War 50e this holding and my concurrence vacate so much of the sentence as is in excess of bad conduct discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for one year, four months and three 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 335786)

1 Incl
R/T

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

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

CSJAGQ CM 335802

AUG 9 1949

UNITED STATES	25TH INFANTRY DIVISION
v.	Trial by G. C. M., convened at Osaka, Honshu, Japan, 28 January and 25 February 1949. Both: Dishonorable discharge (suspended) and confinement for two (2) years. Disciplinary Barracks.
Corporals GERALD M. McGUIRE (RA 18301189) and JENNINGS L. FRANKLIN (RA 16091377), both of Co. A, 65th Engineer Combat Battalion, APO 25	

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

1. The Board of Review has examined the record of trial in the case of the soldiers named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

Corporal Gerald M. McGuire:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Gerald M. McGuire, Corporal, Company A, 65th Engineer Combat Battalion, APO 25, did, at Kanaoka Barracks, Sakai, Honshu, Japan, on or about March 1948 through November 1948, feloniously embezzle by fraudulently converting to his own use, Military Occupation Currency, in the value of $200.00, the property of Post Exchange Branch Number 513, entrusted to him by virtue of his employment in said Post Exchange.

Corporal Jennings L. Franklin:

CHARGE: Violation of the 93rd Article of War.

Specification: In that, Jennings L Franklin, Company A 65th Engineer Combat Battalion, APO 25, did, at Kanaoka Barracks, Sakai, Honshu, Japan, on or about September 1948 through November 1948, feloniously embezzle by fraudulently converting to his own use, Military Occupation Currency in the value of

$200.00, the property of Post Exchange Number 513, entrusted to him by virtue of his employment in said Post Exchange.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for two years. The reviewing authority approved each sentence, ordered the sentence executed but suspended execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement. The Branch United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army may direct was designated as the place of confinement. As to accused McGuire, the result of trial was promulgated in General Court-Martial Orders No. 28, Headquarters 25th Infantry Division, APO 25, 25 March 1949. As to accused Franklin, the result of trial was promulgated in General Court Martial Orders No. 27, Headquarters 25th Infantry Division, APO 25, 25 March 1949.

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

Article of War 16, in part, provides:

> "nor shall any defendant awaiting trial be made subject to <u>punishment or penalties</u> other than confinement prior to sentence on charges against him" (Underscoring supplied).

Executive Order No. 10020, promulgating the Manual for Courts-Martial, 1949, provides that it shall be in force and effect on and after 1 February 1949 with respect to all court-martial processes taken on or after that date. Paragraph 115, page 126, Manual for Courts-Martial, 1949, citing Article of War 16, provides that no accused shall, prior to the order directing execution of the approved sentence, be made subject to any punishment or penalties other than confinement. Paragraph 116g, page 130, provides that a forfeiture becomes legally effective on the date the sentence adjudging it is promulgated.

In CM 335803, <u>Berry</u>, decided 11 May 1949, the Board of Review in a similar case stated:

> "The prescribed forms of sentences to forfeitures (appendix 9, pp 364-365, Forms 8, 9b, 17, 20, MCM, 1949) are worded 'to become due after the date of the order directing execution of the sentence.' These forms are an integral part of the Manual promulgated by the Executive Order. There is no authority in Article 16 nor in the implementing provisions

of the Manual which warrants the forfeiture of pay and allowances due at the date of the order executing the sentence nor does authority exist for forfeitures to become due at the date of the order executing the sentence. And to further clarify appropriate imposable sentences there is no authority in law to impose a forfeiture of all pay and allowances due or to become due after the date of the order directing execution of the sentence. The sentence should be clear and unambiguous, which may be accomplished by observing the approved forms set out in the Manual."

It is the opinion of the Board of Review in the instant case that the forfeiture of all pay and allowances is illegal as to all pay and allowances except those accruing after the date of the order directing the execution of the sentence.

4. For the foregoing reasons the Board of Review holds the record of trial legally sufficient to support the findings of guilty as to each accused and legally sufficient to support only so much of the sentence as to each accused as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for two years.

Abra E. Lipscomb, J.A.G.C.
Lewis B. Hurd, J.A.G.C.
Samuel S. Wolf, J.A.G.C.

REC'D LA - 2 SEP

(2)

CSJAGQ - CM 335802 1st Ind

JAGO, Dept of the Army, Wash 25, D. C. 8/19 AUG 19 1949

To: Commanding General, 25th Infantry Division,
APO 25, c/o Postmaster, San Francisco, California

1. In the case of Corporals Gerald M. McGuire (RA 18301189) and Jennings L. Franklin (RA 16091377), both of Company A, 65th Engineer Combat Battalion, APO 25, 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 as to each accused, and legally sufficient to support only so much of the sentence as to each accused as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for two years. Under Article of War 50e this holding and my concurrence vacate so much of the sentence as to each accused relating to forfeitures as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence.

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

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

(CM 335802).

2 Incls
1. R/T
2. Dft GCMO

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

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

CSJAGV CM 335803

APR 27 1949

UNITED STATES v. Corporal JAMES V. BERRY (RA 35998752), Headquarters Detachment, 7747 Military Police Railway Security Group	HEADQUARTERS FRANKFURT MILITARY POST Trial by G.C.M., convened at Frankfurt am Main, Germany, 9 March 1949. Dishonorable discharge (suspended) and confinement for two (2) and one half (½) years. Disciplinary Barracks.

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

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Corporal James Vincent Berry, Headquarters Detachment, 7747th Military Police Railway Security Group, did, at Frankfurt am Main, Germany, on or about 15 February 1949, with intent to defraud, wrongfully, knowingly and unlawfully have in his possession approximately three thousand dollars ($3,000.00) in counterfeited United States Federal Reserve Notes.

Specification 2: In that Corporal James Vincent Berry, Headquarters Detachment, 7747th Military Police Railway Security Group, did, at Frankfurt am Main, Germany, from on or about 22 December 1948 to on or about 15 February 1949, with intent to defraud, wrongfully, knowingly and unlawfully conceal approximately three thousand dollars ($3,000.00) in counterfeited United States Federal Reserve Notes.

Specification 3: Finding of Not Guilty.

He pleaded not guilty to the Charge and all Specifications, and was found not guilty of Specification 3 of the Charge and guilty of Specifications 1 and 2 of the Charge and of the Charge. No evidence of previous convictions was introduced. Accused was sentenced to dishonorable discharge, to forfeit all pay and allowances due or to become due at the date of the order executing the sentence, and confinement at hard labor for two and a half years. The

reviewing authority approved the sentence and ordered it executed but suspended execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, or elsewhere as the Secretary of the Army may direct as the place of confinement. The result of the trial was promulgated in General Court-Martial Orders No. 12, Headquarters Frankfurt Military Post, APO 757, 28 March 1949.

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

Article of War 16, in part, provides:

> "nor shall any defendant awaiting trial be made subject to punishment or penalties other than confinement prior to sentence on Charges against him" (Underscoring supplied).

Executive Order No. 10020, promulgating the Manual for Courts-Martial, 1949, provides that it shall be in force and effect on and after 1 February 1949 with respect to all court-martial processes taken on or after that date. Paragraph 115, page 126, Manual for Courts-Martial, 1949, citing Article of War 16, provides that no accused shall, prior to the order directing execution of the approved sentence, be made subject to any punishment or penalties other than confinement. Paragraph 116g, page 130, provides that a forfeiture becomes legally effective on the date the sentence adjudging it is promulgated.

The prescribed forms of sentences to forfeitures (Appendix 9, pp 364-365, Forms 8, 9b, 17, 20, MCM, 1949) are worded "to become due after the date of the order directing execution of the sentence." These forms are an integral part of the Manual promulgated by the Executive Order. There is no authority in Article 16 nor in the implementing provisions of the Manual which warrants the forfeiture of pay and allowances due at the date of the order executing the sentence nor does authority exist for forfeitures to become due at the date of the order executing the sentence. And to further clarify appropriate imposable sentences there is no authority in law to impose a forfeiture of all pay and allowances due or to become due after the date of the order directing execution of the sentence. The sentence should be clear and unambiguous, which may be accomplished by observing the approved forms set out in the Manual. The forfeitures imposed in the instant case are illegal in two respects, namely, in imposing forfeitures of all pay and allowances due, and in imposing forfeitures of all pay and allowances to become due at the date of the order executing the sentence.

CSJAGV CM 335803 Cont'd

4. For the foregoing reasons the Board of Review holds the record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 2 of the Charge and of the Charge, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for two and one half years.

Carlos E. McCafee J.A.G.C.
Laurel L. Chambers J.A.G.C.
George B. Springston J.A.G.C.

CSJAGV CM 335803 1st Ind. MAY 13 1949

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

To: Commanding General, Frankfurt Military Post, APO 757, c/o Postmaster, New York, New York.

1. In the case of Corporal James V. Berry (RA 35998752), Headquarters Detachment, 7747th Military Police Railway Security Group, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 2 of the Charge and of the Charge, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for two and one-half years. Under Article of War 50 this holding, together with my concurrence, vacates so much of the sentence as to forfeitures as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence.

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

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

(CM 335803).

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls:
1 Record of trial
2 Draft GCMO

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

CSJAGK CM 335810

3 JUN 1949

UNITED STATES v. Second Lieutenant BYRON R. KEARBEY (0-1540871), 30th Infantry Regiment	THE INFANTRY CENTER Trial by G.C.M., convened at Fort Benning, Georgia, 4 March 1949. Dismissal and $500 fine.

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

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

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

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

Specification: In that Second Lieutenant Byron R. Kearbey, 30th Infantry Regiment, (formerly 325th Infantry Regimental Combat Team) was, at Phenix City, Alabama, on or about 16 November 1948, disorderly in uniform in a public place, to wit: The Swing Club.

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

Specification: In that Second Lieutenant Byron R. Kearbey, ***, was, at Phenix City, Alabama, on or about 16 November 1948, disorderly in uniform in a public place, to wit: The Swing Club.

He pleaded not guilty to and was found guilty of all charges and specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service and to pay to the United States a fine of five hundred dollars. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

Private Joseph F. Hanna and three soldier friends were at a tavern known as "Beechie Howard's" in Phenix City, Alabama, on the night of

Incl # 3

16-17 November 1948. They arrived there at about 2400 hours on 16 November 1948 after spending two or three hours in another tavern (R 6,21,25,31-35). Shortly thereafter, the accused, accompanied by a young lady, entered "Beechie Howard's" and Hanna struck up a conversation with him and went to accused's table for a drink (R 6,7, 14,21,22,26,36). The accused, upon invitation, went to the soldiers' table for a drink, taking his bottle of whiskey with him. The music started and, leaving his bottle of whiskey on the soldiers' table, the accused danced with his companion. After the dance, the accused went to the soldiers' table to get the bottle (R 7,14,15,22,23,27,32).

There were some words between accused and the soldiers, and Hanna was hit on the head by the bottle of whiskey which accused was holding. The accused then moved away ten or twelve feet and Hanna threw a chair at him, which collided in midair with a chair thrown by the accused. Accused then went to the kitchen to await the arrival of the military police and Hanna went outside (R 7-10,15-20,23,24,28-34,37,38).

Before the arrival of the military police, Hanna re-entered "Beechie Howard's" where blood was washed from his face (R 31,34,37).

When Corporals Payne and Hopkins of the military police arrived they took the accused and Hanna to the police station in Columbus, Georgia, and there summoned Lieutenant Sweeney, the military police duty officer, to interview the accused. Lieutenant Sweeney and Corporal Payne testified that accused was orderly, soldierly, and cooperative, but the fact that he had been drinking was apparent, although he was not "drunk" (R 40-47).

En route to the police station accused told Corporal Payne that "he had forgotten himself and did that on the spur of the moment, and please for us to forget it" or words to that effect (R 44,45).

4. Evidence for the Defense

The accused, after being informed of his rights, elected to make an unsworn statement through his counsel. Accused enlisted in the Army in February 1941, at the age of 16, and was sent to the Philippine Islands in the Coast Artillery. He fought on Corregidor with the Beach Defense, being captured on 6 May 1942. He remained a prisoner of war until 5 September 1945 and was badly treated. He re-enlisted in January 1946, and after attending Officer Candidate School was commissioned in February 1948 and in May was assigned to Fort Benning as a student officer for three months. In September 1948 he was assigned to the 325th Infantry, his current assignment (R 76-77).

Accused stated that he had never before been to "Beechie Howard's,"

but that his "date" wanted to go there, so they took a cab to that place. Shortly after their arrival, a paratrooper started to annoy them. Upon realizing the character of the Beechie Howard establishment, accused wanted to leave, but, not wishing to appear rude to his companion, suggested that they have one more drink and leave. They had been there about an hour at that time. He danced with his companion, and when they returned to their table they missed their bottle of whiskey. His companion noticed it on the nearby table of the soldiers. Accused went over and, picking it up, noticed that it was almost empty. When he asked why they had consumed it all, one of the soldiers (Hanna), said: "So what, what are you going to do about it?" and started to get up. Accused, thinking that Hanna might use a knife which he had previously displayed, reached over with his left hand to push Hanna back down in the chair, since his right hand was too close to the soldier to use. Accused was holding the bottle in his left hand. As accused brought his left hand around, Hanna dodged and the bottle accidentally came into contact with Hanna's forehead. Accused then stepped back, and the soldier threw a chair at him. He regretted the injury and did not mean to strike Hanna. He admitted that he had possibly used poor judgment, but he did not believe that he had been disorderly (R 77-79).

Mr. Rutledge was co-operator of a photography machine in "Beechie Howard's" on the night of 16-17 November 1948. Mr. Rutledge saw a soldier bothering the accused and saw a soldier take accused's bottle back to his (the soldier's) table. Mr. Rutledge did not see a soldier struck by a bottle, but may have been developing pictures at the time. He could not identify the soldiers involved. At all times, the accused acted like a gentleman. (R 47-55)

Mrs. Rutledge was the other operator of the photography machine. She saw a soldier bothering the accused, saw the soldier take accused's bottle while the latter was dancing, and saw accused go over to the soldier's table and take his bottle away. She heard part of the conversation, and then had to make a picture. The next thing she saw was a soldier throwing a chair at the accused. Mrs. Rutledge did not see a soldier hit with a bottle that night, and did not see what accused did with the bottle (R 57-65). The accused was a perfect gentleman (R 58).

Mrs. Beechie Howard Parr was the owner of "Beechie Howard's," otherwise known as the "Swing Club." She saw the party of soldiers, who had been drinking "right smart," enter, and heard a sergeant talk to the soldiers trying to make them behave (R 65-68). Later, while dining in another room, she heard an argument and came into the room just as a soldier threw a chair at accused. She had the accused go into the kitchen to get away from the soldiers until the military police came. Two of the soldiers ran outside and were trying to get to the accused in the kitchen when the military police arrived. She did not see blood

on any of the soldiers (R 67-75). The accused was a perfect gentleman (R 68).

None of the civilian witnesses knew accused or had seen him prior to trial except at the time of the alleged offense (R 48,58,59,71,72).

5. Discussion.

The evidence shows that accused was involved in an altercation with an enlisted man in a public tavern, during which the accused, accidentally or otherwise, struck the enlisted man with a bottle, and that the accused and the enlisted man threw chairs at each other. Such an altercation is a disorder in violation of Article of War 96 (CM 296113, Gilmore, 58 BR 89, 96; CM 228046, Johnson, 16 BR 47,55; CM 249220, Hart, 32 BR 61,65; CM 227651, Hess, 49 BR 231,236; CM 264595, Evans, 42 BR 187,193).

The accused was charged with violating Article of War 95 and Article of War 96. The specifications under each charge are identical. Such pleading is proper under military law (McRae v. Henkes, 273 Fed. 108). The evidence clearly establishes a violation of Article of War 96. The only remaining question is whether accused's conduct was such as to constitute a violation of Article of War 95.

For an offense to be a violation of Article of War 95 it must be of such nature as to indicate the moral unfitness of the accused to continue as an officer, or be of such gravity that brother officers cannot associate with him without loss of self-respect (CM 213442, Due, 10 BR 271; CM 202846, Shirley, 6 BR 337; Winthrop (Reprint), pages 711,718).

In CM 228975, Parks, 17 BR 11, the accused was charged with being disorderly under Article of War 95, by engaging in a fight and brawl with an enlisted man. Accused "aggressively accepted whatever challenge had been made and voluntarily engaged" in a fight and brawl with an enlisted man on the walk in front of a restaurant on a public street. Spectators were attracted, and when a policeman removed the enlisted man from on top of accused the latter attacked the policeman and resisted arrest. The Board held that although the accused's conduct was obviously to the prejudice of good order and military discipline it "did not demonstrate moral unfitness to be an officer (par 151, MCM,1928). Violation of Article of War 95 is not, therefore, established."

Considering all the facts in the instant case, the Board is of the opinion that they do not demonstrate accused's moral unfitness to continue as an officer in the honorable profession of arms, that it did not become impossible for his brother officers to associate with him without loss of self-respect, and that the accused's acts did not constitute a violation of Article of War 95.

6. Records of the Department of the Army show that the accused is 25 years of age, separated from his wife, and has one son. He completed two years of high school. Accused enlisted in the Army in February 1941. He was captured in the Philippines on 6 May 1942 and remained a prisoner of war of the Japanese until 5 September 1945. Having been honorably discharged upon release from hospitals and convalescent furlough in January 1946, he then re-enlisted in the Army and served at Fort Riley, Kansas. He attended Officer Candidate School at Fort Riley and was commissioned a second lieutenant in February 1948. In May 1948, he was assigned to Fort Benning as a student officer, and in September 1948 he became a member of Company G, 325th Infantry, to which he was assigned at the time of the incident for which he stood trial. His enlisted service record shows his character as "Very Good" and his efficiency rating as "Satisfactory." His efficiency record as a commissioned officer is not available. The accused has been awarded the Purple Heart and Good Conduct Medals.

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

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

Howard S. Levie, J.A.G.C.

Roger Ter. Cussler, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of the Judge Advocate General

CSJAGU CM 335810

U N I T E D S T A T E S	)	THE INFANTRY CENTER
	)	
v.	)	Trial by G.C.M., convened at Fort Benning, Georgia, 4 March 1949. Dismissal and $500.00 fine.
	)	
Second Lieutenant BYRON R. KEARBEY (0-1540871), 30th Infantry Regiment	)	

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Opinion of The Judicial Council
Brannon, Shaw and Harbaugh
Officers of The Judge Advocate General's Corps

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1. Pursuant to Article of War 50(d)(2) the record of trial by general court-martial in this case has been submitted to The Judicial Council which submits this opinion to The Judge Advocate General.

2. The accused was found guilty of being disorderly in uniform in a public place on or about 16 November 1948 at Phenix City, Alabama, alleged in two identical specifications, one under Article of War 95 and the other under Article of War 96. He was sentenced to be dismissed the service and to pay to the United States a fine of five hundred dollars. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The Board of Review expresses the opinion that the record of trial is not legally sufficient to support the findings of guilty of Charge I and its specification which allege a violation of Article of War 95, but that it is legally sufficient to support the findings of guilty of Charge II and its specification alleging a violation of Article of War 96, and the sentence, and to warrant confirmation thereof.

3. There is a contrariety of evidence as to details, but the principal facts are clear. The evidence shows that on the night of 16-17 November 1948, in the public room of a tavern at Phenix City, Alabama, the accused became embroiled in an altercation with an enlisted man over a bottle of whiskey, struck the enlisted man with a whiskey bottle and precipitated a brawl in which chairs were thrown by the accused and by the enlisted man, and the accused, to save himself from violence at the hands of the enlisted man and the latter's enlisted companions, was forced to take refuge in the kitchen of the establishment pending the arrival of the military police. This occurred in the presence of a considerable number of civilians and enlisted personnel. All of the participants had been drinking intoxicants, and it is probable that the man who was struck was drunk and had been somewhat offensive in his conduct toward the accused. However, there is a total lack of evidence of any legal justification or excuse for the assault committed by the accused.

The only attempt by the accused to explain the incident is contained in an unsworn statement made through the defense counsel at the trial. In

this it was asserted that while the accused and his companion were dancing the soldier had carried a bottle of whiskey belonging to the accused from the table of the accused to a table used by the soldier and his companions. The accused went to retrieve his bottle, found it almost empty, and inquired why the soldier had drunk it all. Thereupon, the enlisted man who had previously been quarrelsome and making contemptuous remarks concerning second lieutenants, said, "So what, what are you going to do about it?" and started to rise. The following is the account contained in the statement of what immediately followed:

> "* * * I couldn't see his hands, which had been under the table, and I was afraid he might have a knife which he had been opening and closing earlier in the evening. I was so close to him (he was on my right) that I could not use my right hand. I brought my left hand around intending to push him back in the seat and avoid trouble. The bottle in my left hand struck him in the head, when he made a quick, darting movement to his right." (R 78)

It is evident that the court did not believe the facts to have been as related in the foregoing statement. It was amply justified in rejecting it. There is unrefuted evidence that the accused himself after being taken to the military police station told a corporal of the military police that he had forgotten himself, and had acted on the spur of the moment, and requested that the incident be forgotten.

The blow with the bottle caused a wound to the forehead of the soldier which bled profusely. The proven facts and circumstances were such as might well have sustained a conviction on charges of aggravated assault in violation of Article of War 93. In the opinion of the Council such behavior on the part of an officer constitutes conduct unbecoming an officer and a gentleman within the meaning of Article of War 95, and the record is legally sufficient to support the findings and the sentence.

4. For the foregoing reasons, the 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.

Franklin P. Shaw, Brig Gen, JAGC

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

E. M. Brannon, Brig Gen, JAGC
Chairman

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Second Lieutenant Byron R. Kearbey (O-1540871), 30th Infantry Regiment, upon the concurrence of The Judge Advocate General the sentence is confirmed but is commuted to a reprimand and a forfeiture of $50.00 pay per month for six months and as thus commuted, will be carried into execution.

Franklin P. Shaw, Brig Gen, JAGC

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

E. M. Brannon, Brig Gen, JAGC
Chairman

27 June 1949

CM 335810

The Judge Advocate General not having concurred in the foregoing action of the Judicial Council, the record of trial is forwarded to the Secretary of the Army for confirming action pursuant to Article of War 48b.

THOMAS H. GREEN
Major General
The Judge Advocate General

28 July 1949.

(GCMO 50, August 8. 1949).

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

CSJAGQ - CM 335820

JUN 3 0 1949

U N I T E D S T A T E S v. Recruit ROBERT D. CHRISTIE (RA 19196163), Headquarters Detachment, 6006 Area Service Unit (Post Operating Company), Fort Lewis, Washington.	2D INFANTRY DIVISION Trial by G.C.M., convened at Fort Lewis, Washington, 21 February 1949. Dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
GOFF, SHULL and WOLF
Officers of The Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50g.

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

CHARGE I: Violation of the 58th Article of War.

Specification: In that Recruit Robert D. Christie, Headquarters Detachment, 6006 Area Service Unit, (Post Operating Company), Fort Lewis, Washington, then Private in Separation Center, (NON-EFFECTIVE), 9202 Technical Service Unit, Transportation Corps, Camp Stoneman Personnel Center, (Enlisted Men Processing), Camp Stoneman, California, did, at Camp Stoneman, California, on or about 28 November 1947, desert the service of the United States and did remain absent in desertion until he was apprehended at Vancouver, Washington, on or about 30 October 1948.

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

Specification: In that Recruit Robert D. Christie, Headquarters Detachment, 6006 Area Service Unit, (Post Operating Company), Fort Lewis, Washington, did, without proper leave, absent himself from his organization at Fort Lewis, Washington, from about 25 December 1948, to about 2 February 1949.

He pleaded not guilty to and was found guilty of the Charges and Specifications. There was evidence of one previous conviction by special court-martial and two previous convictions by summary courts-martial. Accused was sentenced "to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for two years." The reviewing authority approved the sentence but the period of confinement was reduced to one (1) year. The Branch United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army may direct, was designated as the place of confinement. Pursuant to Article of War 50e, the order directing the execution of the sentence was withheld.

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

Article of War 16, in part, provides:

> "nor shall any defendant awaiting trial be made subject to <u>punishment or penalties</u> other than confinement prior to sentence on charges against him" (Underscoring supplied).

Executive Order No. 10020, promulgating the Manual for Courts-Martial, 1949, provides that it shall be in force and effect on and after 1 February 1949 with respect to all court-martial processes taken on or after that date. Paragraph 115, page 126, Manual for Courts-Martial, 1949, citing Article of War 16, provides that no accused shall, prior to the order directing execution of the approved sentence, be made subject to any punishment or penalties other than confinement. Paragraph 116g, page 130, thereof, provides that a forfeiture becomes legally effective on the date the sentence adjudging it is promulgated. The prescribed forms of sentences to forfeitures (Appendix 9, pp. 364-365, Forms 8, 9b, 17, 20, MCM, 1949) are worded "to become due after the date of the order directing execution of the sentence." There is no authority, in the Articles of War or in the implementing provisions of the Manual, for the imposition of the forfeitures of pay and allowances <u>due at</u> the date of the order directing execution of the sentence, <u>to become due at</u> that date, or <u>due or to become due after</u> that date (CM 335803, <u>Berry</u>, 11 May 1949). To the extent the forfeitures imposed exceed the limits indicated in the above quoted forms they are illegal.

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

Peter McGregor Goff, JAGC

Lewis B. Shull, JAGC

Samuel S. Ewell, JAGC

AMBJA 201 Christie, Robert D. (GP) 2d Ind

Hq, 2d Infantry Division, Fort Lewis, Washington, 29 July 1949

TO: The Judge Advocate General, Department of the Army, Washington 25, D.C.

Forwarded herewith is record of trial in the case of Recruit Robert D. Christie, together with six (6) copies of GCMO #153, this headquarters, dated 21 July 1949, promulgated in accordance with the holding of the Board of Review.

FOR THE COMMANDING GENERAL:

A. V. Mahomet

A. V. MAHOMET
Capt., AGD
Asst Adj Gen

1 Incl
Record of Trial

JUL 7 1949

CSJAGQ - CM 335820 1st Ind

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

TO: Commanding General, 2d Infantry Division, Fort Lewis, Washington.

1. In the case of Recruit Robert D. Christie (RA 19196163), Headquarters Detachment, 6006 Area Service Unit (Post Operating Company), Fort Lewis, Washington, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charges I and II and the Specifications thereunder, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for one year. Under Article of War 50e this holding and my concurrence vacate so much of the sentence relating to forfeitures as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence. Under Article of War 50 you now have authority to order execution of the sentence modified in accordance with this 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 335820).

1 Incl
Record of Trial

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

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

CSJAGN-CM 335823

27 MAY 1949

UNITED STATES	)	2D INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Lewis, Washington, 21 February 1949. Dishonorable discharge and confinement for two and one-half ($2\frac{1}{2}$) years. Disciplinary Barracks.
Recruit HARLAND R. GRISWOLD (RA 19004798), Headquarters Detachment, 6006 Area Service Unit (Post Operating Company), Fort Lewis, Washington.	)	

HOLDING by the BOARD OF REVIEW
YOUNG, PITZER and GUIMOND
Officers of The Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Recruit Harland R. Griswold, Headquarters Detachment, 6006 Area Service Unit, (Post Operating Company), Fort Lewis, Washington, then Private Harland R. Griswold, Company B, Special Troops, Service Command Unit, 1907, Army Service Forces Training Center, Fort Lewis, Washington, did, at Fort Lewis, Washington, on or about 24 April 1945, desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort Lewis, Washington, on or about 29 December 1948.

The accused pleaded not guilty, was found guilty of the Charge and Specification, and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for four years. The reviewing authority approved the sentence but reduced the period of confinement to two and one-half years, designated the Branch United States Disciplinary Barracks, Camp Cooke, California, 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. The only question for consideration is the legality of the sentence insofar as it relates to forfeitures.

4. Article of War 16, in part, provides:

"nor shall any defendant awaiting trial be made subject to punishment or penalties other than confinement prior to sentence on charges against him."

The accused was tried on 21 February 1949. Executive Order No. 10020, promulgating the Manual for Courts-Martial, 1949, provides that it shall be in force and effect on and after 1 February 1949 with respect to all court-martial processes taken on or after that date. Paragraph 115, page 126, Manual for Courts-Martial, 1949, citing Article of War 16, provides that no accused shall, prior to the order directing the execution of the approved sentence, be made subject to any penalties other than confinement. Paragraph 116g, page 130, thereof, provides that a forfeiture becomes legally effective on the date the sentence adjudging it is promulgated. The prescribed forms of sentences to forfeitures are worded "to become due after the date of the order directing execution of the sentence" (Forms 8, 9b, 17, and 20, App. 9, MCM, 1949, pp. 364, 365). There is no authority in the Articles of War or in the implementing provisions of the Manual for the forfeiture of pay and allowances which are due at the time the sentence is adjudged or which become due on or before the date of the order promulgating the sentence (CM 335803, Berry, decided 11 May 1949). To the extent that the forfeiture imposed in this case exceeds forfeiture of pay and allowances "to become due after the date of the order directing execution of the sentence," it is illegal.

5. The Board of Review holds the record of trial legally sufficient to support the findings of guilty and to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for two and one-half years.

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

On leave, J. A. G. C.

J. F. Gilmore, J. A. G. C.

CSJAGN-CM 335823 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, 2d Infantry Division, Fort Lewis, Washington.

1. In the case of Recruit Harland R. Griswold (RA 19004798), Headquarters Detachment, 6006 Area Service Unit (Post Operating Company), Fort Lewis, Washington, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the finding of guilty of the Specification and the Charge, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for two and one-half years. Under Article of War 50e(3) this holding and my concurrence vacate so much of the sentence relating to forfeitures as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence. Under Article of War 50 you now have authority to order execution of the sentence modified in accordance with this holding. It is recommended that the general court-martial order include an appropriate statement indicating the portion of the sentence thus vacated.

2. When copies of the published order in this case are forwarded to this office, together with the record of trial, they should be accompanied by the foregoing holding and this indorsement. For convienence 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 335823).

1 Incl
Recordof trial

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

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

(297)

CSJAGQ - CM 335865

AUG 1 2 1949

UNITED STATES v. Pvts. PASTOR QUIMBO (PS 10321596), RESTITUTO CADION (PS 10321313), and ROSENDO E. PETILLA (PS 10318708), all of Det. No. 1, 76th Ordnance Ammunition Co. (PS), and Pfc ZOSIMO URMENITA (PS 10318862), 509th Engineer Depot Co. (PS).	)	MARIANAS-BONINS COMMAND Trial by G.C.M., convened at Saipan, Marianas Islands, 17-18 Feb. 1949. Quimbo, Cadion & Urmenita: Dishonorable discharge. Petilla: Bad conduct discharge. Quimbo: Confinement for fifteen (15) years. Cadion: Confinement for twelve (12) years. Petilla: Confinement for one (1) year. Urmenita: Confinement for five (5) years. All: Philcom General Pris. Stockade.

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

1. The Board of Review has examined the record of trial in the case of the soldiers named above, and submits this, its holding to The Judge Advocate General, under the provisions of Article of War 50e.

2. The accused were tried on the following Charges and Specifications:

CHARGE I: Violation of the 89th Article of War.

Specification: In that Private Pastor Quimbo, Detachment No. 1, 76th Ordnance Ammunition Company (Philippine Scout), Private Restituto Cadion, Detachment No. 1, 76th Ordnance Ammunition Company (Philippine Scout), Private First Class Zosimo Urmenita, 509th Engineer Depot Company (Philippine Scout) and Private Rosendo E. Petilla, Detachment No. 1, 76th Ordnance Ammunition Company (Philippine Scout), did, at Saipan, Marianas Islands, on or about 12 December 1948, commit a riot, in that they, together with certain other soldiers to the number of more than ten (10), did, with force and arms, unlawfully and riotously, and in a violent and tumultous manner, assemble to disturb the peace of Saipan, Marianas Islands, and having so assembled, did unlawfully and

riotously assault Private Regnio Sepnio, Private First Class James D. Dodge, Casimiro F. Lopez, Juanito Dancil and others, by shooting at them with pistols and sub-machine guns, to the terror and disturbance of the people of Saipan, Marianas Islands.

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

Specification 1: In that Private Pastor Quimbo, Private Restituto Cadion, Private Rosendo E. Petilla, all of Detachment No. 1, 76th Ordnance Ammunition Company (Philippine Scout) and Private First Class Zosimo Urmenita, 509th Engineer Depot Company (Philippine Scout), acting jointly and in pursuance of a common intent, did, at Saipan, Marianas Islands, on or about 12 December 1948, with intent to commit a felony, viz: murder, commit an assault upon Private Regnio Sepnio, by feloniously and willfully shooting at the said Private Regnio Sepnio with pistols and sub-machine guns, and thereby wounding him in the head.

Specification 2: In that Private First Class Zosimo Urmenita, 509th Engineer Depot Company (Philippine Scout), did, at Saipan, Marianas Islands, on or about 12 December 1948, with intent to do him bodily harm, commit an assault upon Romulo O. Muriera, by feloniously and willfully advancing on the said Romula O. Muriera in a menacing manner with a dangerous weapon, to wit a hammer.

Each accused pleaded not guilty to all Charges and Specifications. The accused Urmenita was found not guilty of Specification 2 of Charge II. As to all other Charges and Specifications the accused were found guilty, the court excepting the words "Juanito Dancil" from Specification, Charge I. Accused were each 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 at such place as the reviewing authority may direct as follows:

Quimbo	-	15 years
Cadion	-	15 years
Urmenita	-	8 years

The accused Petilla was sentenced to be discharged from the service with a bad conduct discharge, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for one (1) year. No record of previous convictions was introduced as to

any accused. The reviewing authority approved the sentence as to each accused, but reduced the period of confinement of the accused Cadion to 12 years, and of the accused Urmenita to 5 years. He designated the Philcom General Prisoner Stockade, Fort Stotsenburg-Clark Air Force Base, APO 74, or elsewhere as the Secretary of the Army may direct as the place of confinement. The order directing the execution of the sentences was withheld and the record of trial forwarded under the provisions of Article of War 50e.

3. In compliance with the request of each accused, the court-martial as organized had three enlisted persons as members. Two of these enlisted members, Sergeants Steel and Lee, were on detached service to an organization to which the accused Quimbo and Cadion were also on detached service. The accused Urmenita was on detached service to the basic organization to which the two members named above were assigned. None of the accused, however, were assigned to the organization to which Sergeants Steel and Lee were assigned. Concerning the service of enlisted persons on a court-martial, Article of War 16 provides in part, as follows:

> "No enlisted person may sit as a member of a court-martial for the trial of another enlisted person who is assigned to the same company or corresponding military unit."

In view of the above limitation, the question requiring discussion is whether the word "assigned" as used in Article of War 16 includes "detached service" and whether the court was lawfully constituted as to the accused Quimbo, Cadion and Urmenita.

The answer to the above question can only be resolved by determining the intended meaning of Congress in its use of the word "assigned" in Article of War 16. The legislative history of Article of War 16 shows that the purpose of providing for the service of enlisted persons on courts-martial for the trial of other enlisted persons was to improve morale by giving them a share in the administration of military justice. The only recorded comment, however, concerning the quoted limitation imposed upon the selection of enlisted persons for courts-martial service is found in the remarks of Major General Hubert D. Hoover, The Assistant Judge Advocate General, in his discussion of that Article before the House of Representatives Committee on Armed Services, wherein he stated, as follows:

> "It was thought that the limitation here contemplated would prevent ill feeling in units and would be a protection to both the members and to the accused." (Subcommittee No. 11, Legal, 18 April 1947 (Vol. 1 House Hearings, Committee on Armed Services, 80th Congress, 1st Session, p. 2041)).

General Hoover's comments do not, however, suggest or imply a broadening of the accepted military meaning of the word "assigned".

Army Regulations 345-400, 18 April 1947, furnish the definitions of the above mentioned terms, providing in pertinent part, as follows:

"12. Assigned.-a. An individual will be reported as assigned when he fills a position vacancy authorized by a table of organization, manning table, or other War Department authority under which the organization is operating.

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"14. Attached from other organizations.-a. An individual will be reported as attached from another organization when he becomes attached to the reporting organization but remains an assigned or attached unassigned member of another organization and is included in the strength of the latter organization.

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"***

"16. Special duty.-a. An individual is on special duty when performing duty for another unit and reporting daily to the unit to which assigned, attached unassigned, or attached from another organization. Individuals on special duty will be carried as present for duty in the strength section on the morning report of the unit to which assigned, attached unassigned, or attached from other organizations.

***

"17. Detached service.-a. An individual will be reported on detached service when performing duty for, and being administered by, an organization other than that to which assigned or attached unassigned.

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"18. Temporary duty.-a. An individual is on temporary duty when absent from the unit or station of assignment performing duty incident to regular duties and being administered by the organization to which assigned or attached unassigned. Temporary duty will not be converted to detached service except upon issuance of proper orders."

The War Department Technical Manual 20-205, 18 January 1944, Dictionary of United States Army Terms, defines the terms in question, as follows:

assigned - "placed in a military organization so as to become an organic part of it. Assigned differs from attached, which means placed temporarily, not as an organic part of an organization."

attached - "placed temporarily in a military organization for duty, rations, or quarters without becoming an organic part of the military organization. Attached differs from assigned, which means placed as an organic part of an organization. We may speak of attached artillery, an attached company, attached personnel, or attached medical personnel."

detached - "separated from one's proper organization, usually for special duty with another unit; not assigned permanently to any specific branch. Individuals as well as units may be detached."

detached service - "duty with another organization, making necessary a continuous absence of 24 hours or more from the military unit to which one is normally attached; detached duty."

special duty - "duty performed by an individual away from his own organization but still under its control."

temporary duty - "task of short duration, as distinguished from regular duty. Temporary duty may be in addition to, or instead of, regular duty. Temporary duty is generally to be performed in an organization other than that to which an individual is assigned."

In discussing the problem of statutory construction Crawford states that:

> "Technical terms in a statute, * * * must be accorded their technical meaning, unless the statute indicates that the legislature intended otherwise. Moreover, there is a presumption that they have been used in their technical sense. * * * This rule is applicable to * * * military terms * * *." (Construction of Statutes, 1940, Sec. 187, p. 319).

In interpreting the meaning of the military term "supersede", as used in a statute, the Supreme Judicial Court of Massachusetts in the case of Ex parte Hall (1 Pick 261) made the statement, as follows:

> "The only way to ascertain the sense of the legislature in using the word supersede, is, to learn the military sense in which the word is commonly used; for in the enactment of laws, when terms of art or peculiar phrases are made use of,

it must be supposed that the legislature have in view the subject matter about which such terms or phrases are commonly employed. Now, in a military sense, to be superseded means to have one put in the place, which, by the ordinary course of military promotion, belongs to another; and this definition is natural and consistent with the common understanding of the term."

Since it clearly appears that the word "assigned" as used in military terminology is limited to its technical meaning, and since Congress must be presumed in enacting Article of War 16 to have intended that meaning, we must conclude the enlisted persons on the court in the present case were legally selected and that their inclusion on the court in no way prejudiced the rights of the accused.

4. For the reasons stated, the Board of Review holds that the court-martial was properly constituted, as to each accused. The record of trial is legally sufficient to support the findings and sentence as to each accused.

Abylh E. Lyon, J.A.G.C.
Alvin H. Sherrill, J.A.G.C.
Samuel S. Cowles, J.A.G.C.

CSJAGQ - CM 335865 1st Ind.

AUG 28 1946

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

TO: Commanding General, Marianas-Bonins Command, APO 246, c/o Postmaster, San Francisco, California

1. In the case of Pvts. Pastor Quimbo (PS 10321596), Restituto Cadion (PS 10321313), and Rosendo E. Petilla (PS 10318708), all of Det. No. 1, 76th Ordnance Ammunition Co. (PS), and Pfc Zosimo Urmenita (PS 10318862), 509th Engineer Depot Co. (PS), 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 sentences. 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 sentences.

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 335865).

FOR THE JUDGE ADVOCATE GENERAL:

WILLIAM P. CONNALLY, JR.
Colonel, JAGC
Assistant Judge Advocate General

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

CSJAGN-CM 335886

6 JUN 1949

U N I T E D S T A T E S	)	1ST CAVALRY DIVISION
v.	)	Trial by G. C. M., convened at Tokyo, Japan, 28 February 1949. Richardson: Forfeiture of $50 per month for six months and confinement for six (6) months. Eighth Army Stockade. Everett and Pugh: Dishonorable discharge (suspended) and confinement for one (1) year. Disciplinary Barracks.
Corporal HENRY D. EVERETT (RA 18339953), Recruits ALVA PUGH (RA 15420757) and RICHARD RICHARDSON (RA 12112487), all of Troop C, 8th Cavalry Regiment, APO 201, Unit 2.	)	

HOLDING by the BOARD OF REVIEW
YOUNG, PITZER and GUIMOND
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 named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50g.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Corporal Henry D. Everett, Troop C, 8th Cavalry, Recruit Alva Pugh, Troop C, 8th Cavalry, and Recruit Richard Richardson, Troop C, 8th Cavalry, acting jointly, and in pursuance of a common intent, did, at Tokyo Quartermaster Depot, Shinagawa, Japan, on or about 24 January 1949, with intent to do him bodily harm, commit an assault upon Private First Class Russell S. Haye, Troop C, 8th Cavalry, by feloniously and willfully striking the said Private First Class Russell S.

Haye about the face and head with their open hands and closed fists.

Each accused pleaded not guilty to, and was found guilty of, the Specification and the Charge. Accused Everett and Pugh were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for one year. The reviewing authority approved the sentences, but suspended that portion thereof adjudging dishonorable discharge until the soldiers' release from confinement, and designated the Branch United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army might direct, as the place of confinement. (In so far as the accused Richardson is concerned, the record of trial has been examined in the office of the Judge Advocate General and found legally sufficient (Article of War 50f). He was sentenced to confinement at hard labor for six months and to forfeit fifty dollars ($50.00) per month for a like period. The reviewing authority approved the sentence and ordered it executed. The Eighth Army Stockade, APO 343, or elsewhere as the Secretary of the Army might direct, was designated as the place of confinement.)

3. The record of trial discloses one irregularity, the effect of which must be considered. The order appointing the court, dated 27 January 1949, designated Lieutenant Colonel Samuel W. Russ, JAGD, as "alternate law member." He was present throughout the trial and functioned as law member, the regularly appointed "law member" having been excused by the convening authority.

Since the law member of a military court performs many of the functions of both judge and jury, the decisions of civilian tribunals on questions involving the legality of judicial proceedings before a judge or jury defectively appointed or impanelled, though not necessarily controlling, cannot be disregarded. The issues raised by litigation before de facto judges and alternate jurors are especially analogous to the question involved in the instant case. A de facto judge is one who occupies a de jure office, under color of right, accepted by the public as being what he purports to be (State v. Roberts, 130 Kan. 754, 288 Pac. 761); and it is well established that his acts are not null and void. In re Manning, 139 US 504, 11 S. Ct. 624; McDowell v. U. S., 159 US 596, 16 S. Ct. 111. Most analogous to, but more extreme than the case under consideration, is that of the judge appointed pursuant to an unconstitutional statute or properly appointed by an official who completely lacked authority so to appoint. In both situations, the judge has been held to be de facto. State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; Brown v. O'Connell, 36 Conn. 432, 4 Am. Rep. 89; Commonwealth v. Di Stasio, 297 Mass. 347, 8 NE (2d) 923 (Cert. denied 302 US 683, 58 S. Ct. 50); West End Corp. v. Deutsch, 238 NYS 256. Here the

alternate law member occupied the de jure position of law member under color of right since he acted in accordance with the order of an authority competent to appoint the court; and clearly he was considered by all persons concerned as the properly designated law member of a legally constituted court.

Somewhat less compelling, but nevertheless supporting the view adopted here, is the conclusion to be drawn from the cases involving statutory provisions for replacing unavailable jurors with alternate jurors. Such statutes have been consistently upheld against the contention that a constitutional right to trial by jury was being infringed when such alternates actually served. State v. Dalton, 206 NC 507, 174 SE 422; People v. Peete, 54 Cal. App. 333, 202 Pac. 51; Stone v. People, 3 Ill. 326. Although these cases involve statutes specifically providing for such alternates, it seems that were alternates improperly drawn or appointed, that is, without complying with the statutory conditions to such appointment, their participation would not render the proceedings void. Commonwealth v. Spallone, 154 Pa. Super 282, 35 A. (2d) 727, 730; Umble v. State, 207 Ala. 508, 93 So. 531. In the case under consideration, there can be no doubt that the appointing authority was empowered to appoint a law member. Although the method of replacing the law member here was clearly irregular, it does not prevent him from being a de facto law member.

This brings us to consideration of whether the purpose of the law which requires that there be a law member detailed and present at every case tried by general court-martial is defeated by the method here employed. The appointing authority may make the initial appointment of the law member, or replace a law member already designated, by separate order prior to trial (CM 286310, Corriveau, 27 BR (ETO) 223; SPJGJ, 1945/1956, 2 Feb 1945); or he may, by order issued in advance, designate a law member to replace during trial the regularly appointed law member during the latter's temporary foreseen absence (CM 336019, Minton (1949)). However, Article of War 8 provides in part that "The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the Judge Advocate General's Corps or an officer who is a member of the bar of a Federal Court or of the highest court of a State of the United States and certified by the Judge Advocate General to be qualified for such detail: Provided, That no general court-martial shall receive evidence or vote upon its findings or sentence in the absence of the law member regularly detailed" (First underscoring supplied). The law does not require that one of the members be detailed as law member. Rather it requires that a law member be detailed "as one of the members." Consequently, it appears reasonable to hold that, although irregular, the fact that an alternate law member was detailed does not necessarily conflict with the statute, so long as only one law member actually sat "as one of the members"

and heard the case. The sole purpose of the statute is obviously to assure that the accused be tried by a court which includes among its members one learned in the law, so that his trial will be conducted fairly and in accordance with accepted judicial practice. In the absence of a showing that the appointing authority, for some improper reason, favored one law member over the other for this particular trial, it certainly may be assumed that two law members of equal qualifications were selected. The quoted portion of the Article is plainly mandatory, but can it be said that since the detail was technically irregular "the error complained of has injuriously affected the substantial rights of * * * [the] * * * accused" (AW 37)? We think not. Article of War 8 should not be so narrowly construed. It is a fundamental legal principle that the legislature in enacting a statute cannot have intended an unreasonable result, and although the law may be mandatory, some latitude must be allowed in the method of enforcement. As stated in Section 4706, Horack, Sutherland's Statutory Construction (3rd Ed.):

> "The literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislature and if the words are sufficiently flexible to admit of a construction which will effectuate the legislative intention. The intention prevails over the letter, and the letter must if possible be read so as to conform to the spirit of the act."

And in Pierce v. Van Dusen, 78 Fed. 693, at page 697:

> "While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of the law should not be sacrificed to a literal interpretation of such words."

By providing in the order appointing the court for a fully qualified law member to act in the event that the regularly appointed law member becomes unavailable, the appointing authority has simply accomplished in one order what he clearly could do in separate successive orders, either written or verbal (CM 211561, Self, 10 BR 99). In the instant case, the regularly appointed law member was excused by verbal order of the appointing authority. From this aspect alone, then, it may be said that the constitution of the court was legally changed by verbal orders of competent authority. In any view, however, the procedure adopted here, though deemed improper, is not such an irregularity as to necessitate setting aside the findings and sentence on the theory that the rights of the accused have been substantially prejudiced.

4. The Board of Review holds the record of trial legally sufficient to support the findings and sentences as to accused Everett and Pugh.

Chas. G. King, J. A. G. C.

On leave, J. A. G. C.

J. A. Gilmond, J. A. G. C.

1st Indorsement

Dept. of Army, J.A.G.C. JUN 24 1949 To the Commanding General, 1st Cavalry Division, APO 201, c/o Postmaster, San Francisco, California

1. In the case of Corporal Henry D. Everett (RA 18339953), Recruits Alva Pugh (RA 15420757) and Richard Richardson (RA 12112487), all of Troop C, 8th Cavalry Regiment, APO 201, Unit 2, attention is invited to the foregoing authenticated copy of the holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences as to accused Everett and Pugh. Confirming action is not by The Judge Advocate General or the Board of Review deemed necessary.

2. Inasmuch as courts-martial are of limited statutory jurisdiction, and Article of War 8 does not specifically authorize the appointment of an "alternate" law member, as was done in this case, it is recommended that to obviate possible collateral attack in habeas corpus proceedings alleging irregularity in the appointment of the courts, the practice of designating an "alternate" law member not be followed.

FOR THE JUDGE ADVOCATE GENERAL:

WILLIAM P. CONNALLY, JR.
Colonel, JAGC
Assistant Judge Advocate General

CM 335886

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

CSJAGN-CM 335898

24 JUN 1949

UNITED STATES	)	82D AIRBORNE DIVISION
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, 17 March 1949. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.
Recruit FRED CHARLES, JR. (RA 15239857), Battery B, 376th Airborne Field Artillery Battalion.	)	

HOLDING by the BOARD OF REVIEW
YOUNG, GUIMOND and TAYLOR
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 I: Violation of the 58th Article of War.

Specification: In that Recruit Fred Charles, Jr., Battery "B", 376th Airborne Field Artillery Battalion, (then Private, Battery "F", 80th Airborne Anti-Aircraft Battalion), did, at Fort Bragg, North Carolina on or about 22 October 1946 desert the service of the United States and did remain absent in desertion until he was apprehended at Portsmouth, Ohio on or about 12 May 1948.

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

Specification: In that Recruit Fred Charles, Jr., (then Private) Battery "B", 376th Airborne

Field Artillery Battalion, did, without proper leave absent himself from his organization at Fort Bragg, North Carolina from about 0600 hours 23 July 1948, to about 1300 hours 12 January 1949.

He pleaded not guilty to and was found guilty of both Specifications and Charges. 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, at such place as the proper authority might direct, for two years. One previous conviction was properly considered. The reviewing authority 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.

3. Whether or not the prosecution satisfactorily proved the desertion alleged in the Specification of Charge I is the only matter to be considered. An essential element of the offense of desertion, i.e. absence without leave, was sought to be proved by the introduction of an extract copy of the duly authenticated morning report of the organization of which accused was a member at the time of the alleged initial absence. This entry, after naming the accused, recited: "Above 2 EM dy to AWOL eff date 0630, 22 Oct 46" (Pros. Ex. 1). Termination of the period of absence was satisfactorily established by a stipulation to the effect that if Edward Harris, Federal Bureau of Investigation agent, had been present, he would have testified that "On May 12 1948 I was an FBI agent on duty in Portsmouth, Ohio. On that day I took into custody Rct. Fred Charles, Jr., RA 15239857 at Portsmouth, Ohio. He was wearing civilian clothes at the time" (Pros. Ex. 2). In so far as the commission of the offense was concerned, accused elected to remain silent (R. 16), and no other proof of this absence was introduced. In an effort to attack the validity of the aforementioned morning report, the defense attempted to introduce another extract copy of the morning report which indicated that the accused passed from "dy to AWOL eff date 0630 22 Nov 46" (R. 15). It was not admitted because of the omission of any authentication (R. 16). Following the court's deliberation on its findings, evidence of one previous conviction was admitted, in the form of a properly authenticated extract copy of accused's service record, which disclosed that on 31 October 1946, he was convicted by summary court-martial for violation of Article of War 61 "AWOL fr organization fr 21 Oct 46 to 28 Oct 46" (Pros. Ex. 5) (Underscoring supplied).

From a study of the aforementioned documents it is obvious

that accused was absent without leave from 21 October 1946 until 28 October 1946, and that, following conviction by summary court-martial for this offense, he again absented himself from 22 November 1946 until apprehended 12 May 1948. The date of the second departure, 22 November 1946, marked the actual commencement of the period of absence upon which the desertion charge was based, but it is established only by reference to matter outside the record, the exhibit unsuccessfully sought to be introduced by the defense.

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

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

Consequently, although an inference, or presumption, of fact is not necessarily destroyed by the introduction of rebutting evidence that is not necessarily credible, such an inference or presumption is successfully rebutted by undisputed proof to the contrary, which proof is sometimes spoken of as evidence that the triers of fact cannot reasonably disbelieve (Scullin v. Cities Service Oil Co., 304 Mass. 75, 22 NE (2d) 666; CM 223448, Riesenman, 13 BR 389, 402; CM 289727, Melonas, 1 BR (A-P) 247, 252). Such is the case here. The certificate of previous convictions showing a trial for the offense of absence without leave from 21 October to 28 October 1946 was clearly undisputed proof which, under the rule above stated, was sufficient to rebut prima facie the presumption upon which the Government's case rested. It revealed that the unauthorized absence of the accused, rather than continuing until 12 May 1948 as alleged, was terminated 28 October 1946. When, if ever, accused departed again prior to the stipulated date of return, is open to conjecture. The result is that the initial date of absence without leave has not been established and proof of the offense of desertion as alleged in the Specification of Charge I must fail (CM 252646, Miller, 34 BR 119; CM 287505, Gibson, 15 BR (ETO) 273; CM 330751, Wogan, 79 BR 167; Cf CM 332704, Bilbo, 81 BR 185). Nor does the stipulation as to apprehension aid the case for the prosecution. It

does not establish the initial date of absence, and although it establishes that accused was absent, "Absence itself is not the gist of the offense, but absence without proper leave" (CM 317087, Osbourne, 66 BR 201, 203; See also CM 302949, Hamm, 59 BR 209; CM 320240, Dunlap, 69 BR 275).

The record of trial establishes, within the allegations of Charge I and its specification, a lesser included offense of absence without leave from 22 October 1946 to 28 October 1946. The record shows, however, that the accused has been finally convicted and punished for this offense. The defense counsel, by his obvious effort at the trial to show that the only absence for which the accused could be punished began on 22 November 1946, adequately though indirectly raised the defense of former trial with respect to the prior unauthorized absence (AW 40; pars 64 and 68, MCM, 1949). Accordingly, the accused cannot legally again be tried for such absence without leave.

5. For the foregoing reasons, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge II and the specification thereof; legally insufficient to support the findings of guilty of Charge I and the specification thereof, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for six (6) months.

ON LEAVE, J. A. G. C.

J. F. Guinan, J. A. G. C.

John J. Taylor, J. A. G. C.

JUL 7 1949

CSJAGN - CM 335898 1st Ind

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

TO: Commanding General, 82d Airborne Division, Fort Bragg, North Carolina.

1. In the case of Recruit Fred Charles, Jr. (RA 15239857), Battery B, 376th Airborne Field Artillery Battalion, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge II and its Specification; legally insufficient to support the findings of guilty of Charge I and its Specification, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for six (6) months. Under Article of War 50e(3) this holding and my concurrence vacate the findings of guilty of Charge I and its Specification, and 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 execution of the sentence, and confinement at hard labor for six (6) months. Under Article of War 50 you now have authority to order the execution of the sentence as modified in accordance with this holding. Instead of taking the above action you may, if you so desire, disapprove the entire sentence and order a rehearing on appropriate charges and specifications.

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

(CM 335898).

1 Incl
Record of Trial

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

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

CSJAGH CM 335904

MAY 11 1949

UNITED STATES v. First Lieutenant RAYMOND DAVID YOUNG, 040988, 9224th Technical Service Unit, Headquarters Transportation School, Fort Eustis, Virginia.	FORT EUSTIS, VIRGINIA Trial by G.C.M., convened at Fort Eustis, Virginia, 25 February and 29 March 1949. Dismissal, total forfeitures, and confinement for three (3) years.

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

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

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

CHARGE I: Violation of the 58th Article of War.

Specification: In that First Lieutenant Raymond David Young, 9224 Technical Service Unit, Headquarters, Transportation Corps School, did, at Fort Eustis, Virginia, on or about 29 August 1948, desert the service of the United States, and did remain absent in desertion until he was apprehended by civilian authorities at New Orleans, Louisiana, on or about 19 January 1949.

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

Specification 1: In that First Lieutenant Raymond David Young, 9224 Technical Service Unit, Headquarters, Transportation Corps School, did, at Fort Eustis, Virginia, on or about 27 July 1948, with intent to defraud, wrongfully and unlawfully make and utter to Fort Eustis Branch Exchange, a certain check, in words and figures as follows, to wit:

- -

1st LT. RAYMOND D. YOUNG No. 131

FORT BRAGG, N.C. 27 July 1948

PAY
TO THE
ORDER OF Cash----------$ 20 00/100

Twenty----------00/100 DOLLARS

First-Citizens Bank & Trust Company

66-931 FORT BRAGG, N. C. /s/ Raymond D Young 1st Lt
040988

- -

and by means thereof did fraudulently obtain from the Fort Eustis Branch Exchange the sum of $20.00, he, the said First Lieutenant Raymond David Young, then well knowing that he did not have and not intending that he should have sufficient funds in the First Citizens Bank and Trust Company for the payment of said check.

Specification 2: In that First Lieutenant Raymond David Young, 9224 Technical Service Unit, Headquarters, Transportation Corps School, did, at Fort Eustis, Virginia, on or about 11 August 1948, with intent to defraud, wrongfully and unlawfully make and utter to Fort Eustis Branch Exchange, a certain check, in words and figures as follows, to wit:

- -

1st LT. RAYMOND D. YOUNG No. 103

FORT BRAGG, N.C. 11 Aug 1948

PAY
TO THE
ORDER OF Cash $ 75 00/100

Seventy Five and ----------00/100 DOLLARS

First-Citizens Bank & Trust Company

66-931 FORT BRAGG, N.C. /s/ Raymond D Young 1st Lt T.C.
040988

Post Exchange

- -

and by means thereof did fraudulently obtain from the Fort Eustis Branch Exchange the sum of $75.00, he, the said First Lieutenant Raymond David Young, then well knowing that he did not have and not intending that he should have sufficient funds in the First Citizens Bank and Trust Company for the payment of said check.

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

Specification 1: (Identical with Specification 1, Charge II).

Specification 2: (Identical with Specification 2, Charge II).

The accused pleaded not guilty to Charge I and its Specification, but with respect thereto, guilty of absence without leave for the period alleged, in violation of Article of War 61; not guilty to Specifications 1 and 2 of Charge II and Charge II; and not guilty to Specifications 1 and 2 of Charge III. He 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 the 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. Issue of accused's sanity. Following arraignment but prior to pleading to the general issue, the defense moved for a dismissal of all charges and specifications "* * based on the insanity of the accused at the time the alleged offenses were committed" (R 7). In support of this motion, the defense offered the testimony of Lieutenant Colonel Gerald Peterson, Major Will R. Winfrey, Major Frank M. Turnbull and First Lieutenant Joseph G. Malinauski (R 7-14). Lieutenant Colonel Peterson testified that a great change appeared in the accused during the last six weeks he was on duty as an instructor at the Transportation School, Fort Eustis, Virginia. Prior to this time, the accused had performed his duties in a superior manner. The change was manifested by poor performance of duty, by nervousness and trembling of the hands, and by a rash appearing on accused's hands, face and body. Treatment at Walter Reed General Hospital was contemplated (R 7,8). The observations of Major Winfrey and Lieutenant Malinauski, both instructors at the Transportation School, were similar to those of Lieutenant Colonel Peterson (R 9,10,13,14). Major Turnbull, who returned the accused from New Orleans to Fort Eustis, following accused's apprehension, noticed upon first seeing the accused at New Orleans, that the accused appeared

tired and nervous. Major Turnbull further observed that in his conversations with the accused, the latter would constantly interject new and unrelated subjects, and switch from one subject to another without cause. Accused's speech while on the trip from New Orleans to Fort Eustis was also incoherent (R 11,12).

Following the above evidence, the defense restated its motion whereupon the prosecution offered the following stipulation:

> "* *'I, Captain Horace E. Perkins, Neuropsychiatrist, Station Hospital, Fort Eustis, Virginia, examined 1st Lt Raymond D. Young in the Neuropsychiatric Consultation Service on the 9th of February 1949. He is able to differentiate between right and wrong, to adhere to the right, and to participate adequately in his own defense. There is no evidence present now that the officer is suffering from a psychosis (which is insanity) that would make him immune to criminal charges. That I, Capt Horace E Perkins have never been a psychiatrist. I am just acting as neuropsychiatrist, Station Hospital and have been practicing such for two weeks.'" (R 15)

The accused agreed to this stipulation which was accepted by the court (R 14,15).

4. Evidence for the prosecution.

The accused is a member of the military service (R 21,35).

The prosecution introduced, without objection by the defense, an extract copy of the following morning report entries from Headquarters, Transportation Corps School, 9224 TSU TC:

"31 August 1948

CORRECTION Omitted M/R 29 Aug 48
Young Raymond D (TC) 040988 1st Lt
Fr emerg lv (Abs 4 days) to AWOL 0001 hrs

/s/ Bruce K Bryan
/t/ BRUCE K BRYAN
Capt TC

28 September 1948

Young, Raymond D (TC) 040988 1st Lt
Fr AWOL to dropped fr rolls AWOL since
0001 hrs 29 Aug 48 WDAGO Form 66 & A/P
forwarded TAGO

/s/ Bruce K Bryan
/t/ BRUCE K BRYAN
Capt TC" (R 20; Pros Ex 1)

The prosecution similarly introduced an extract copy of the following morning report entry from the Guard Detachment, 4106 Area Service Unit, 4th Army, Camp Leroy Johnson, New Orleans, Louisiana:

"22 Jan 49

Young Raymond D 0-40988 1st Lt
Atchd & jd fr 9224th TSU TC Ft Eustis Va
fr AWOL to app by C Auth NOLa 19 Jan 49
conf Guardhouse this Sta 1300

/s/ Charles Lewis
Capt, TC
Commanding." (R 20; Pros Ex 2)

The accused cashed his personal check in the amount of twenty dollars ($20.00) at the Post Exchange Office, Fort Eustis Branch Exchange, on 27 July 1948. The check was drawn on the First-Citizens Bank and Trust Company, Fort Bragg, North Carolina, on forms inscribed with the accused's printed rank and name in the upper left-hand corner. It was made payable to "Cash" and signed by the accused (R 21,22; Pros Ex 3). Mrs. Helen Thacker, the cashier at the above Post Exchange, recalled receiving the check from the accused, giving him the sum of twenty dollars in cash therefor, and stamping on the reverse side of the check, "For deposit in the First National Bank, Yorktown, Va. to the credit of Fort Eustis Branch Exchange, Working Fund Account" (R 22,24; Pros Ex 3). The accused's check was returned to the Post Exchange on 9 August 1948 with the notation "Insufficient Funds" (R 23,25,26,27; Pros Ex 3).

On 11 August 1948, Mrs. Thacker again cashed a check for the accused at the Post Exchange Office. This check, which was dated 11 August 1948, payable in the amount of seventy-five dollars, and had the words "Post Exchange" written on the lower left-hand corner, was in all other respects similar to the twenty dollar check (R 22; Pros Ex 4). Mrs. Thacker gave the accused seventy-five dollars in cash for the check and placed a stamped indorsement thereon identical to the one on the twenty dollar check (R 22; Pros Ex 4). The latter check was returned to the Post Exchange on 21 August 1948, also bearing the stamped notation "Insufficient Funds" (R 22,23,26; Pros Ex 4).

The accused maintained a checking account in the First-Citizens Bank and Trust Company, Fort Bragg, North Carolina, during the period 1 June 1948 to 20 August 1948 (R 27,28; Pros Ex 5). There had been

deposited to this account on 1 July 1948 the sum of two hundred fifty-seven dollars and sixteen cents ($257.16). By 13 July 1948, however, the amount in this account had been reduced to two dollars and eight cents ($2.08) at the close of business. Two debit entries were made on 14 July 1948, as a result of charges for checks returned without payment. The sum of one hundred forty dollars ($140.00) was deposited on 16 July 1948, but by 23 July 1948, checks drawn against the accused reduced the balance to seven dollars and seventy-eight cents ($7.78). The next deposit was made on 6 August 1948 and was in the amount of two hundred and fifty-eight dollars and fifty-six cents ($258.56). Meanwhile, however, between 23 July and 5 August there had been twelve charges made against the accused's account. Eight of such charges were made on 28 July, three on 4 August, and one on 5 August. These were "* * return ck charges and regular service charges" (R 27,28; Pros Ex 5, p.4,5). Following the deposit of 6 August 1948 in the accused's account, the balance was reduced to thirteen dollars and sixty cents ($13.60) on 9 August. Return check charges on 10, 11, 13, 17 and 18 August reduced the credit balance to ten dollars and ten cents ($10.10) on 18 August 1948 (Pros Ex 5; p.6). The credit balance in the account was further reduced to one dollar and thirty-five cents ($1.35) on 19 August by the payment of an eight dollar and seventy-five cent ($8.75) check drawn against the account. The check last mentioned was the only check paid by the bank during the period 10 August 1948 to 31 August 1948 (R 27,28; Pros Ex 5; p.6).

Mrs. Thacker had not been notified that she was to cash no more checks for the accused until approximately three weeks after the checks were returned (R 27). The Post Exchange was repaid for the two checks the week prior to the second and concluding day of the trial (29 March 1949) (R 23).

5. Evidence for the defense.

First Lieutenant Lewis T. Conant, Headquarters 9224 TSU, Transportation School, testified that he had first met the accused in February of 1946 at Camp Plauche, Louisiana, when he and the accused were sergeants and shared a squad room for about five weeks. Lieutenant Conant again encountered the accused when the Transportation School was transferred to Fort Eustis, at which time the accused was a Master Sergeant serving as Regimental Sergeant Major, 7th Training Regiment (R 29,30,31). In visiting the accused's home in Newport News, he met accused's wife and saw the accused's child. At that time, Lieutenant Conant observed that the house was not neat and "* * * got the idea what he [accused] had been up against just by talking to his wife and observing her and her actions" (R 29). The accused had complained to Lieutenant Conant in

February of 1946 that his wife was "* * * quite a gadabout. Apparently she was unfaithful in the respect that she was running around with sailors, to be exact." Accused had also complained about the fact that his wife had sold their household furniture and silverware (R 29). Lieutenant Conant further testified:

> "I ran into Lt. Young again when he reported back on active duty as a Regular Army officer. I would say the middle of 1948, I can't recall the exact date, but Lt. Young looked changed then in the respect that apparently he had done a great deal of worrying, even at that time, over his domestic difficulties. Lt. Young always seemed to be very efficient as a Master Sergeant. As the Sergeant Major of a training regiment he was very good. When he first took over the job he knew very little about being a Sergeant Major and he did a great deal of studying at night in the room that we occupied. He seemed very willing. He was always neat and very understanding, and my impression was that he was a very good soldier." (R 29)

According to First Lieutenant William H. Pensyl, Headquarters Transportation School, Fort Eustis, Virginia, a witness called by the defense, the accused had been a "good soldier" while serving as Sergeant Major of the 7th Training Regiment and a "good officer" later when he was assigned to the Highway Branch of the Transportation School. The accused was always well behaved and well mannered (R 31,32).

The following stipulated testimony was offered by the defense:

> "'That I, CID Agent Peterson, investigated and apprehended 1st Lt. Raymond D. Young on February 19, 1949 and in the investigation found that he made no attempt to change his name or social security number or in any way hide his identity.'" (R 33)

A letter dated 17 February 1949 from the accused's wife bearing a duly executed acknowledgment was offered by the defense and received in evidence without objection (R 33; Def Ex A). In pertinent part, this letter is as follows:

> "I received a phone call from Lt. Young on December 31, 1948. I recognized the voice as being that of my husband and he informed me that he was returning to Military Authorities." (Def Ex A)

After having been fully advised of his rights by the Law Member, the accused elected to make a sworn statement (R 34,35). He testified

that he left Fort Eustis on emergency leave for South Carolina to procure documents necessary for the sale of his automobile and upon returning, he spent an evening with his wife in Richmond. The following morning, after taking his wife to work, he went to the bus station and obtained a ticket, intending to return to camp. While waiting for the bus, in the words of the accused:

> "I went to a corner restaurant and had a beer and got to talking to a fellow. The next thing I remember I was in Atlanta, Georgia, not knowing how I got there other than vaguely remembering transferring from one bus to another en route. I had a ticket for New Orleans, Louisiana in my pocket. I stayed there in Atlanta and tried to think out what I had done, how I got there, what the circumstances were, etc. I realized that if I turned in immediately, which I should have done, I would be put under confinement or arrest and I needed some money at the time. So I decided to go to New Orleans and try to procure work to make some money to pay off debts and give my wife before turning in. While there I maintained my correct identification. I procured a job, waiting for the Mardi Gras when I would be able to make enough in a short period of time to be able to present my wife with some and pay off debts. I called my wife the 31st of December, New Years Eve, and told her I would return to Richmond and turn myself in to the military authorities. At no time while I was gone can I remember, did I ever believe that I would not be punished for leaving and would not be apprehended or anything like that. I knew I was to return, and if I wasn't apprehended before the first week of March, I fully intended to return to the service." (R 36)

The accused testified further that he was presently married to his second wife with whom he had an excellent married life. His previous marriage had not been successful. Upon returning from overseas he found that his first wife had not taken proper care of his child and her child by a former marriage (R 36,41), and had incurred numerous debts (R 36, 41). Accused and this wife separated and he obtained custody of his child. He placed the child with relatives in Cincinnati, Ohio. Later the accused and his first wife were reconciled and established residence in Newport News. When accused was recalled to active duty, this spouse "* * decided she wasn't following the Army life anymore." Accused went to Fort Bragg, leaving the children in her care. Thereupon "* * she incurred a lot more debts and eventually she remarried." Accused obtained a divorce in Ohio and later remarried. Later the accused's first wife and her relatives wrote his commanding officers in an effort to obtain money for debts alleged to have been incurred by the accused's first

wife and for money advanced for her medical services while accused was serving overseas (R 36,37). After receiving his commission in the Regular Army, the accused was required to answer these communications by indorsement, explaining his status in each instance. Accused stated that his wife purchased furniture and sold it at a substantial loss, then purchased furniture again. The accused served overseas in the Italian Theater for approximately twenty months. He was in combat for twelve months (R 38). In answer to a question of defense counsel as to how he had spent his time since he was apprehended, the accused answered "The first three days were spent in the 3rd precinct cells, New Orleans, La. Since then, I've been under confinement, under armed guard." (R 38).

At the close of the accused's direct examination, the following occurred:

> "TJA: Before I cross-examine the witness I would like a ruling from the court as to whether the statements that he made in reference to money matters should be regarded as statements tending to show that he did not pass bad checks or whether I am allowed to cross-examine him on Specifications 1 and 2 of Charge II and Specifications 1 and 2 of Charge III.
>
> DC: I think the defense has clearly brought out that there was nothing in the testimony regarding bad checks, nothing stated. Simply about the first charge and other circumstances during the life of the accused.
>
> LM: The ruling of the law member is that the testimony has in general been confined to Charge I and mitigating circumstances in connection with his general background, and that questions on Charge II and Charge III would be out of order unless he further testifies to those charges." (R 38,39)

Thereafter, upon cross-examination, the accused testified that he did not return from leave, as required; that when he was in Atlanta, he realized he would be put under guard and punished so he decided to go to New Orleans; that in Atlanta there was a Provost Marshal's Office nearby; that he "* * thought about being under arrest and not being entitled to pay under arrest, and I [he] was needing money to pay debts * *"; and, that he arrived in New Orleans the first week of September and remained there until apprehended by two city detectives and a CID agent on 19 January 1949 (R 39,40). Concerning his indebtedness, the accused had answered by indorsement on four occasions. He had received his last communication from his first wife in August 1948 (R 40).

In the course of accused's examination by the court, he stated that all of the debts incurred while he was overseas were paid before January

of 1948 except those his first wife's people were writing about. While in New Orleans he worked as night manager for a luncheon stand at twenty-five dollars per week and meals, as a tractor-trailer operator at thirty-five to forty dollars per week and as an agent for a novelty company working on a commission at an average of from three to twenty-one dollars per day. (R 40,41). In staying in New Orleans instead of returning to the Army, the accused "* * figured working in that novelty company through Mardi Gras I would average $30 a day easily and I had a chance to make extra money on the side. I figured I could make close to $100.00 a day in ten days time." (R 41). Accused had no other source of income. Upon selling his car, however, the accused had given some money to his wife and "* * was carrying the rest * *" with him (R 42). Accused enlisted as a master sergeant on 6 February 1946 and was recalled as a commissioned officer on 8 November 1946. Accused was integrated in the Regular Army on 10 February 1947. He was divorced from his first wife on 7 May 1947 and remarried on 1 May 1948 (R 40,41).

The accused had been given four days leave to permit him to obtain the title to his car, and to sell it to "pay off some debts." (R 40,42) Concerning accused's transportation to New Orleans, the following question and answer is pertinent:

"Q. Having sold your car then you did have sufficient money in your possession to have bought a ticket to Atlanta or New Orleans?
A. Yes, sir, I had given some money to the wife and was carrying the rest with me, sir." (R 42)

Upon recross-examination by the prosecution, the accused stated that he owed the bank in Atlanta twelve hundred and sixty dollars ($1260.00) and had a total indebtedness of approximately twenty-eight hundred ($2800.00) to three thousand ($3000.00) dollars.

Following closing arguments and closing of the court, the following occurred:

"PRES: The court has reopened to ask for further evidence. If there are no objections on the part of the defense, the court would like to recall the accused to the stand to clarify certain elements of his evidence as submitted.

DC: There is no objection on the part of the defense." (R 43).

Thereupon the accused again took the witness stand. In answer to questions by the court as to his pay and allowances while overseas, the accused

stated it was approximately two hundred and ten dollars ($210.00) and then about three hundred and six dollars ($306.00). Of these amounts, accused retained only about forty-two ($42.00) dollars per month for himself, allotted two hundred dollars ($200.00) to his wife and sent the rest to the bank (R 43,44). Referring to the accused's alleged indebtedness to his wife's relatives and a letter they had written to his commanding officer several weeks before, the following appears:

"Q. How much was this particular letter referring to, how much indebtedness?
A. I don't remember whether that letter quoted any particular indebtedness at all. They told me it was close to $2,000, $500 for hospital bills in Cincinnati, and the rest was on furniture and things like that, that she had bought in Cincinnati, and care of the children, etc.

Q. Presumably then this was a particular pressure in August 1948 that demanded you to sell your car?
A. These two checks, I knew about one of them then, sir, and I wanted to get some money. (Underscoring supplied)

Q. That's the reason you went to South Carolina?
A. I wanted to get some money to cover this $75 check that I knew about here at the PX. That's the reason Colonel Peterson gave me the four days, was to go to South Carolina to procure the title so that I could bring it back to Virginia and sell it.

Q. How much money did you realize from your car?
A. $225.00.

Q. That was your equity?
A. Yes, sir.

Q. What did you do with the $225.00?
A. I gave $85 to my wife and what I did with the rest, I just spent when I left here, sir.

Q. Did you pay any of your outstanding debts?
A. That $85 paid some, sir, that I gave to my wife, and I was bringing the rest with me down to Fort Eustis to pay off the PX over here.

Q. Did you intend to deposit this money in the bank?
A. No, sir, I intended to pay cash for these checks and cover them that way, and pick them up that way, sir." (R 44)

Accused testified that he was not paying alimony but only "* * $35 a month plus a trust fund and educational insurance and insurance on the child" (R 44). Accused's pay and allowances in August of 1948 amounted to three hundred thirty dollars ($330.00) per month of which sum he was drawing approximately two hundred fifty-seven dollars ($257.00). Accused had previously increased the child support from thirty ($30.00) to thirty-five ($35.00) dollars monthly upon the recommendation of military superiors (R 45,46).

6. In connection with the issue of insanity advanced by defense counsel, a careful study and analysis of the record of trial impels us to conclude that no competent evidence was introduced to establish that the accused was not sane at all times herein relevant. The motion and statement by the accused's counsel without more, do not raise the issue of insanity, and are not competent from an evidential standpoint to show mental defect, disease or derangement (CM 249921, Maurer, 32 BR 229). Nor does any of the testimony of defense witnesses on this issue suggest an actual psychosis on the part of the accused. The most that may be said of such testimony is that it indicates accused had appeared to be very nervous immediately before his unauthorized departure, had broken out in a rash, and had become less proficient in the performance of his assigned military duties. Following his apprehension, accused's speech had appeared to a lay witness to be incoherent, inconsequential and lacking in continuity. Of equally inconclusive character is the stipulation offered in rebuttal to this testimony by the prosecution. It follows, therefore, particularly in view of the presumption of sanity and the demeanor and testimony of the accused before the court (CM 332151, Missik (25 Mar 49), Par 63, MCM 1928; Par 125a, MCM 1949; CM 271889, Barbera, 46 BR 193), that the motion of the defense predicated on the accused's alleged unsoundness of mind was properly overruled by the court.

7. The specification of Charge I alleges that the accused deserted the service at Fort Eustis, Virginia, on or about 29 August 1948 and remained absent in desertion until his apprehension by civilian authorities at New Orleans, Louisiana, on 19 January 1949. Although he has pleaded not guilty to the offense of desertion, the accused has pleaded guilty to absence without leave for the period alleged. Evidence for the prosecution competently establishes his absence without leave for this period. Further, while testifying as a witness in his own behalf, the accused has also admitted his unauthorized absence, and his apprehension on 19 January 1949 in New Orleans by two city detectives and a CID agent. Stipulated testimony of a CID agent presented by the defense corroborates such apprehension. Thus, the accused's absence for the period in question, terminated by his apprehension, as alleged, is undisputed. It follows that the only issue remaining as to the proof of this

specification concerns whether the accused "* * intended, at the time of absenting himself or at some time during his absence, to remain away permanently * *" from his place of service, organization, or place of duty (Par 130(a), MCM 1928, p.143; Par 146a, MCM 1949, p.198).

With respect to the element of intent above mentioned, it is clear that in the absence of a satisfactory explanation, the accused's prolonged absence, terminated by his apprehension, would, without more, justify an inference that he intended to remain permanently absent (Par 130a, MCM 1928, supra, and par 146a, MCM 1949, supra). In view of the evidence in the instant case, however, we find that the requisite proof of intent need not be predicated upon the above inference, although expressly permitted by both the Manual for Courts-Martial 1928 and the Manual for Courts-Martial 1949. Considering the facts and circumstances relating to the accused's unauthorized absence, both as shown by the accused's explanation and by the other evidence, it appears that the accused failed to return from leave of absence which had been granted him for the purpose of selling his automobile to obtain money with which to pay debts. At the time of accused's departure several of his worthless checks were being held by the Fort Eustis Branch Post Exchange. Although accused stated that he received a net amount of two hundred twenty-five ($225.00) dollars from the sale of his automobile, he admitted that he did not pay the Post Exchange for these checks. The fact that the accused thus left his station while indebted to an Army agency as a result of passing several worthless checks likewise provides competent evidence of an intention permanently to remain absent (CM 261405, Bailey, 40 BR 229). The same may be said of accused's failure to surrender to military authorities in either Atlanta or New Orleans where he admittedly knew military police were located, and of his civilian employment during the period of his absence. Just as the circumstances surrounding the inception of his unauthorized absence are vague, so are the reasons for his civilian employment and continued absence untenable and unacceptable. Since the accused is an officer and chargeable with knowledge of the long standing regulation that pay does not accrue to military personnel while absent without authority "unless excused or unavoidable," his statements that he remained absent and accepted civilian employment to earn money to pay his debts are hardly worthy of serious consideration, and even much less worthy of belief (Par 3a, Army Regulations 35-1420, 15 December 1939; CM 246591, Graham, 30 BR 95; CM 318507, Hayes, 71 BR 391,397; CM 332151, Missik, 25 Mar 49). Considered in the light of the fact that accused admittedly earned but twenty-five to forty dollars per week, aside from special occasions, or about one-half the amount he would have received from the Army had he remained on duty, the patent fallacies in his attempt to justify his unauthorized absence are greatly magnified. We must accordingly conclude, as did the trial court, that the competent and

legal evidence adduced compels the conclusion that during the course of his unauthorized absence the accused intended permanently to remain absent. The other elements of the offense of desertion not being disputed, his guilt of the offense is, in our opinion, established beyond a reasonable doubt.

Specification 1 of Charge II and Specification 1 of Charge III each allege in identical language that the accused, with intent to defraud, wrongfully and unlawfully, made and uttered a check for twenty ($20.00) dollars at Fort Eustis, Virginia, on or about 27 July 1948, and obtained therefor the same sum, well knowing that he did not have, and not intending that he should have, funds in the drawee bank to pay the check. Specifications 2 of Charges II and III are likewise phrased identically and allege an offense similar except as to the date (11 August 1948), and the amount ($75.00). Although violative of different Articles of War, the offenses alleged in specifications 1 of Charges II and III, involve the same transaction and will be considered together from the standpoint of proof. For the same reason, specifications 2 of Charges II and III will be similarly treated.

The evidence clearly shows that on 27 July and 11 August, the accused personally presented his checks for twenty ($20.00) dollars and seventy-five ($75.00) dollars, respectively, at the Post Exchange, and obtained payment therefor in cash. It is likewise shown by competent proof that there were not sufficient funds in his bank account with which these checks could be paid, either at the time of cashing or at a time when the checks could normally be expected to reach the bank. Accused's bank balance between 27 July and 5 August varied from seven dollars and seventy-five cents ($7.75) on the date first mentioned to one dollar and fifty-four cents ($1.54) on the latter date. Following a deposit on 6 August, before which date the first check must have been returned unpaid, the accused's account was reduced to thirteen dollars and sixty cents ($13.60), by 9 August 1948. No other deposits were made in that month although accused drew the seventy-five ($75.00) dollar check against the account on 11 August, as previously shown. It does not appear from the record that accused had made credit arrangements with his banking institution. Quite to the contrary, there is evidence showing numerous other checks were returned unpaid by the bank during the same period. In no instance was accused permitted an overdraft. From these facts above, the accused's fraudulent intent at the time of making and uttering the checks may be inferred (CM 307125, Keller, 60 BR 335; CM 330282, Dodge, 78 BR 345 and cases therein cited). As stated by the Board of Review in CM 330282, Dodge, supra, at pages 353 and 354: "* * the essence of the intent to defraud charged in cases of this class is that the accused obtained something of value for a worthless

check and that at the time the exchange was effected he knew, actually or constructively, that the check was worthless or that it would be worthless upon prompt presentment for payment. Clearly, a check drawn upon an insufficient account is as worthless as a check drawn upon a nonexistent account or upon an 'account' in which there are no funds (CM 307125, Keller, 60 BR 335,345; CM 320578, Himes, 70 BR 31,37)." Accused's subsequent desertion, admittedly with money in his possession with which to pay the checks, without making restitution, is corroborative of his initial fraudulent intent.

We consider it appropriate to comment on the admissibility of the evidence contained in the last sentence of the preceding paragraph. It is evident upon examination of the accused's testimony, as previously quoted in our opinion, that he broached the subject, and testified, concerning his failure to make restitution for the checks before his desertion, despite his pecuniary ability so to do. This was done in accused's non-responsive answer to a question posed by the court upon recross-examination, following his recall (R 44; opinion page 11). By virtue of these circumstances, no error resulted and the accused was bound by his testimony, notwithstanding an earlier ruling of the court, made at the request of defense counsel, whereby cross-examination of the accused was limited to the offense of desertion (CM 335586, Wilkins, May 1949).

That the accused's conduct in passing the two checks under the circumstances shown is violative of Article of War 95, as well as Article of War 96 is well established (par 151, MCM 1928, p.186; par 182, MCM 1949, p.254; CM 259234, Holladay, 38 BR 293-297; CM 307125, Keller, supra).

8. The official Army and Air Force Register shows the following concerning the accused:

"Young, Raymond D. (040988). B--Ohio 1 Apr. 20. A--Ohio, B.S.M. /Non-Federal: Pvt. Inf. Calif. N.G. 29 Oct. 40 to 2 Mar. 41./--- Pvt., pfc., and t/5 Inf. Calif. N.G. 3 Mar. 41 to 23 Nov. 42; 2 lt. A.U.S. 24 Nov. 42; accepted 24 Nov. 42; A.D. 24 Nov. 42; 1 lt A.U.S. 16 Oct. 43; reld. A.D. 22 Nov 45; 1 lt. Inf-Res. 6 Sept. 46; accepted 14 Sept. 46; A.D. 9 Nov. 46.---M/sgt. T.C. 15 Feb. 46 to 8 Nov. 46; 1 lt Q.M.C. 10 Feb. 47 with rank from 24 Nov. 45; accepted 27 Feb. 47; T.C. 27 Feb. 47."

Department of the Army records further show that the accused is married and the father of one child by a previous marriage. He was graduated from high school in Cincinnati, Ohio, in 1934. Prior to

entering the military service the accused was employed as a service station attendant. Following graduation from The Infantry School, Fort Benning, Georgia, where he received a commission as a second lieutenant of Infantry, Army of the United States, he was assigned to the 88th Infantry Division. He served overseas with that organization in the Mediterranean Theater of Operations for approximately eighteen months, of which period fourteen months were spent in combat. He participated in the Rome-Arno, North Apennines and Po Valley campaigns and has been awarded the Combat Infantryman Badge and the Presidential Unit Citation for combat service in addition to the Bronze Star Medal, previously mentioned. His efficiency ratings prior to his separation from the service were all "Excellent." Since recall to active duty and being commissioned in the Regular Army, the accused's ratings have been "Superior."

9. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is mandatory upon a conviction of Article of War 95. Dismissal, total forfeitures, and confinement for three years is authorized upon conviction of desertion in violation of Article of War 58; and making, uttering and receiving money for worthless checks in the amounts of twenty ($20.00) dollars and seventy-five ($75.00) dollars, with intent to defraud, in violation of Article of War 96. Confinement in a penitentiary is authorized by Article of War 42 upon conviction of the offense of making, uttering and receiving money in payment of a worthless check in an amount in excess of fifty ($50.00) dollars, with intent to defraud (Sec 22:1301, District of Columbia Code, 1940 Edition).

Wilmot T. Baughman, J.A.G.C.

Charles J. Bernhardt, J.A.G.C.

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

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 335904

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

In the foregoing case of First Lieutenant Raymond David Young, 040988, 9224th Technical Service Unit, Headquarters Transportation School, Fort Eustis, Virginia, with 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.

Franklin P. Shaw
Franklin P. Shaw, Brig Gen, JAGC

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

31 May 1949.

E.M. Brannon
E. M. Brannon, Brig Gen, JAGC
Chairman

I concur in the foregoing action.

Thomas H. Green
THOMAS H. GREEN
MAJOR GENERAL
THE JUDGE ADVOCATE GENERAL

L)
10 June 1949

(GCMO 39, June 21, 1949).

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

(335)

CSJAGH CM 335921

AUG 10 1949

UNITED STATES	)	BERLIN MILITARY POST
v.	)	Trial by G.C.M., convened at Berlin, Germany, 21 February, 2,3,4 and 7-12 March 1949. Sentenced to pay to the United States a fine of four hundred dollars ($400.00) and confinement until said fine is so paid, but for not more than six (6) months.
WILLIAM MADITZ, CAF-5, Step 1, Department of the Army Civilian, AGO D-079095, Quartermaster Branch, Berlin Military Post.	)	

HOLDING by the BOARD OF REVIEW
BAUGHN, BERKOWITZ, and LYNCH
Officers of The Judge Advocate General's Corps

The record of trial in the case of the Department of the Army civilian named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings of guilty and the sentence. The record of trial has now been examined by the Board of Review and held legally sufficient to support the findings of guilty and the sentence. This holding by the Board of Review is now submitted to The Judge Advocate General under the provisions of Article of War 50e.

Wilmot T. Baughn, J.A.G.C.

Charles J. Berkowitz, J.A.G.C.

Geo Lynch, J.A.G.C.

During the months of August, September and October of 1948 the accused, Department of the Army civilian, was employed as warehouse manager in the sales commissary, Andrews Barracks, Berlin Military Post (R 60). During this period the accused's immediate superior was Charles P. Elam, Jr., Department of the Army civilian, employed in the 7852 Quartermaster Service Company, Berlin, Germany, as store manager in the sales commissary, Andrews Barracks (R 60,63,200,201).

The commissary at Andrews Barracks had been in operation prior to the last day of July, 1948, as had the commissary at Uncle Tom's Area, of which latter installation the accused had been assistant manager. Effective 31 July 1948, the two commissaries in effect were merged, and as of 1 August 1948 the accused assumed his duties as warehouse manager in the Andrews Barracks commissary (R 70).

Commissary items were brought to the Goertzallee warehouse by airlift (R 191). Items which were shipped in to the commissary at Andrews Barracks from the warehouse at Goertzallee were accompanied by a transfer form. The amount was checked by commissary and warehouse personnel both upon leaving the warehouse, and again upon arriving at the commissary (R 73). At the time of the next accounting of the stock on hand, which was the usual inventory at the end of the month, the individual identity of the items comprising the stock on hand, was lost, and it went from an item record to a dollar and cents record. Any shortage would show up as a deficit at the end of the month (R 73). A deficit in fact existed for the month of August 1948 in the amount of approximately $475.00; for September in the amount of approximately $2,000.00; and for October in the amount of approximately $9,000.00; and for November in the amount of approximately $2500.00 (R 74). These deficits constituted the total of the four commissary installations, but in the case of the October and November deficits the distribution journal was broken down into the three component parts, comprising the warehouse, the commissary DP, and the commissary store, and the losses were localized in the commissary store itself (R 74-75).

Normally, sales from the commissary were paid for at the end of the month at the central payment office on Kronprinzenallee, but there was a limited number of cash sales made to authorized persons or installations, including the Red Cross (R 62,77). Cash sales were recorded in a sales book, containing approximately 100 serially numbered sales tickets, issued to the store manager. A record of these books was kept, and when the 100 cash sales were completed the book was returned again to the custody of the sales commissary officer (R 62,335). The cash sales records indicated that no cash sale had been made during the months of August, September or October 1948 to the accused or to his immediate superior, Elam (R 62-63). Lieutenant

Colonel George G. Myrick, who normally authorized the personnel who would make cash purchases, knew of no authorization for either the accused or Elam to make such purchases for cash, and no authority had been given to either to purchase 555 pounds of lard or 84 pounds of cocoa (R 356,357).

The court took judicial notice of the price list of subsistence stores for use in the European Command, which list established the price of refined service-type lard at between 26 and 28 cents per pound (R 106,107). The nonstandard price list of 7 April and 13 August 1948 set the price of cocoa at eighty-four cents per seven-pound can (R 77). Both prices were effective at the time of the alleged offense.

On or about October 1948, in the basement of the sales commissary at Andrews Barracks, the accused ordered Kurt Hockwin, commissary storekeeper in the basement, to "get some men and get some of the sacks over there from Berlin [electrician] and get some of the sacks from the storeroom" (R 35). Hockwin and several other employees removed approximately ten to fifteen sacks (R 28,34,88-90). The sacks were located in two separate storerooms. Hockwin and one other employee went to the electrician's room and removed "three or four" sacks, and two other employees went to the room where normally "* * * coffee, lard * * *" and "cocoa" were stored, and removed the remainder of the sacks (R 34, 36-39). The closed sacks, which contained some wood and some "hard smooth" items (R 34-36,114) and which could have "contained tin" (R 118) were loaded through the loading window and placed on a truck (R 42,114,119; Pros Ex 3). Normally, wood would not go out through this window (R 43). The truck was driven by Wieschermann, at the direction of the accused, to #49 Wilskistrasse, Berlin, where the accused resided in one of the apartments (R 46,87,90). The accused and Kurt Hockwin accompanied the load of sacks to #49 Wilskistrasse, where it was unloaded in the anteroom of the basement (R 28,29,90,98).

On 26 November 1948 Robert B. Shaw, "CID" Agent, served a search warrant on Elam at the apartment house at 49 Wilskistrasse where Elam and accused each had an apartment. Elam accompanied Shaw to the basement of the building and at Shaw's request to open a locked storage place in the basement Elam secured a key from accused and unlocked it. In the storage place Shaw seized a quantity of lard and cocoa. The lard and cocoa were in wooden containers wrapped in burlap bags or sacking. Some of the bags were tied and some were loose. Prosecution Exhibits 4,5 and 6 were identified as the property seized. Shaw gave Elam a receipt for the property seized and identified Defense Exhibit A as a photostatic copy of the receipt. The copy reflected the seizure by Shaw of 15 37-pound tins of lard and 7 12-pound cans of cocoa (R 46-49,138).

Shaw testified that Prosecution Exhibits 4, 5 and 6 represented the property listed on the receipt (R 51-52).

On or about 27 January 1949 CID director Orazio R. Carlucci, after having fully warned the accused of his rights under the 24th Article of War, elicited from him an oral statement that "* * * he [accused] was ordered by Mr. Elam to pick up some lard and some cocoa and deliver that lard and cocoa from the commissary to Mr. Elam's billet, and that he believes that it was some time in August when this occurred. He didn't know exactly when; and also that he had put this lard in burlap bags before it was loaded onto the truck and delivered it to Elam's house. He further told me that Elam had paid for this out of a cash account which is being operated by the Red Cross" (R 56-57). There was no objection to the voluntary nature of the statement (R 57).

b. For the defense.

Charles P. Elam, Jr., Department of the Army civilian employed by the 7852 Quartermaster Service Company, was the immediate superior of the accused during the months of August through October of 1948 (R 201). During the month of August 1948, Elam specifically ordered the accused to deliver fifteen 37-pound cans of lard and twelve 7-pound cans of cocoa to his [Elam's] house [billet] at #49 Wilskistrasse (R 201,211, 239,303). He had purchased the lard and cocoa for his "* * * own personal use as presents" (R 212), having paid for them in cash (R 203). At the time of the alleged purchase there were present, besides Elam himself, the accused, James E. Jones, formerly assistant to Elam, and Sergeant Okazaki, commissary employee (R 248). Regarding this particular occasion, Elam testified that, having ascertained that certain items including lard and cocoa were to be rationed effective about 1 September 1948, he was desirous of making the purchase, and of using it as gifts during the Christmas season (R 215). This purchase was admittedly over and above his allowance for the month (R 213). In the presence of the three persons above named, Elam put the money in the safe in his office in the commissary, and the next morning, according to Elam, it was sent forward to the accounting office (R 213,248). Both the accused and Elam, at the time of the purchase, computed the amount due (R 251-252). Elam testified that this purchase was to be run through as a Red Cross cash sale, and so went into the records (R 215-216). "When the Red Cross comes into the commissary to purchase, their food is run through on the control machine; in turn, we have a cash sales book, which has an original and a duplicate ticket; in turn, the Red Cross signs the original, which goes forward to our accounting office, and they take the duplicate as a receipt" (R 216).

Elam's duties at the Andrews Barracks commissary placed him directly under the authority of Lieutenant Colonel George G. Myrick, Quartermaster Section, Berlin Military Post, and his /Elam's/ orders were subject to being countermanded by Myrick (R 237). Elam was not an authorized purchasing agent for the Red Cross (R 217). There was a ticket for every cash sale that was made, and also covering the money value that was turned in (R 238). Elam, however, consistently availed himself of his rights under the 24th Article of War, whenever he was interrogated on the question of whether he or the Red Cross actually signed for the particular purchase of lard and cocoa (R 214, 216,226,232,233,266,296,300,305,310,315,319,323,325).

c. Rebuttal for the prosecution.

Lieutenant Colonel George G. Myrick was recalled by the prosecution and testified that he had never given written authority to Elam or to the accused to make any cash purchases for themselves, and that he did not recall ever having given such authority orally (R 356). Elam had been advised as to which personnel and installations might make cash purchases, and which therefore need not be referred to Myrick; but no sanction had ever been given to other cash sales (R 357).

Myrick caused to be published on 28 February 1948 an SOP, and on 26 September 1948 a letter of instruction, both pertaining to the handling of commissary cash sales at Andrews Barracks (R 329,336). These publications were corroborative of the statements of the witness to the effect that cash sales were to be made only to authorized personnel or organizations, and were descriptive of the cash sales procedure.

Colonel Myrick identified Prosecution Exhibits 8-19, 21-22 as sales slips comprising one sales book with slips 05960101-200 (R 335-344) and testified that to his belief the book with the exceptions of ice sales and two other sales not pertinent to the case covered all cash sales from 1 August to the end of November 1948 (R 336).

From an examination of the sales slips (Pros Exs 8-18,19,21,22) it was evident that none bore the signature of either the accused or Elam. Such slips should have appeared in the records of cash sales if Elam had in fact purchased for cash (R 344-345).

Ordinarily, Elam would be required to sign the cash sales slips for the purchase of such items as constituted Prosecution Exhibits 4, 5 and 6 (R 358).

During the latter part of November 1948, Myrick became apprised of the apparent "custom" of unauthorized personnel making cash purchases, and charging them to the Red Cross account (R 364). This practice was evident, at the time of the trial, from an examination of the sales books (R 366). Having been informed of this unauthorized practice, Myrick decided to allow it to continue for a 10 to 14-day "test period," to ascertain whether in fact it existed (R 370). The Red Cross sales recorded during the times under consideration were subsequently found to be excessive (R 371). Having discovered to his satisfaction that irregular purchases were being effected through the Red Cross account, corrective action was taken by Myrick during the latter part of November 1948, at which time he "cleaned house" (R 384).

d. By witnesses for the court.

Hilda Habermann, a witness called by the court, testified that she was the housekeeper at #49 Wilskistrasse, and had been since "May or June" 1948. Number 49 Wilskistrasse is an apartment building of 6 /7/ units, of which the accused occupied the one on the first floor left, and Elam occupied the one on the first floor right (R 391). Witness Habermann recalled the delivery of sacks in question, and testified that: "Mr. Maditz often used to bring some wood, and then I had to help him in carrying this, and that particular time it looked very heavy to me. He was swaying under the wood he had to carry" (R 407).

Sergeant Kay Okazaki testified that he did not remember the "cash purchase" by Elam, but that he had merely "* * * heard some conversation about purchasing something" in the commissary office (R 433-434). At the time of the alleged sale he had gone into the office to get his hat, and while there saw Elam "bending over the safe * *" and saw " * * something going into the safe" (R 435-436).

Upon being recalled by the court Elam testified that all cash sales were made in one of two ways; (1) to personnel authorized by S-4, Berlin Military Post; or (2) through the Red Cross account (R 454). With reference to which sales slip or slips recorded his purported purchase of the lard and cocoa, Elam testified as follows:

"Q All right. Give him prosecution exhibits 8 through 19, 21, and 22. Will you look at those sales slips, Mr. Elam, and tell me if you recognize any of the slips as purporting to be the slip or slips that you wrote the following morning or that was written up?

A As to the exact date when these slips were written, I don't know.

Q. You said it was during the month of August, did you not?
A Yes, sir, this was during the month of August. Sir, on the 24th Article of War, I refuse to answer that question, as it may tend to incriminate me.

* * *

Q You have stated that after making this purchase it was written up on a cash sales slip as a cash sale. The court is aware of the protection which the 24th Article of War affords you or any other witness, but the court is also interested in arriving at the true status of this matter, and before you avail yourself of this protection, the court would like for you to look through those slips and see if any of those slips are the slips which you may or may not have signed. After you have looked at them, if you decide not to answer, then that is your prerogative?
A Looking through those slips, I couldn't tell you which cash sales or two cash sales or possible three, sir; therefore, I think there is no point if I looked through them. If I picked out three slips or one slip or two slips, it would only be a guess." (R 464,466)

Guenter Bolz, fireman at #49 Wilskistrasse, was called by the court, and in regard to the particular load of sacks in issue testified that some "* * were heavier than the others, and I [Bolz] noticed that right away" (R 489).

3. The evidence thus shows that accused during August, September, October and November 1948 was warehouse manager in the sales commissary, Andrews Barracks, Berlin Military Post. His superior during the same period was Charles P. Elam, Jr., who was manager of the sales commissary. Elam's superior was Lieutenant Colonel George G. Myrick, sales commissary officer, Berlin Military Post. In the over-all operation of all commissary activities of the Berlin Military Post during the months of August, September, October and November, shortages occurred as follows: August, $475.00; September, approximately $2,000.00; October, approximately $9,000.00, and November, approximately $2500.00. The October and November losses were localized to the Andrews Barracks commissary. No attempt, however, was made to localize the August and September losses. On 26 November 1948, pursuant to a search warrant served on Elam, 15 37-pound cans of lard and 12 7-pound tins of cocoa wrapped in burlap bags were seized in the basement of the building at 49 Wilskistrasse where Elam and accused each had an apartment. In order to unlock the storage place where the lard and cocoa were stored Elam had to procure the key from accused. On 27 January 1949 accused after having been warned of his rights under Article of War 24 orally stated to O. R. Carlucci that at a time believed by accused to be in August he was ordered by Elam to pick up some lard and cocoa from the commissary and deliver it to Elam's billets. He placed the lard in burlap bags, had it loaded onto a truck and delivered it to Elam's house.

Accused stated that Elam had informed him that payment had been made for the commodities out of a cash account operated for the Red Cross.

Cash sales were recorded in duplicate in sales books which contained 100 serially numbered slips in duplicate. The books were issued to the commissary manager and upon being completed were returned to the custody of the sales commissary officer. The sales slips covering the period August through October, inclusive, failed to reflect any sales to either Elam or accused.

Testifying for the defense, Elam claimed that he had made the purchase of 555 pounds of lard and 84 pounds of cocoa sometime in August and that the sale had been recorded on a sales slip or on sales slips made out to reflect a sale to the Red Cross. Upon being confronted with all the sales slips covering the months of August, September, October, and November 1948, Elam first declined and then stated that he was unable to point out the slip or slips upon which his claimed purchase of the lard and cocoa were recorded. He further claimed that the accused, another former assistant James E. Jones, and Sergeant Okazaki were present when he made the purchases which he alleged was consummated upon his placing between $150.00 and $160.00 in the safe in his office. Okazaki, called as a witness by the court, failed in material detail to corroborate Elam's version of his purchase.

It may be seen that two questions are raised by the foregoing resume of the evidence. Was there a larceny committed by Elam, and, if so, was accused an aider and abettor in the commission of the larceny. We are of the opinion that both questions must be answered in the affirmative. That the lard and cocoa in question, of the value and ownership alleged, were taken by accused for Elam is uncontradicted. Whether the taking was accomplished in October 1948, as contended by the prosecution, or in August 1948, as contended by the defense is of no consequence. The issue as to whether the taking was larcenous is raised by the defense contention that Elam had purchased the commodities for cash. The court was entitled to reject this contention of the defense and in our view of the case, rightfully so. Cash sales were to be recorded in the sales book provided for that purpose, and the claim was made by Elam that his purchase was so recorded, and yet when given the opportunity to examine all cash sales slips for the period in question was unable or refused to identify the slip or slips which recorded his alleged purchase. We, as evidently did the court, conclude that Elam's claimed purchase of the lard and cocoa, existed solely in convenient afterthought.

In an oral pretrial statement, accused stated that at Elam's direction, he had lard and cocoa removed to Elam's billets, and that

prior to so doing he had the lard and cocoa put in sacks. The lard and cocoa, when recovered by government agents were in burlap bags. By his own admission accused had possession of recently stolen property at the time he transported it from the warehouse and, in all probability, in joint possession at the storage place where the property was found by the CID. In connection with the issue of accused's larcenous intent, we observe, "Proof that a person was in possession of recently stolen property may raise a presumption that such person stole it * *" (Par 125a, MCM 1949, p.151). Since the presumption may, with other circumstances, be relied upon to establish elements of the offense including the intent, we find no objection to relying upon it to some degree for the single element of the requisite felonious intent in an instance where these other elements of the offense are independently proved.

Aside from the presumption stemming from accused's possession of recently stolen property, the court could find that accused's transportation of the stolen property from the commissary to the building in which he and Elam had quarters was accomplished by stealth. The evidence shows that the cans of lard and cocoa were crated and we conclude that the only reason that the crates of lard and cocoa were placed in burlap sacks was to conceal the character of the property being stolen. Concealment of the property taken is an additional circumstance from which the court could infer accused's intent and guilt of the larceny charged.

The defense in this case was that the property subject of the larceny alleged was in fact not stolen, and that accused transported the property pursuant to orders from Elam in the belief that Elam was the owner of the property. We have hereinbefore concluded that the property was in fact stolen. In explanation for accused's possession of the property, the defense offered the witness Elam who testified that accused witnessed Elam's purchase of the property in question. It is noted that in his pretrial oral statement accused merely asserted that Elam had purchased the property out of a Red Cross cash account. The substance of accused's pretrial statement recounted by its auditor was not impeached by the defense. If in fact accused had witnessed the purchase of the property, it would be expected that he would so assert. Under the circumstances shown, the rejection by the court of the defense's explanation of accused's possession of the property was, to say the least, not unreasonable.

4. Prior to trial the defense made demand upon the prosecution for the sales slips which were subsequently placed in evidence as part of the prosecution's case. The prosecution was willing to have the sales slips inspected by the defense counsel but not by defense

witnesses. The defense would not accede to this limitation and renewed its demand before the court. The court refused to order the prosecution to enlarge the limit of its original offer of the opportunity for inspection by the defense counsel. During trial, the witness Elam, for whose inspection the defense requested the sales slips, was given unlimited opportunity to inspect the sales slips. We are of the opinion that it was the duty of the trial judge advocate to turn over to the defense the evidence requested and further the duty of the court so to direct the trial judge advocate (CM 321309, Tisdall, 70 BR 301,310-311), but that the error in not giving effect to the defense request was cured by the unlimited opportunity for inspection afforded Elam while a witness before the court.

5. For the reasons hereinbefore stated the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty and the sentence.

Wilmot T. Baughn, J.A.G.C.

Charles J. Berkowitz, J.A.G.C.

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

18 AUG 1949

CSJAGH CM 335921 1st Ind

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

TO: The Commanding Officer, Berlin Military Post, APO 742, c/o Postmaster, New York, New York.

In the case of William Maditz, CAF-5, Step 1, Department of the Army Civilian, AGO D-079095, Quartermaster Branch, Berlin Military Post, attention is invited to the foregoing authenticated copy of the holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confirming action is not by The Judge Advocate General or the Board of Review deemed necessary.

FOR THE JUDGE ADVOCATE GENERAL:

WILLIAM P. GONNALLY, JR.
Colonel, JAGC
Assistant Judge Advocate General

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

MAY 9 1949

CSJAGI CM 335931

UNITED STATES v. Private THOMAS L. KELLEY (RA 44107533), Battery A, 37th Field Artillery Battalion, Fort Lewis, Washington.	)	2D INFANTRY DIVISION Trial by G.C.M., convened at Fort Lewis, Washington, 4 March 1949. Dishonorable discharge (suspended), forfeiture of all pay and allowances due or to become due, and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
JONES, ALFRED and JUDY
Officers of the Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private, then Private First Class, Thomas L. Kelley Battery A, 37th Field Artillery Battalion, did at Fort Lewis, Washington on or about 29 July 1946 desert the service of the United States and did remain absent in desertion until he was apprehended at Florence, Alabama on or about 2 December 1948.

He pleaded not guilty to the Charge and Specification and was found guilty of the Specification except the words "he was apprehended at Florence, Alabama," of the excepted words not guilty, and guilty of the Charge. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for one year. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement. The results of trial were promulgated in General Court-Martial Orders No. 53, Headquarters 2d Infantry Division, Fort Lewis, Washington, dated 31 March 1949.

3. The record of trial is legally sufficient to support the findings of guilty and legally sufficient to support the sentence in part. The only question for consideration is the legality of the sentence with respect to the effective date of the forfeiture.

4. The offense of which accused was found guilty was committed prior to 1 February 1949, but he was tried and sentenced after that date on 4 March 1949. Section 245, Public Law 759, 80th Congress, provides that all offenses committed and all penalties, forfeitures, fines or liabilities incurred prior to 1 February 1949 may be prosecuted, punished and enforced in the same manner and with the same effect as if the new law had not been passed. This provision, however, must be considered along with Article of War 16 as implemented and interpreted by Executive Order 10020 and the Manual for Courts-Martial, 1949.

Article of War 16 prohibits any punishment or penalties, other than confinement, during the time an accused is waiting trial and prior to sentence on charges against him. This prohibition is expressed in the Manual for Courts-Martial, 1949, in the words: "nor shall any accused prior to the order directing execution of the approved sentence, be made subject to any punishment or penalties other than confinement" (par. 115, MCM 1949). With respect to the effective date of forfeitures, it is stated in paragraph 116g, Manual for Courts-Martial, 1949, that "a forfeiture becomes legally effective on the date the sentence adjudging it is promulgated." Appendix 8, Manual for Courts-Martial, 1949, at Item 8, provides that the sentence to total forfeitures should read:

> "* * * to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, * * *." (Underscoring supplied).

Executive Order Number 10020 prescribes that the Manual for Courts-Martial, 1949, "shall be in full force and effect * * * on and after February 1, 1949, with respect to all court-martial processes taken on or after February 1, 1949 * * *."

The only reasonable interpretation of that part of the sentence adjudged against accused which reads "to forfeit all pay and allowances due or to become due" would effect a forfeiture of all pay and allowances due or to become due at the date the sentence was adjudged.

In view of Article of War 16 and the provisions of the Executive Order and Manual for Courts-Martial cited above, even though the offense was committed prior to 1 February 1949, the court was authorized to impose a sentence with respect to forfeitures of only pay and allowances to become due after the date of the order promulgating the sentence. That part of the sentence adjudging forfeiture in excess thereof is clearly excessive and cannot be sustained.

CSJAGI CM 335931 1st Ind

JAGC, Dept. of the Army, Washington 25, D. C. JUN 17 1949

TO: Commanding General, 2d Infantry Division, Fort Lewis, Washington

1. In the case of Private Thomas L. Kelley (RA 44107533), Battery A, 37th Field Artillery Battalion, Fort Lewis, Washington, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the modified Specification and the Charge and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for one year. Under Article of War 50e this holding and my concurrence vacate so much of the sentence relating to forfeitures as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence.

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

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

(CM 335931)

THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls
1. Record of trial
2. Draft of GCMO

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

CSJAGQ - CM 335933

JUN 30 1949

UNITED STATES	2D INFANTRY DIVISION
v.	Trial by G.C.M., convened at Fort Lewis, Washington, 2 March 1949. Dishonorable discharge (suspended), forfeiture of all pay and allowances due or to become due and confinement for six (6) months. Post Stockade.
Recruit EDWARD D. YOUNG (RA 15266202), Headquarters Company, 1st Battalion, 25th Infantry Regiment, Fort Lewis, Washington.	

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

1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Recruit Edward D. Young, Headquarters Company, 1st Battalion, 25th Infantry Regiment, then Private, Company B, 1st Battalion, 25th Infantry Regiment, did, at Fort Lewis, Washington, on or about 8 July 1948, desert the service of the United States and did remain absent in desertion until he was apprehended at Dayton, Ohio, on or about 13 January 1949.

He pleaded not guilty to and was found guilty of the Charge and guilty of the Specification, except the word "apprehended" substituting therefor the words "returned to military control." Of the excepted word, not guilty, of the substituted words, guilty. Evidence of one previous conviction was introduced. Accused was sentenced "to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for one year." The reviewing authority approved the sentence but the period of confinement was reduced to six (6) months. As thus modified the sentence was ordered executed, but the dishonorable discharge was suspended until the soldier's release from confinement and the Post Stockade, Fort Lewis, Washington, was designated as the place of confinement. The result

of trial was promulgated in General Court-Martial Orders No. 54, Headquarters 2d Infantry Division, Fort Lewis, Washington, 31 March 1949.

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

Article of War 16, in part, provides:

> "nor shall any defendant awaiting trial be made subject to punishment or penalties other than confinement prior to sentence on charges against him" (Underscoring supplied).

Executive Order No. 10020, promulgating the Manual for Courts-Martial, 1949, provides that it shall be in force and effect on and after 1 February 1949 with respect to all court-martial processes taken on or after that date. Paragraph 115, page 126, Manual for Courts-Martial, 1949, citing Article of War 16, provides that no accused shall, prior to the order directing execution of the approved sentence, be made subject to any punishment or penalties other than confinement. Paragraph 116g, page 130, thereof, provides that a forfeiture becomes legally effective on the date the sentence adjudging it is promulgated. The prescribed forms of sentences to forfeitures (Appendix 9, pp. 364-365, Forms 8, 9b, 17, 20, MCM, 1949) are worded "to become due after the date of the order directing execution of the sentence." There is no authority, in the Articles of War or in the implementing provisions of the Manual, for the imposition of the forfeitures of pay and allowances due at the date of the order directing execution of the sentence, to become due at that date, or due or to become due after that date (CM 335803, Berry, 11 May 1949). To the extent the forfeitures imposed exceed the limits indicated in the above quoted forms they are illegal.

4. For the foregoing reasons the Board of Review holds the record of trial is legally sufficient to support the findings of guilty of the modified Specification and the Charge, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for six (6) months.

Abe McGregor Goff, JAGC
Lewis F. Shull, JAGC
Samuel S. Crosby, JAGC

CSJAGQ - CM 335933 1st Ind

JAGO, Dept of the Army, Wash. 25, D. C. JUL 7 1949

TO: Commanding General, 2d Infantry Division, Fort Lewis, Washington.

1. In the case of Recruit Edward D. Young (RA 15266202), Headquarters Company, 1st Battalion, 25th Infantry Regiment, Fort Lewis, Washington, 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 under the Charge and Specification, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for six months. Under Article of War 50e this holding and my concurrence vacate so much of the sentence relating to forfeitures as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence.

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

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

(CM 335933).

2 Incls
1. R/T
2. Dft GCMO

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

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

CSJAGI CM 335935

JUN 2 0 1949

UNITED STATES v. Private WILLIAM O. OWENS (RA 38749237), Company D, 5th Quartermaster Supply Battalion, 5th Armored Division, Camp Chaffee, Arkansas.	5TH ARMORED DIVISION Trial by G.C.M., convened at Camp Chaffee, Arkansas, 25 March 1949. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
JONES, ALFRED and JUDY
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 I: VIOLATION OF THE 93D ARTICLE OF WAR.

SPECIFICATION 1: In that Private William O. Owens, Company D, 5th Quartermaster Supply Battalion, did at Camp Chaffee, Arkansas, on or about 3 February 1949, feloniously steal Ten Dollars ($10.00), lawful money of the United States, the property of Recruit Paul J. Nicholosi, from a registered letter entrusted to his care, addressed to Recruit Paul J. Nicholosi, said Private William O. Owens then acting in his official capacity as Unit Mail Clerk.

SPECIFICATION 2: In that Private William O. Owens, Company D, 5th Quartermaster Supply Battalion, did at Camp Chaffee, Arkansas, on or about 14 February 1949, feloniously steal Ten Dollars ($10.00), lawful money of the United States, the property of Private Charles Todd, Junior, from

a registered letter entrusted to his care, addressed to Private Charles Todd, Junior, said Private William O. Owens then acting in his official capacity as Unit Mail Clerk.

SPECIFICATION 3: In that Private William O. Owens, Company D, 5th Quartermaster Supply Battalion, did at Camp Chaffee, Arkansas, on or about 7 February 1949, with intent to defraud, sign the name "J. C. Lavergne" on a certain document; to wit, WD AGO Form 922:

RECORD OF AND RECEIPT FOR REGISTERED AND INSURED MAIL

CP. CHAFFEE ARK
(Base Post Office, APO, etc.)

Co. D. 5th QM
(Company, battery, etc.)

Registration or insurance Number	Office of origin	Date of mailing	Addressed to	Signature of addressee or disposition	Date of delivery
R 2301	Opelousas, La.	2.5.49	J. C. Lavergne	/s/J. C. Lavergne	2.7.49
R 235	Lakevill, Miss.	2.4.49	Otis O. Woodall	/s/Otis O. Woodall	2.7.49
R 252	Winnona, Mo.	2.5.49	Chester E. Burns	/s/Chester E. Burns	2.10.49

/s/Floyd A Chase
1st Lt Inf

Before number, show "R" for registered mail and "I" for insured mail.

Insured pieces 0 Registered pieces 3 Total pieces three

Date received 2/7 - 49 Name William O. Owens
Unit mail clerk.

W. D., A. G. O. Form No. 922
February 1, 1943 *U. S. Government Printing Office: 1943 16-33135-1

which said signature was of a writing of a private nature which might operate to the prejudice of another.

SPECIFICATION 4: In that Private William O. Owens, Company D, 5th Quartermaster Supply Battalion, did at Camp Chaffee, Arkansas, on or about 7 February 1949, with intent to

defraud, sign the name "Otis O. Woodall" on a certain document; to wit, WD AGO Form 922:

33123

RECORD OF AND RECEIPT FOR REGISTERED AND INSURED MAIL

CP. CHAFFEE ARK
(Base Post Office, APO, etc.)

Co. D. 5th QM.
(Company, battery, etc.)

Registration or insurance Number	Office of origin	Date of Mailing	Addressed to	Signature of addressee or disposition	Date of Delivery
R 2301	Opelousas, La.	2.5.49	J.C. Lavergne	/s/J.C. Lavergne	2.7.49
R 235	Lakevill, Miss	2.4.49	Otis O. Woodall	/s/Otis O. Woodall	2.7.49
R 252	Winnona, Mo.	2.5.49	Chester E. Burns	/s/Chester E. Burns	2.10.49

/s/ Floyd A Chase
1st Lt Inf

Before number, show "R" for registered mail and "I" for insured mail.

Insured pieces 0 Registered pieces 3 Total pieces three

Date received 2/7 - 49 Name William O. Owens
Unit mail clerk.

W. D., A. G. O. Form No. 922
February 1, 1943 * U. S. Government Printing Office: 1943 16-33135-1

which said signature was of a writing of a private nature which might operate to the prejudice of another.

SPECIFICATION 5: In that Private William O. Owens, Company D, 5th Quartermaster Supply Battalion, did at Camp Chaffee, Arkansas, on or about 7 February 1949, with intent to defraud, sign the name "Chester E. Burns" on a certain document; to wit, WD AGO Form 922:

RECORD OF AND RECEIPT FOR REGISTERED AND INSURED MAIL

CP. CHAFFEE ARK
(Base Post Office, APO, etc.)

Co. D. 5th QM.
(Company, battery, etc.)

(358)

Registration or insurance Number	Office of Origin	Date of mailing	Addressed to	Signature of addressee or disposition	Date of Delivery
R 2301	Opelousas, La.	2.5.49	J.C. Lavergne	/s/ J.C. Lavergne	2.7.49
R 235	Lakevill, Miss	2.4.49	Otis O. Woodall	/s/ Otis O. Woodall	2.7.49
R 252	Winnona, Mo.	2.5.49	Chester E. Burns	/s/ Chester E. Burns	2.10.49

/s/ Floyd A Chase
1st Lt Inf

Before number, show "R" for registered mail and "I" for insured mail.

Insured pieces 0 Registered pieces 3 Total pieces three

Date received 2/7 - 49 Name William O. Owens
Unit mail clerk.

W. D., A. G. O. Form No. 922
February 1, 1943 * U. S. Government Printing Office: 1943 16-33135-1

which said signature was of a writing of a private nature which might operate to the prejudice of another.

CHARGE II: VIOLATION OF THE 96TH ARTICLE OF WAR.

SPECIFICATION 1: In that Private William O. Owens, Company D, 5th Quartermaster Supply Battalion, did at Camp Chaffee, Arkansas, from on or about 25 January 1949 to on or about 14 February 1949, unlawfully take 335 letters addressed to persons unknown, out of the Army Post Office, before they were delivered to the persons to whom they were directed, with design to obstruct the correspondence of these unknown persons.

SPECIFICATION 2: In that Private William O. Owens, Company D, 5th Quartermaster Supply Battalion, did at Camp Chaffee, Arkansas, on or about 3 February 1949, wrongfully and unlawfully open a certain letter addressed to Recruit Paul J. Nicholosi which said letter was then in the custody of the said Private William O. Owens, an official agent for the transmission of mail, before said letter was delivered to the person to whom it was directed.

SPECIFICATION 3: In that Private William O. Owens, Company D, 5th Quartermaster Supply Battalion, did at Camp Chaffee, Arkansas,

on or about 3 February 1949, wrongfully and unlawfully open a certain letter addressed to Sergeant Eugene L. Mitchell which said letter was then in the custody of the said Private William O. Owens, an official agent for the transmission of mail, before said letter was delivered to the person to whom it was directed.

SPECIFICATION 4: In that Private William O. Owens, Company D, 5th Quartermaster Supply Battalion, did at Camp Chaffee, Arkansas, on or about 15 February 1949, wrongfully and unlawfully open a certain letter addressed to Sergeant Cesar R. Pierantoni which said letter was then in the custody of the said Private William O. Owens, an official agent for the transmission of mail, before said letter was delivered to the person to whom it was directed.

SPECIFICATION 5: In that Private William O. Owens, Company D, 5th Quartermaster Supply Battalion, did at Camp Chaffee, Arkansas, on or about 14 February 1949, wrongfully and unlawfully open a certain letter addressed to Sergeant Cesar R. Pierantoni which said letter was then in the custody of the said Private William O. Owens, an official agent for the transmission of mail, before said letter was delivered to the person to whom it was directed.

SPECIFICATION 6: In that Private William O. Owens, Company D, 5th Quartermaster Supply Battalion, did at Camp Chaffee, Arkansas, on or about 13 February 1949, wrongfully and unlawfully open a certain letter addressed to Sergeant first class James D. Fitzhugh which said letter was then in the custody of the said Private William O. Owens, an official agent for the transmission of mail, before said letter was delivered to the person to whom it was directed.

SPECIFICATION 7: In that Private William O. Owens, Company D, 5th Quartermaster Supply Battalion, did at Camp Chaffee, Arkansas, on or about 9 February 1949, wrongfully and unlawfully open a certain letter addressed to Private first class Frank J. Bell which said letter was then in the custody of the said Private William O. Owens, an official agent for the transmission of mail, before said letter was delivered to the person to whom it was directed.

SPECIFICATION 8: In that Private William O. Owens, Company D, 5th Quartermaster Supply Battalion, did at Camp Chaffee, Arkansas, on or about 12 February 1949, wrongfully and unlawfully open a certain letter addressed to Private first class Chester E. Burns which said letter was then in the custody of the said Private William O. Owens, an official agent for the transmission of mail, before said letter was delivered to the person to whom it was directed.

He pleaded guilty to and was found guilty of all Specifications and Charges. 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 seven years. The reviewing authority approved the sentence, reduced the period of confinement to three years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50e.

3. The record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 2 of Charge I and Charge I and Charge II and its specifications and the sentence as approved by the reviewing authority. The only question requiring consideration is whether it is legally sufficient to support the findings of guilty of Specifications 3, 4 and 5 of Charge I as a violation of Article of War 93.

4. The specifications under discussion allege in pertinent part that accused did, "with intent to defraud, sign the name***" (of certain persons on a certain document /Record of and Receipt for Registered and Insured Mail/), "which said signature was of a writing of a private nature which might operate to the prejudice of another." Although it is alleged that the signing of another person's name by the accused was "with intent to defraud" it is not alleged that such signing was false, forged, or falsely done (underlining for emphasis).

The genuine making of a false instrument is not generally a forgery unless so provided by statute. Forgery statutes in the various states are usually directed against the false making of an instrument (Note 3, page 1162, Vol. 2, Whartons Criminal Law /Goucher v. State 113 Neb. 352, 204 N. W. 967; State v. Lebo 116 La 784, 117 So. 829; State v. Lamb (1930) 198 N. C. 423, 152 S. E. 154/).

The United States Army has adopted the concept of forgery as evolved and generally defined by various state and federal statutes.

> "Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice" (par. 180i, p. 243, MCM 1949) (Underscoring supplied).

"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. (Underscoring supplied).

"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." (par. 180i, p. 244, MCM 1949).

In the instant case, since the specifications fail to allege either that the signing was falsely done, or that the signature was forged, they fail to charge forgery in violation of Article of War 93. The omission is of matter of substance and not form (United States v. Carll, 105 U. S. 611). Such defect is not cured by: resort to proof adduced at the trial (Dig. Ops. JAG 1912-40, Sec. 452 (20)); accused's improvident plea of guilty (CM 261047, DEANGELO, 40 BR 105, 106); the provisions of Article of War 37; nor by the principle expressed by the Supreme Court of the United States in the case of Collins v. McDonald, 258 U. S. 416, at page 420, wherein it was held:

"It is not necessary that the charge in court-martial proceedings should be framed with the technical precision of a common-law indictment * * *."

These specifications do sufficiently allege, however, a violation of Article of War 96.

5. For the reason stated, the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 2 of Charge I and Charge I, and Charge II and its Specifications, legally sufficient to support only so much of the findings of guilty of Specifications 3, 4 and 5 of Charge I as involves findings of guilty thereof in violation of Article of War 96, and legally sufficient to support the sentence, as approved by the reviewing authority.

On Leave J.A.G.C.

Frank C. Alfred J.A.G.C.

Jackson K. Judy J.A.G.C.

(362)

7 JUL 1949

CSJAGI CM 335935 1st Ind.

33123

JAGO, Department of the Army, Washington 25, D. C. 7/7/49

TO: Commanding General, 5th Armored Division, Camp Chaffee, Arkansas.

1. In the case of Private William O. Owens (RA 38749237), Company D, 5th Quartermaster Supply Battalion, 5th Armored Division, Camp Chaffee, Arkansas, I concur in the holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 2, Charge I, and Charge I, and Charge II and its Specifications, legally sufficient to support only so much of the findings of guilty of Specifications 3, 4 and 5, Charge I, as involves findings of guilty of the specifications in violation of Article of War 96, and legally sufficient to support the sentence as approved by the reviewing authority. Under Article of War 50e(3) this holding and my concurrence vacate so much of the findings of guilty of Specifications 3, 4 and 5, Charge I, as involves findings other than findings of guilty of the specifications in violation of Article of War 96. Under Article of War 50 you now have authority to order the execution of the sentence as approved.

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

(CM 335935)

1 Incl.
R/T

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

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

CSJAGN-Sp C M 9

25 APR 1949

UNITED STATES	)	UNITED STATES ARMY, ALASKA
v.	)	Trial by Sp. C. M., convened at Fort Richardson, Alaska, 18 February 1949. Bad conduct discharge (suspended), forfeiture of $28 per month for six (6) months and confinement for six (6) months. Post Stockade.
Recruit NORMAN H. McNEELY (RA 38711628), 51st Ordnance Service Company, Fort Richardson, Alaska.	)	

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

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1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50e.

2. The accused was tried by a special court-martial appointed by the Commanding Officer, Special Troops, United States Army, Alaska, upon the following Charges and Specifications:

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

Specification: In that Recruit Norman H. McNeely, 51st Ordnance Service Company, Fort Richardson, Alaska, did, without proper leave, absent himself from his company, 51st Ordnance Service Company, Fort Richardson, Alaska, from about 1900 hours, 11 January 1949, to about 0630 hours, 16 January 1949.

ADDITIONAL CHARGE I: Violation of the 69th Article of War.

Specification: In that Recruit Norman H. McNeely, 51st Ordnance Service Company, having been duly placed in arrest at Fort Richardson, Alaska, on or about 17 January 1949, did, at Fort Richardson, Alaska, on or about 2100 hours, 21 January 1949, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that Recruit Norman H. McNeely, 51st Ordnance Service Company, did, without proper leave,

absent himself from his company at Fort Richardson, Alaska, from about 2100 hours, 21 January 1949, to about 0200 hours, 26 January 1949.

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

Specification: In that Recruit Norman H. McNeely, 51st Ordnance Service Company, Fort Richardson, Alaska, did, at Anchorage, Alaska, on or about 2 January 1949, with intent to defraud wrongfully and unlawfully made and utter to HEWITTS DRUG STORE, Anchorage, Alaska, a certain check, in words and figures as follows, to wit:

The Bank of Alaska

~~THE FIRST NATIONAL BANK~~

OF ANCHORAGE

ANCHORAGE, ALASKA Jan, 2 1949 NO. _____

PAY TO THE ORDER OF Cash $25.00

Twenty five & no/100 DOLLARS

RA 38711628 Norman H. McNeely
51st Ord Svc Co

and by means thereof, did fraudulently obtain from HEWITTS DRUG STORE, Anchorage, Alaska, twenty five (25) dollars, he the said Recruit Norman H. McNeely, then well knowing that he did not have and not intending that he should have any account with the Bank of Alaska, Anchorage, Alaska, for the payment of said check.

He pleaded not guilty to, and was found guilty of all Charges and Specifications. He was sentenced to be discharged the service with a bad conduct discharge, to forfeit twenty-eight dollars pay per month for six months, and to be confined at hard labor for six months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 47(d). The officer exercising general court-martial jurisdiction approved the sentence and ordered it executed, but suspended execution of the bad conduct discharge until the soldier's release from confinement, and designated the Post Stockade, Fort Richardson, Alaska, as the place of confinement. The result of trial was promulgated in Special Court-Martial Orders No. 2, Headquarters, United States Army, Alaska, 14 March 1949.

3. The record of trial is legally sufficient to support the findings and so much of the sentence as involves forfeitures and confinement. The only question for consideration is the validity of the sentence to bad conduct discharge.

4. The offenses here involved were committed in January 1949. At that time the authorized maximum punishment for Additional Charge III included dishonorable discharge (par. 104c, MCM, 1928). For Army purposes there was no such thing as a bad conduct discharge. A dishonorable discharge could be adjudged only by a general court-martial (AW 108, MCM, 1928), consisting of not less than five officers (AW 5, MCM, 1928); and it was mandatory that there be detailed as one of the members a law member, whether or not he attended the trial (AW 8, MCM, 1928; Dig. Ops. JAG, 1912-40, sec. 365 (9)). It was provided that there be a thorough and impartial investigation before reference of any charge to a general court-martial for trial (AW 70, MCM, 1928), but a failure in that regard did not deprive a general court-martial of jurisdiction (Humphrey v. Smith, _____ US _____, 17 Law Week 4380, decided 25 April 1949).

On 1 February 1949 there became effective the changes to the Articles of War enacted by Title II of the Act of 24 June 1948 (62 Stat. 627), and the new "Manual for Courts-Martial, U. S. Army, 1949" prescribed by Executive Order 10020, 7 December 1948. The instant case was tried pursuant to the amended articles and under the provisions of the new manual. Dishonorable discharge continues to be an authorized punishment for the offense specified under Additional Charge III (par. 117c, MCM, 1949). Either a general or special court-martial may adjudge a bad conduct discharge (AWs 12 and 13, MCM, 1949). Both the bad conduct discharge and the dishonorable discharge are the same form of punishment - punitive separation from the service (par. 87b, MCM, 1949, p. 96). The bad conduct discharge is lesser in degree than is the dishonorable discharge (par. 87b, MCM, 1949, p. 95). Since it is less severe and of the same form as the punishment previously allowed for such an offense, in and of itself a bad conduct discharge is not within the condemnation of the ex post facto clause of Section 9, Article I, Constitution of the United States of America (see 1 Wharton, Criminal Law, 12th ed., pp. 57, 58). As before, only a general court-martial may now adjudge dishonorable discharge (AWs 12, 13 and 108, MCM, 1949); such tribunal must have at least five members, including a law member who now, although not formerly, must attend the major trial activities (AWs 5 and 8, MCM, 1949). Also, as before, a special court-martial may now legally comprise as few as three members, and no law member is prescribed (AW 6, MCM, 1949).

In the present case there was a pre-trial investigation in January which complied substantially with the then existing Article of War 70, and the special court-martial which tried the case had six members in attendance (R. 2). There was, of course, no law member. The matter for decision is whether the exercise of authority by such a court to punish with a bad conduct discharge an offense committed before the grant of that authority became

effective is void as an ex post facto application of the new legislation, where manifestly it would not be in the case of a general court-martial having a law member.

5. The universally-quoted general rule is:

> "So far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose. The legislature may abolish courts and create new ones, (may reduce the number of judges required to preside at a trial,) and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." (emphasis added) (1 Cooley, Constitutional Limitations, 8th ed., pp. 551, 552).

To the same effect, see 1 Wharton Criminal Law, 12th ed., pp. 60, 61; 11 Am. Jur. 1185-1190; 16 C J S 896-898, and 22 C J S 78, 192.

The application and development of that general rule by the Supreme Court of the United States is summarized thus:

> "Expressions are to be found in earlier judicial opinions to the effect that the constitutional limitations may be transgressed by alterations in the rules of evidence or procedure. See Calder v. Bull, 3 Dall. 386, 390, 1 L. ed. 648, 650; Cummings v. Missouri, 4 Wall. 277, 326, 18 L. ed. 356, 364; Kring v. Missouri, 107 U. S. 221, 228, 232, 27 L. ed. 507, 508, 510, 2 Sup. Ct. Rep. 443. And there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition. Kring v. Missouri, 107 U. S. 221, 27 L. ed. 507, 2 Sup. Ct. Rep. 443; Thompson v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620. But it is now well settled that statutory changes in the mode of of trial or the rules of evidence, which do not deprive

the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited. A statute which, after indictment, enlarges /171/ the class of persons who may be witnesses at the trial, by removing the disqualification of persons convicted of felony, is not an ex post facto law. Hopt v.Utah, 110 U. S. 575, 28 L. ed. 263, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417. Nor is a statute which changes the rules of evidence after the indictment so as to render admissible against the accused evidence previously held inadmissible, Thompson v. Missouri, 171 U. S. 380, 43 L. ed. 204, 18 Sup. Ct. Rep. 922; or which changes the place of trial, Gut v. Minnesota, 9 Wall. 35, 19 L. ed. 573; or which abolishes a court for hearing criminal appeals, creating a new one in its stead. See Duncan v. Missouri, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570.

Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see Malloy v. South Carolina, 237 U. S. 180, 183, 59 L. ed. 905, 906, 35 Sup. Ct. Rep. 507, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance. See Gibson v. Mississippi, 162 U. S. 565, 590, 40 L.ed. 1075, 1081, 16 Sup. Ct. Rep. 904; Thompson v. Missouri, supra, 386 /43 L. ed. 207, 18 Sup. Ct. Rep. 922/; Mallett v. North Carolina, 181 U. S. 589, 597, 45 L. ed. 1015, 1019, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241." (emphasis added) (Beazell v. Ohio, 46 S. Ct. 68, 269 US 167, 70 L. Ed. 216).

Duncan v. Missouri, op. cit. found no damage to substantial rights in an amendment to the Missouri constitution which changed the state supreme court from one body of five members at the time of the offense to two divisions of four and three members, respectively, the smaller of which heard the defendant's appeal. Likewise People v. Green, 94 NE (NY) 658, held a statute not ex post facto which gave new jurisdiction of capital offenses to an existing court, although the statute took effect after the offense had been committed; and the like result was reached in Marion v. State, 29 NW (Neb) 911, where the newly-enacted law gave the trial judge, rather than the jury as at the time of the offense, power to pass on the law of the case. To the same effect was Commonwealth v. Phillips, 11 Pick. (Mass) 27,

holding that a new tribunal may be erected, or new jurisdiction given to an existing court, to try past offenses, and this was not ex post facto. So, also, of Commonwealth v. Phelps, 96 NE (Mass) 349, where the effect of the new law was that one instead of two judges should preside at jury trials; Cooke v. U. S., 11 S. Ct. 268, 138 US 157, 34 L. Ed. 906, and Post v. U. S., 16 S. Ct. 611, 161 US 583, 40 L. Ed. 816, reached the same conclusion as to legislation extending or varying geographical jurisdiction.

On the other hand, in Kring v. Missouri, op. cit., a bare majority of the court found unconstitutional harshness in an enactment which deprived the accused of a defense which would have been available under the laws when the offense was committed; and likewise Thompson v. Utah, op. cit., of a new states's constitution providing a trial jury of but eight members where the offense was committed in territorial days when the sixth amendment to the Federal constitution assured a jury of twelve.

6. It is worth remembering that the special court-martial is no novelty. Inferior courts have been authorized by our military codes from the beginning (Winthrop, Military Law and Precedents, 2d ed. 1920 reprint, p. 480). This is no untried agency to which the law proposes to entrust new punishing power.

Nonetheless, the detailed statutory composition of none of our courts-martial even begins to approach the ancient sanctification of the composition of common law juries. In particular, the law member of the general court-martial is a post-World War I creation. The case of Thompson v. Utah is deemed not controlling of the present issue because it turns on a portion of the Federal constitution which does not apply to courts-martial. Had Utah not become a state an act of Congress revising the composition of trial juries would have violated the Sixth Amendment, and the ancient principle which that amendment re-affirms, just as much as did the Utah constitution. No comparable part of the Federal constitution so restricts Congress in its dealings with the composition of courts-martial. Nor do Kring v. Missouri, a split decision involving more of substantive than procedural law, or other of the exceptional cases which have found major procedural change to amount to harsh and arbitrary deprivation of substantial protections, appear to warrant departure from the general rule.

Rather, it is believed that Duncan v. Missouri, People v. Green, Marion v. State, Commonwealth v. Phillips, and like decisions following the general rule are more closely analogous to the present problem. At the time he committed his offenses the accused in this case had no vested right to the presence and participation of a law member in a trial which could result in his punitive separation from

the service. Can it be said for him that the deprivation of his right to have a law member appointed, though taking no part, in such a trial, was so harsh and arbitrary as to be unconstitutional? We think not. The true question is whether he was tried by a court which could give him the same fairness and accuracy of ruling as he was entitled to when his derelictions occurred. The president of a special court-martial is obliged to rule correctly on interlocutory questions subject to objection by members of the court, in the law member's absence the same was true of the president of a general court-martial before 1 February, and the obligations of these courts themselves to rule correctly is no whit less than the obligation on a law member in his rulings. Also, it is worthy of note that a bad conduct discharge adjudged by special court-martial undergoes automatic appellate review (AW 50(e), MCM, 1949) just as did a dishonorable discharge adjudged by general court-martial before 1 February (AW 50½, MCM, 1928), thereby assuring equivalent final safeguard against error in both cases. As stated in Cooley, supra, remedies must always be under the control of the legislature and endless confusion would follow if every case had to be tried only in accordance with the practice and before the courts in existence when its facts arose. The infinity of that confusion would be most vividly demonstrated, in military law, in attempting to dispose of offenses for which there has been no statute of limitations. In revising the Articles of War, Congress has the right to change the forms of trial as long as it deprives accused persons of no substantial safeguards, and that is what it has done here. In short, the grant of jurisdiction to special courts-martial effective 1 February 1949 to adjudge bad conduct discharge for offenses committed before that date, which offenses could have earned dishonorable discharge both before and after, is deemed a reasonable and orderly exercise of the legislative power. Any legal disadvantage to persons accused is limited and insubstantial. So viewed, it is not within the ex post facto prohibition.

7. The Board of Review holds the record of trial legally sufficient to support the findings of guilty and the entire sentence.

Thomas J. Stoney, J. A. G. C.

J. M. Ditzler, J. A. G. C.

J. F. Gilmore, J. A. G. C.

CSJAGG Sp CM 9 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 20 MAY 1949

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

In the foregoing case of Recruit Norman H. McNeely, 38711628, 51st Ordnance Service Company, Fort Richardson, Alaska, The Judge Advocate General has not concurred in the holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Pursuant to Article of War 50e (2) the holding and record of trial are accordingly transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.

1 Incl
Record of trial

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

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

CSJAGU SPCM 9

U N I T E D S T A T E S	UNITED STATES ARMY, ALASKA
v.	Trial by Sp. C. M., convened at Fort Richardson, Alaska, 18 February 1949. Bad conduct discharge (suspended), forfeiture of $28.00 per month for six (6) months and confinement for six (6) months. Post Stockade
Recruit Norman H. McNeely (RA 38711628), 51st Ordnance Service Company, Fort Richardson, Alaska	

- - - - - - - - - - -

Opinion of The Judicial Council

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

- - - - - - - - - - -

1. Pursuant to Article of War 50e(2) the record of trial by special court-martial in this case has been transmitted to The Judicial Council which submits this opinion to The Judge Advocate General.

2. Upon trial by a special court-martial convened by the Commanding Officer, Special Troops, United States Army, Alaska, on 18 February 1949 the accused was found guilty of two specifications alleging absence without leave in violation of Article of War 61 (Charge I and its specification; Additional Charge II and its specification); of breach of arrest in violation of Article of War 69 (Additional Charge I and its specification) and of wrongfully making and uttering a certain check in the amount of $25.00 with intent to defraud, and fraudulently obtaining from the payee by means thereof $25.00 well knowing that he did not have and not intending that he should have any account with the drawee bank, in violation of Article of War 96 (Additional Charge II and its specification). All offenses were alleged to have been committed during the month of January 1949. He was sentenced to be discharged the service with a bad conduct discharge, to forfeit twenty-eight dollars pay per month for six months, and to be confined at hard labor for six months. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47(d). The officer exercising general court-martial jurisdiction, the Commanding General, United States Army, Pacific, approved the sentence and ordered it executed, but suspended the execution of the bad conduct discharge until the soldier's release from confinement, and designated the Post Stockade, Fort Richardson, Alaska, as the place of confinement. The result of trial was promulgated by Special Court-Martial Orders No. 2, Headquarters, United States Army, Alaska, 14 March 1949. The Board of Review held the record of trial legally sufficient to support the findings of guilty and the sentence.

3. The record of trial is legally sufficient to support the findings of guilty and so much of the sentence as adjudges forfeitures and confinement. The question presented by the record is whether a special court-martial convened after 1 February 1949, the effective date of Title II, Selective Service Act of 1948 (62 Stat 627) had the power to adjudge a bad conduct discharge for offenses committed prior to 1 February 1949. This in turn presents the further question whether the new power granted special courts-martial to impose a bad conduct discharge applies retroactively and prospectively or prospectively only.

4. It is a cardinal principle of statutory construction that if a statute is capable of more than one interpretation, that interpretation which is clearly consistent with the constitution is to be preferred, and one which will bring the statute into conflict with the constitution, in whole or in part, or raise a grave or doubtful constitutional question is to be avoided (Knight Templar's and Masons' Life Indemnity Co. v. Jarman, 187 U.S. 197, 205; Chippewa Indians v. U.S., 301 U.S. 356, 376; National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U.S. 1, 30; 16 CJS sec 98 and cases therein cited). Any law which operates in any manner to the substantial disadvantage of an accused in respect of an offense committed prior to the effective date of the law is an ex post facto law within the meaning of Article I, Section 9, Clause 3, Constitution of the United States (Medley, Petitioner, 134 U.S. 160, 171; Thompson v. Utah, 170 U.S. 343, 351).

5. Before 1 February 1949, as well as since, a general court-martial was required to consist of not less than five members, a special court-martial of not less than three; and, with exceptions not pertinent to this case, concurrence in the sentence of not less than two-thirds of the members present, whether adjudged by a general or special court-martial, has been required. The Supreme Court has held that a statute which reduced the number of triers of fact, and consequently the number of members who must concur in a finding of guilty or sentence, operated to the substantial disadvantage of the accused (Thompson v. Utah, supra). To authorize trial by a special court-martial which may be composed of a lesser number of members than the minimum competent to adjudge a penal discharge prior to 1 February 1949, would raise a grave and doubtful question which would not arise if the statute were given only prospective operation. The fact that a particular special court-martial may have been composed of five or more members is not considered material. There is nothing in the language used to indicate that the Congress intended the application of the statute to depend upon the facts of particular cases.

6. If the grant of additional punishing power contained in Article of War 13, as amended, was intended to apply at all to offenses committed prior to 1 February 1949, many exceptions to such application would be necessary to avoid what clearly would amount to an increase in the punishment for offenses by a law taking effect after their commission. The table of maximum punishments in the Manual for Courts-Martial, 1949, authorizes a bad conduct discharge to be imposed upon a conviction of certain offenses for which prior to that date neither a dishonorable discharge nor a bad conduct discharge was authorized. For example,

the maximum punishment for absence without leave from guard with intent to abandon in violation of Article of War 61, prior to 1 February 1949 was confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months (MCM, 1928, par 104c, p 97). Since 1 February 1949, the maximum sentence for that offense has included bad conduct discharge (MCM, 1928, par 117c, p. 134). There are numerous similar instances in which exception would have to be made to avoid the above indicated result (MCM, 1928, par 104c and MCM 1949, par 117c, supra). Applied only to sentences based on convictions of offenses committed on or after 1 February 1949 the additional punishing power vested in special courts-martial by Article of War 13, as amended, can be exercised with uniformity and in such a manner as to avoid many and serious complications which would result if it were exercised as to offenses committed prior to the effective date of the amendment. The language used is clearly capable of an interpretation giving it prospective operation only. We find nothing in the Executive Order of 7 December 1948 or in the Manual for Courts-Martial, 1949, which requires, or indicates, a contrary interpretation. Under the circumstances the Council feels forced to the conclusion that the added punishing power of special courts-martial to adjudge bad conduct discharge must be held to apply prospectively, that is only to offenses committed on and after 1 February 1949,

7. For the reasons stated The Judicial Council is of the opinion that so much of the sentence as adjudges a bad conduct discharge must be vacated.

Franklin P. Shaw, Brig Gen, JAGC

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

E. M. Brannon, Brig Gen, JAGC
Chairman

(374)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Sp CM 9

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

In the foregoing case of Recruit Norman H. McNeely (RA 38711628), 51st Ordnance Service Company, Fort Richardson, Alaska, upon the concurrence of The Judge Advocate General so much of the sentence as is in excess of confinement at hard labor for six months and forfeiture of twenty-eight dollars pay per month for six months is vacated. All rights, privileges and property of which Recruit McNeely has been deprived by virtue of that portion of the sentence so vacated will be restored.

Franklin P. Shaw, Brig Gen, JAGC

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

22 June 1949

E. M. Brannon, Brig Gen, JAGC
Chairman

I concur in the foregoing action.

THOMAS H. GREEN
Major General
The Judge Advocate General

27 June 1949

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