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GENERAL
OF THE ARMY

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AND
JUDICIAL COUNCIL

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OPINIONS
REVIEWS

VOL. 4

1950

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JUDGE ADVOCATE GENERAL'S CORPS

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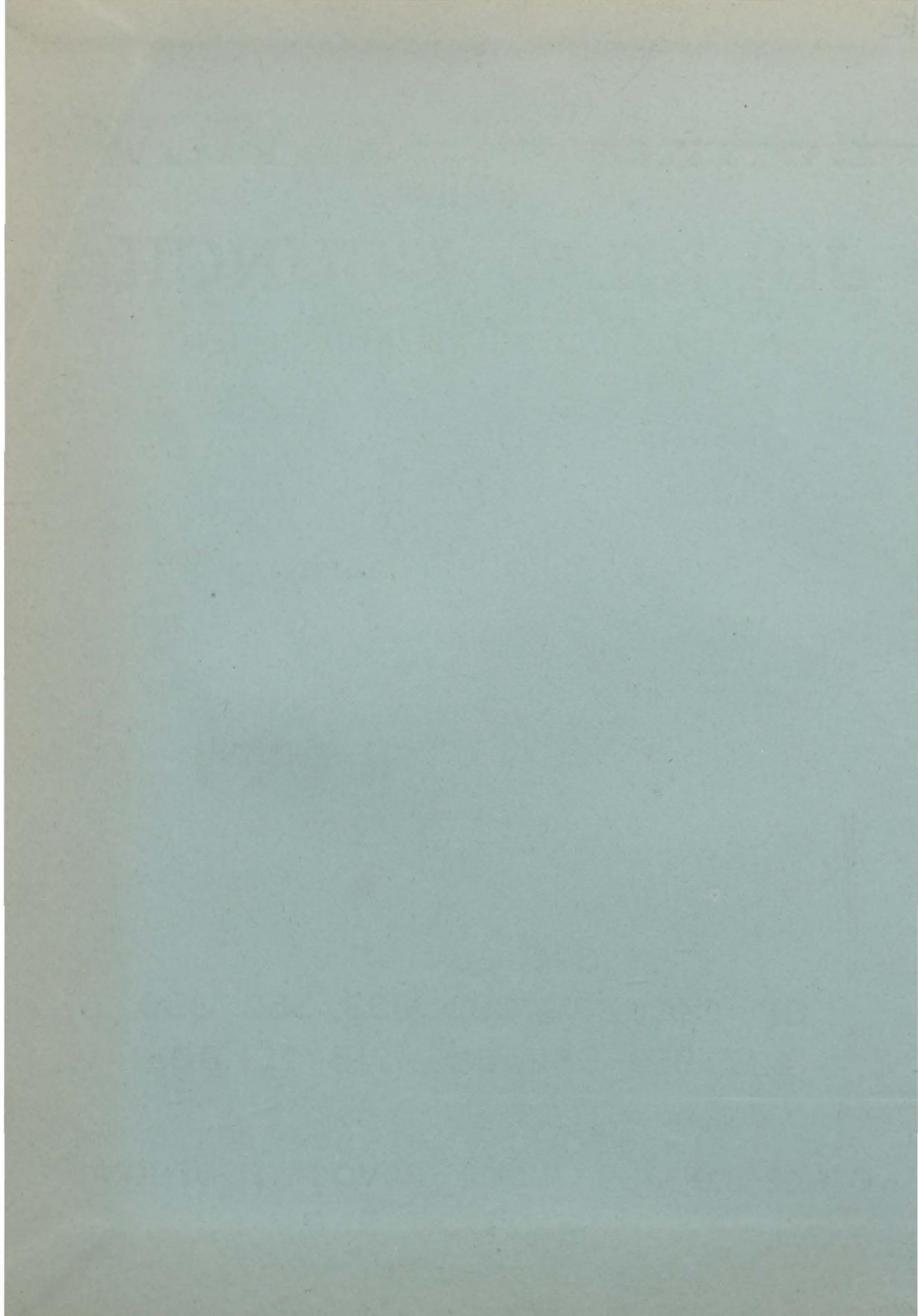
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OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C.

1950



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Judge Advocate General's Corps

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OFFICE OF THE JUDGE ADVOCATE GENERAL

Washington, D. C.

1980

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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).
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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.

1

CSJAGK - CM 337006

24 AUG 1949

UNITED STATES

UNITED STATES ARMY, EUROPE

v.

Trial by G.C.M., convened at Warzburg,
Germany, 6 May 1949. To forfeit \$200.00
pay and to be reprimanded.

Captain JOHN M. BOND
(O-1289035), 84th Transpor-
tation Truck Company.

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

1. The record of trial in the case of the officer named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings of guilty and the sentence. The record has now been examined by the Board of Review and the Board submits this, its 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 on motion).

Specification 2: In that Captain John M. Bond, 84th Transportation Truck Company, did, at Lager Hammelburg, Germany, on or about 8 March 1949, willfully and knowingly bring Irene Killi, a prostitute, into the Bachelor Officers Quarters for the purpose of having sexual intercourse with said prostitute, said act being to the prejudice of good order and military discipline.

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

He pleaded not guilty to the charge and its specifications and was found guilty of Specification 2 except the words "for the purpose of having sexual intercourse with said prostitute," and of the excepted words was found not guilty, and guilty of the charge. No evidence of previous convictions was introduced. He was sentenced to forfeit two hundred dollars (\$200.00) of his pay, and to be reprimanded. The reviewing

authority approved the sentence and ordered it executed. The result of trial was published in General Court-Martial Orders No. 41, United States Army, Europe, APO 403, 26 May 1949.

3. Evidence

For the Prosecution

In the evening of 8 March 1949, accused and Lieutenant Oliver Cox were driving through the town of Hammelburg, Germany. They "picked up" two German women in the vicinity of a railroad station. One of the women, Irene Killi, accused had met at a party at the officers' billets near Hammelburg two nights before. The group proceeded to accused's quarters in the "BOQ" at Lager, Hammelburg, where they had some drinks. Lieutenant Cox left the party and remained away for about an hour. When he returned at about 2300 hours, he found the accused lying across his bed, apparently quite drunk. Lieutenant Cox in preparing to take his companion home offered to take Irene Killi with him, which offer was refused. He took his companion home and returned to the "BOQ" about midnight and found Irene standing at the door of accused's room, fully dressed. He again offered to take her home but she refused to go. Lieutenant Cox did not know that Irene Killi was a prostitute and had no reason to believe that she was other than a respectable woman (R 9,10,11,14,22,28,41,42).

Captain James Prather testified that on 8 March 1948 he was quartered in the "BOQ" at Hammelburg, Germany. During the evening there were three or four officers and two girls "sitting around talking and drinking" in accused's quarters. The accused drank considerable liquor. Captain Prather left about 2230 hours, at which time the accused was "lying across his bunk with his pants on and a robe." He was either asleep or "passed out." He (Captain Prather) had never met these two women before this occasion and had no reason to believe that either of them was a prostitute. There was no officer club in Hammelburg and it was customary for officers quartered in the "BOQ" to entertain their wives and female guests in their rooms. The accused was married but his wife was not present on this occasion (R 15-15).

Miss Irene Killi testified that she had arrived in Hammelburg four or five days prior to 8 March 1949 and that she had been in that city only once before for a period of about four hours. She described herself as a 30-year old German widow. Since 1945 she had been living with American soldiers in the cities of Munich and Nurnberg. She further testified that she had had sexual relations with more than ten men, for a consideration of food, cigarettes and chewing gum, that she had been given treatment for venereal disease, and that she had received a jail sentence for prostitution. Other guests, both men and women, were present in the accused's billet at the "BOQ" on the night of 8 March 1949. The accused was asleep in bed at about 2200 hours. She refused Lieutenant Cox's offer

to take her home because she was drunk. The last guest left at about 0200 hours, and about 0300 hours she removed her dress and went to sleep in the same bed as the accused. The accused did not know when she went to bed. They did not have sexual intercourse during the night. Upon awakening the following morning the accused was surprised to find her in bed with him. Captain Bond left the "BOQ" sometime before 0600 hours on 9 March and she left about noon. The accused gave her some cigarettes and fruit "for spending the night with him." The accused did not know that she had been confined to a venereal disease hospital, nor did he know that she had performed acts of sexual intercourse for pay. Sometime during the evening of 8 March, accused showed her a list of women's names who had been in venereal disease hospitals, but her name was not on the list (R 10,15,17,18-19,22,26,29,31).

Paragraph V, Circular Number 62, Headquarters European Command, dated 8 August 1948, provides in part:

"V--QUARTERS, BILLETTS AND TRANSIENT ACCOMMODATIONS. ***

* * *

"2. Except in barracks and transient quarters, bachelors may entertain members of the opposite sex in their quarters. Since military and civilian personnel in the European Command are representatives of the United States, good taste and the requirements of the mission place on all personnel a responsibility to conduct themselves in a manner reflecting favorably upon the United States; consequently two or more guests should be present when members of the opposite sex are being entertained." (R 7, Pros Ex 1)

For the Defense

After being duly apprised of his rights as a witness by the law member accused elected to be sworn as a witness in his own behalf. He testified that he met Irene Killi at a party in the officers' billets about two or three days prior to 8 March 1949. The party was attended only by officers and their friends, and there was nothing to indicate that Miss Killi was a prostitute. He met Irene in the vicinity of the railroad station on the evening of 8 March 1949, and took her to his billet at the "BOQ" for the sole purpose of having some female guests with whom he could drink. He had taken Irene to the Post on at least one prior occasion a day or two before the date of the alleged offense. When accused awoke the following morning and found Irene in his room, the enlisted men at the Post had already begun to move around outside and he did not think it was wise to go out with a woman at that time of the morning, as it might raise the inference that he had done something wrong. Accused further testified that the venereal disease list referred to by the prosecution was on his table, and that he had been discussing it with another officer when Irene walked up "just joking" and asked if her name was on it (R 27,36,44-48).

Lieutenant Cox testified on behalf of the defense that the sole purpose of taking the two girls to the "BOQ" was "we just wanted some female

guests to have a drink." He also reiterated his former testimony about trying to take Irene home (R 40-43).

Captain Prather testified that he had never known of Captain Bond being in "any similar trouble." There were no family quarters in Hammelburg and all officers were required to live in the "BOQ" (R 43).

4. Discussion

The specification of which the accused was found guilty alleges that the accused did on or about 8 March 1949, "willfully and knowingly bring Irene Killi, a prostitute, into the Bachelor Officers Quarters, said act being to the prejudice of good order and military discipline." In support of the essential elements of this offense the proof must show not only that the accused brought the woman in question into the "BOQ"; that she was in fact a prostitute; and such facts and circumstances as would reflect with prejudice upon good order and military discipline, but also, that at the time alleged he knew her to be a prostitute.

The fact that the accused did bring Irene Killi into the "BOQ" on the night of 8 March 1949 is undisputed and the testimony of Irene Killi clearly establishes the fact that she was a prostitute. The evidence shows, however, that her activities of prostitution and any reputation she might have had as a prostitute necessarily were confined to the cities of Munich and Nurnberg, Germany, and were not known or suspected by either military or civilian persons at Lager, Hammelburg, inasmuch as she had arrived there just a few days prior to the offense alleged. No witness for the prosecution or defense, except Irene Killi herself, knew or had any suspicion that she was a prostitute. Furthermore, the record does not contain any evidence from which it might be inferred beyond mere conjecture that the accused had knowledge that she was a prostitute or from which such knowledge could reasonably be imputed to him.

Two days after meeting Irene Killi, the accused and another officer took Miss Killi and an unidentified woman to the accused's quarters. The accused had in his quarters a list which contained the names of women who had been in venereal disease hospitals. During the evening it was determined that Miss Killi's name was not on this list. While this evidence may give rise to a suspicion that during the two days the accused had known Miss Killi he acquired some knowledge of her reputation, such evidence in the opinion of the Board of Review fails to establish that he in fact knew or should have known her reputation as a prostitute. A finding of guilty cannot be supported by evidence which raises a mere suspicion, surmise or conjecture (CM 324095, Driscoll, 73 BR 38). Consequently, the evidence fails to support one of the essential elements of proof of the alleged offense, viz., that the accused willfully and knowingly brought a prostitute into the Bachelor Officers Quarters. Likewise the record fails to show that Irene Killi was known as a prostitute to any military or civilian

persons at the time and in the vicinity of the alleged offense and so there appears no reasonable ground for the belief that the action of the accused in taking a woman, unknown by him to be a prostitute, to his quarters operated to the prejudice of good order and military discipline.

In CM 237858, Sparhawk, 24 BR 127,132, the accused was charged with associating in public with a common prostitute. The Board of Review said:

"The gist of the offense is the unfavorable reaction upon the minds of those who might observe the association. If the observers do not know that the female with whom the accused was associating is a prostitute no discredit is suffered by the service."

It was also shown by the evidence that at Hammelburg, Germany, it was the usual custom for officers to entertain female guests in their Bachelor Officers Quarters and this practice, so far as it pertained to bachelor officers, was sanctioned by Circular 62, Section V, Headquarters European Command, dated 8 August 1948. Consequently the bringing of a woman with a good reputation into the barracks would not prejudice good order and military discipline.

Under the circumstances as presented by the evidence in this case the Board of Review concludes that the prosecution failed to show that the action of the accused in bringing Irene Killi into his bachelor officers quarters was prejudicial to good order and military discipline.

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

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

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

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

SEP 1949

CSJAGK - CM 337006

1st Ind

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

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

1. In the case of Captain John M. Bond (O-1289035), 84th Transportation Truck 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. Under Article of War 50(e) this holding and my concurrence vacate the findings of guilty and the sentence as to the accused.

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 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 337006).

2 Incls:

1. Record of trial
2. Draft of GCMO



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

7

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

CSJAGH CM 337029

AUG 26 1949

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

24TH INFANTRY DIVISION

v.)

) Trial by G.C.M., convened at Kokura,
Kyushu, Japan, 12, 13 May 1949.

Private ROBERT H. BILLER,)
RA 13276921, Company C,)
19th Infantry Regiment.)

) Dishonorable discharge, total for-
feitures after promulgation, and
confinement for thirty (30) years.
) United States Penitentiary, Lewisburg,
) Pennsylvania.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Robert H. Biller, Company "C" 19th Infantry, did, at Beppu, Kyushu, Japan, on or about 16 April 1949, with malice aforethought, willfully, feloniously, and unlawfully kill Uchida Michio, a human being, by striking him at the base of the skull with a wooden pole, approximately two inches by two inches by five feet.

The accused pleaded to the Specification, "Guilty, except the words 'with malice aforethought', to the excepted words, Not Guilty", to the Charge, "Not Guilty, but Guilty of the 93rd Article of War." He was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for thirty years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of the Army may direct, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50e.

3. a. Evidence for the prosecution.

The accused, a member of the military service assigned to Company C, 19th Infantry Regiment, appeared at the Kakususein Inn, otherwise referred to as the Enlisted Men's Dance Hall, at approximately 1500 hours on 16 April 1949 (R 7,8,11,17,22,25,27). He was accompanied by Private Ernest Sanchez of the same organization, both soldiers being on pass following an inspection in their organization that morning (R 17,21,22). At about 1830 hours, they were joined by Recruit Clarence Schaffer of Company D, 19th Infantry. During the evening, Private Charles McClard of their organization and another soldier named Loper joined the group (R 11,26,27). While at the dance hall all five soldiers were drinking beer (R 11).

At about 2045 or 2100 hours, the five soldiers left the dance hall to return to camp (R 10,22). Accused was drunk, had difficulty walking, and was argumentative (R 10,13,23). His companions were also under the influence of liquor (R 13,22,27). Shortly thereafter, the accused was observed carrying a "club" described as "about five feet long by 2" x 2" or "about a 2 x 2 [inches], four feet long" (R 8,18,25). As the soldiers walked down a dirt road, the accused was swinging the club at stones along the roadside in a manner similar to that in which a golf club would normally be swung (R 16,26,28,29,30; Pros Ex 1). When the group reached a point in Beppu City approximately one block from the "R.T.O" (Rail Transportation Office), which was in the direction in which they were proceeding, Recruit Schaffer observed a Japanese riding a bicycle down the road toward them (R 9,17,21,27,30,31). As the Japanese reached a position in the road between the accused and the lower of the two stone walls bordering the roadway, the accused, according to Recruit Schaffer, struck the Japanese "across the head" with the club he was carrying (R 8,12,16,18,19,23,25,28; Pros Ex 1). The blow was to the right of the center of the forehead (R 25). Private McClard only observed that accused swung the club or stick but Private Sanchez saw accused swing the club at the head of the cyclist. Both McClard and Sanchez saw the person fall from the bicycle although neither actually saw the blow strike the Japanese (R 8,14,16,17,18,19,21,24; Pros Ex 1). It was dark at the time of the incident (R 10,19). Private McClard heard a "thud" between the time accused swung and the time the person fell (R 14). Once the Japanese had fallen from the bicycle, he did not move (R 21). Neither Private McClard nor Private Sanchez appear to have seen the victim at any time appreciably before the accused wielded his stick or club but it is undisputed that the Japanese did not molest the five soldiers (R 11,19,25).

At approximately 2100 or 2120 hours, Homonaga Shiga, a Japanese national, was walking down a street in the rear of the railroad station

in Beppu City when he "heard a bicycle falling down and then later the sound of a man being beaten * * by a stick * *." (R 31,33). In describing the sound, presumably made by a stick, Shiga testified that it was a "boku" sound (R 34). Shortly thereafter, Shiga observed five people coming toward him. All appeared to be members of the Occupation Forces, and were wearing the same kind of clothing but had no hats (R 31,33,34). When these five persons came abreast of Shiga, they attacked and beat him with sticks for four or five minutes. Shiga had given no provocation for the assault (R 35). The sticks were about two and one-half feet long by one and one half inches by one and one half inches (R 36). Each of the five struck Shiga and one of the sticks was broken and left at the scene. While being beaten, Shiga heard one of his assailants say "Shizu Kani" with an accent "like Occupation Forces" (R 35). Shiga suffered a chipped tooth, a cut lip and a bruised right arm and elbow (R 34). Following this altercation, Shiga obtained a drink of water from a nearby building and then proceeded down the street to the place where the sounds of the falling bicycle and the earlier beating appeared to have emanated. This was at a point on the roadway some 100 meters or 110 yards from Shiga's position when he first heard the sounds and about 70 meters from the location on the road where he was assaulted (R 33,34,35; Pros Ex 1). At a place on the road, previously identified on a photograph by Privates Sanchez and McClard and Recruit Schaffer as the place where the person on the bicycle was struck, Shiga " * * saw a child and a bicycle * *." (R 32; Pros Ex 1). Shiga noticed "blood around him for about a circle of about fifteen to eighteen inches." (R 33).

The victim's mother, Shigeko Uchida, arrived at the scene of the incident, and found her son lying on the ground with " * * both fists out and lying on his left side" (R 37). Approximately twenty-five minutes after Shiga's arrival a military policeman arrived and the child was placed in a jeep (R 32,33). Accompanied by his mother, the victim, identified as Michio Uchida, was taken to the Kokaratsu National Hospital. While there he "didn't say a word" according to his mother who remained at the hospital until he died (R 37,38).

It was stipulated by the prosecution, defense and accused that if Dr. Ikezaki Taneyoshi of the Kokaratsu National Hospital were present he would testify as follows:

"19 April 1949

- "1. Name of Patient - Uchida Michio 15 Years of age.
2. Name of disease - Fracture of the skull at the bottom, caused by a blow on the head and face. Wound on the face.
3. Condition and progress -

When I examined the above mentioned patient at about 9:40 P.M. on 16th of April 1949, he was unconscious, pale and his pulse weakly numbered 66 per minute.

His temperature was 36 degrees (Celsius Thermometer)

At the left side of his head, a part was swelled up and was recognized to be bleeding internally and the part was 10 c.m. x 15 c.m. wide.

At the center of the part, a wound was found which was 3 c.m. long obliquely and was deep enough to reach the periosteum and the wound was bleeding a great deal.

His left upper eyelid was recognized to be swelled up.

The right and left pupil were not the same as to size and were dialated a little.

Reaction against the light was tested and found active.

Fresh blood was found coming out from the nostrils and both side of the earholes. Specially plenty blood from the left earhole.

The result of the pressure test of cerebrospinal fluid was 190 (when lying on his side) the amount of the cerebrospinal fluid that was transpired was 30 cubic c.m. Then the pressure came down to 100 from 190.

Color of the fluid was bloody red.

Though I gave him a medicine stimulating the action of the heart and gave him some Ringor's solution and transpired the cerebrospinal fluid and took necessary action to stop bleeding and to prevent suppuration, etc., the condition of the patient did not get better, and he died at 6:00 A.M. on 17th April 1949." (R 38,39)

b. Evidence for the defense.

After having been fully advised of his rights, the accused elected to remain silent (R 42,43).

Recruit George D. Loper testified that the accused was "pretty drunk" when he first saw him at about 1900 hours on 16 April 1946. According to Recruit Loper "He [the accused] was kind of staggering around and he had a bottle of beer in his hand" (R 39). Upon leaving

the Kakususein Club at about 2045 hours, the accused could hardly walk (R 40). Sanchez gave the accused a quart of Japanese beer at that time and accused drank it by himself (R 40). Accused was able to walk back to camp unaided, however, and he entered the camp area, unassisted, by climbing over a concrete and rock fence about five feet high (R 40-42).

4. The accused was charged with, and found guilty of, unpremeditated murder at Beppu, Kyushu, Japan, on 16 April 1949, in violation of Article of War 92, in that he did "with malice aforethought, willfully, feloniously, and unlawfully kill Uchida Michio, a human being, by striking him at the base of the skull with a wooden pole, approximately two inches by two inches by five feet." He had pleaded guilty to voluntary manslaughter.

Elements of offense and proof.

Murder is defined by the Manual for Courts-Martial, 1949, as "the unlawful killing of a human being with malice aforethought." The word "unlawful" as used in this definition means "without legal justification or excuse" (MCM, 1949, par 179a, p. 230). The oft-quoted definition of "malice" found in Commonwealth v. Webster (5 Cush. 296; 52 Am. Dec. 711) is in pertinent part as follows:

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

Another definition of "malice", given by then Chief Justice Holmes of the Massachusetts Supreme Judicial Court is as follows:

"Reduced to its lowest terms, malice in murder means knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act, coupled perhaps with an implied negation of any excuse or justification" (Commonwealth v. Chance, 174 Mass. 245, 252; cited in CM 319168, Poe).

The proof necessary to establish the offense of unpremeditated murder is prescribed by the Manual for Courts-Martial as follows:

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

Plea of guilty to voluntary manslaughter.

By his plea of guilty to the offense of voluntary manslaughter, accused admitted that he willfully and unlawfully killed Uchida Michio by the means alleged in the specification. Before accepting the plea the law member explained to the accused the effect of the plea and the elements of the admitted offense. The law member further explained to the accused the elements of the offense of involuntary manslaughter. After this explanation the accused conferred with his counsel and re-affirmed his desire to plead guilty to voluntary manslaughter. The Manual for Courts-Martial states with respect to improvident pleas the following:

"In all cases in which a plea of guilty is entered and also whenever an accused, in the course of the trial following a plea of guilty, makes a statement to the court, in his testimony or otherwise, inconsistent with the plea, the * * court * * * will make such explanation and statement to the accused as the occasion requires. * * * If, after such explanation and statement, it appears to the court that the accused in fact entered the plea improvidently or through lack of understanding of its meaning and effect, or if after such explanation and statement the accused does not voluntarily withdraw his inconsistent statement, the court will proceed to trial and judgment as if he had pleaded not guilty. * * * " (MCM, 1949, Par 71, p.67)

The accused remained silent at the trial and consequently no inconsistency arose such as the foregoing provision in the Manual for Courts-Martial contemplates. We find it unnecessary, however, to rely upon the plea of guilty to voluntary manslaughter to establish the elements of willfulness and unlawfulness, implicit in such plea and requisite to the findings of guilty of the offense alleged. All elements in the offense alleged: willfulness, unlawfulness and malice aforethought are established by the uncontradicted evidence of record.

Elements of the offense: Homicide by accused.

The evidence shows that Uchida Michio, a 15 year old boy, died at 0600 on 17 April 1949 as the result of a "Fracture of the skull at the

bottom, caused by a blow on the head and face. Wound on face." Some nine hours earlier the accused had struck the boy on the head with a piece of 2" x 2" wood, about four or five feet long, as he rode his bicycle down a dirt road. Following the blow the boy toppled from his bicycle to the ground. Whether the injury to the skull resulted from the blow by accused, or by the fall to the ground, or both, is not established by the testimony with scientific certainty. The medical testimony does show that the fracture was caused by "a blow on the head and face" and, weighing the respective results of the blow with the club in question and a fall to the ground the conclusion can scarcely be escaped that the injury was caused immediately by the blow inflicted by accused. It appears most improbable that an injury of the seriousness shown by the record could have been sustained by a fall from a bicycle to the dirt. The legal responsibility for the resulting death would be the same, in our opinion, if the fracture was caused by the fall rather than by the blow. There is a direct line of causation between the blow and the death such as is contemplated by the following rule:

"To warrant a conviction for homicide it is necessary, but sufficient, to establish that the act of accused was a proximate cause of death. In this connection proximate cause does not necessarily mean the last act of cause or the act nearest in point of time to the death; it means rather nearness in point of causal relation. Accused's act or omission need not be the immediate cause of the death and he is responsible if the direct cause resulted naturally from his conduct. An injury is the efficient, proximate cause of the death where it directly and materially contributed to the happening of a subsequent accruing immediate cause of the death; or, as the rule is sometimes stated, if the act of accused was the cause of the cause of death, no more is required." (40 C.J.S. 854).

The blow with the club being the proximate cause of death the degree of the offense is determined by the circumstances under which the blow was administered. If the circumstances are sufficient to establish that the blow was intentional and with malice, the degree of the offense is thereby determined as murder rather than manslaughter. In this connection we must refer to those cases in which death results from a fall caused by a blow from the fist (CM 327731, Adams and Shells, 76 BR 157; CM 287101, Davis, 10 BR (ETO) 79). In these cases it was held that since death is not the natural and probable result of simple assault and battery with the fists, ordinarily no intent to kill can be presumed even though death is in fact caused thereby. Since the killing is unintentional, no higher degree of homicide than involuntary manslaughter can be sustained. These cases are distinguishable from

the present case in which a blow is inflicted with an instrument which, as hereinafter shown, is considered to be a deadly weapon, from the use of which an intent to kill and the existence of malice may be inferred.

Elements of the offense: Unlawful homicide.

The circumstances surrounding the dealing of the blow by accused establish conclusively that the blow was not accidental. Although accused had previously been swinging the club at stones as he walked along the road, the record does not show that the deceased was struck while accused was engaging in such idle practice. Accused's companion, Sanchez, who saw the club in the air testified that accused swung the club at the boy's head. An intentional rather than an accidental blow is also indicated by the fact that accused and his companions did not stay at the scene to render aid to the boy but instead went quickly away. If the blow was wholly inadvertent it is most unlikely that the boy would have been left on the ground unaided. The most convincing evidence of all, however, is the fact that immediately after the assault on the boy, the accused and his companions perpetrated another assault, with clubs, on an unoffending Japanese pedestrian. While this victim could not identify his assailants, save as members of the Occupation Forces, the sequence of events leaves no doubt as to the identity of the perpetrators of this second assault. This attack occurred a few meters down the road (a thoroughfare shown to be bordered by walls, fences and buildings) from the scene of the fatal assault. Only a few minutes separated the two incidents. The accused and his companions were proceeding in the same direction as the assailants of the Japanese pedestrian. No other soldiers were shown to have been on the road at the time. The connection of accused and companions with the second assault is obvious. The second assault following immediately upon the first illustrates a pattern of lawless misconduct on the part of accused and his confederates. Evidence, as to the second assault was clearly admissible under the following provisions of the Manual for Courts-Martial:

"Evidence of other acts of the accused, closely connected in point of time and circumstances of commission to the offense for which he is on trial, is admissible if it tends to establish the identity of the accused as the perpetrator of the offense in question, to show the motive or plan of action of the accused, to show his intent or guilty knowledge if intent or guilty knowledge is an element of the offense charged, or to refute his claim that his participation in the offense charged was the result of accident or mistake. Such evidence is admissible even though it tends to establish the commission of an offense not charged. * * *." (MCM, 1949, Par 125b, p. 154) (Underscoring supplied)

In view of the evidence discussed it is concluded that the blow was intentional and not accidental. The homicide was, therefore, unlawful or without legal excuse.

Elements of the offense: Malice.

The final element of the offense of which accused was convicted is that the killing was with malice aforethought. The evidence necessary to show malice aforethought is indicated in the following discussion from the Manual for Courts-Martial:

"Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take the life of anyone. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed.

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except if death be inflicted in the heat of a sudden passion, caused by adequate provocation--see 180a); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, even though such knowledge be accompanied by indifference whether death or great bodily harm is caused, or by a wish that it may not be caused; * * *." (MCM, 1949, Par 179a, p. 231).

It is apparent from the nature of the blow to the head of the victim that accused had an intention to cause grievous bodily harm. The law is well established that malice may be inferred from the character of the instrument employed to administer a blow resulting in a homicide.

"In the absence of circumstances disproving malice, malice may be presumed from the intentional use of a deadly weapon in a deadly and dangerous manner. The use of a deadly weapon is not conclusive as to malice, and the inference of malice therefrom may be overcome, and it has been held that where the facts and circumstances of the killing are in evidence, the existence of malice must be determined as a fact from all the evidence. It cannot be affirmed as a legal conclusion that an intent to take life is rebutted by the absence of a deadly weapon.

* * *

"A deadly weapon is one which is likely to produce death or great bodily injury from the manner in which it is used, and whether a weapon is to be regarded as deadly often depends more on the manner in which it has been used than on its intrinsic character. The mere fact that an instrument produced death does not establish its character as a deadly weapon, although it may be evidence thereof. Among other instruments which may under the circumstances of their use be regarded as deadly weapons may be enumerated sticks and cudgels of various descriptions, * * *." (40 C.J.S. 874,875,876).

Sticks, similar in size to the one used in this case, have been held to be deadly weapons in the following cases: Winter v. State, 123 Ala. 1, 26 S. 949; State v. West, 51 N.C. 505; State v. Fletcher (Mo), 190 S.W. 317. The Supreme Court of the United States discussed the question in the case of Allen v. United States, 157 U.S. 675, 15 S.Ct. 720, 39 L.Ed. 854, in the following language:

"* * * In one sense it may be true that sticks or clubs are not deadly weapons. Carrying them does not impart any hostile intent, nor, even in view of an expected affray, a design to take life. But when a fight is actually going on sticks and clubs may become weapons of a very deadly character. Life may be endangered or taken by blows from them as readily as by balls from a pistol. * * *."

In accordance with the foregoing principles of law we conclude that malice may be inferred from the fact that a club of the size indicated herein was employed as a weapon, that the club was forcibly directed against the head of the deceased, and the attendant facts and circumstances of the case.

The defense of intoxication.

The evidence shows that accused had been drinking beer for sometime prior to the fatal assault and that he was drunk at the time he inflicted the blow. It is also shown that following the incident accused went back to camp without assistance and that he climbed over a five foot wall in order to enter the camp. Concerning drunkenness as a defense, the Manual for Courts-Martial provides:

"It is a general rule of law that voluntary drunkenness, whether caused by liquor or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent or state of mind, when a particular intent or state of mind is a necessary element of the offense." (MCM, 1949, Par 140a, p.188)

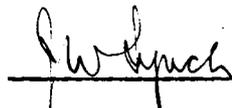
The question whether the accused's degree of drunkenness was such as to establish his inability to entertain the malice aforethought required in the offense of murder, was a matter for the court's determination under all the evidence before it on that issue (CM 294675, Minnick, 26 BR(ETO) 11, 20; CM 319168, Poe, 68 BR 141, 172). There is substantial evidence to support the court's conclusion that accused was capable at the time of the assault of entertaining malice aforethought and, consequently, no justification exists for a reduction in the degree of the offense.

5. Accused is shown by the charge sheet to have been 18 years and 6 months of age at the time of the offense. A letter from his father states that he is now only 17 having been enlisted at the age of 16, the father assisting therein. The date of the enlistment was 18 May 1948. He has no previous convictions.

6. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to confinement at hard labor for thirty years is authorized upon conviction of unpremeditated murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of unpremeditated murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 1111, act of 25 June 1948; 18 U.S.C. 1111.

 _____, J.A.G.C.

On Leave _____, J.A.G.C.

 _____, J.A.G.C.

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

CSJAGI CM 337082

JUL 29 1949

UNITED STATES)

9TH INFANTRY DIVISION)

v.)

Trial by G.C.M., convened at
Fort Dix, New Jersey, 25 March
and 1 April 1949. Dishonorable
discharge, total forfeitures
and confinement for six (6)
months. Post Stockade.

Private ALBERT H. CENTER)
(RA 35789016), Headquarters)
Company, 60th Infantry Regiment.)

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 50g.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Albert H. Center, Headquarters Company, 60th Infantry Regiment, 9th Infantry Division, Fort Dix, New Jersey, then being a Regimental Mail Clerk and by virtue of such position having received from the United States Post Office a Registered Letter identified as article number R-1579, did, at Fort Dix, New Jersey on or about 5 October 1948, knowingly and wrongfully fail to properly list the said registered letter on War Department Adjutant General's Office Form 922.

Specification 2: Similar offense involving a registered letter identified as article number R-1182, at Fort Dix, New Jersey, on or about 5 October 1948.

Specification 3: Similar offense involving a registered letter identified as article number R-10265, at Fort Dix, New Jersey, on or about 9 October 1948.

Specification 4: Similar offense involving a registered letter identified as article number R-225, at Fort Dix, New Jersey, on or about 13 October 1948.

Specification 5: Similar offense involving an insured package identified as article number I-246, at Fort Dix, New Jersey on or about 27 October 1948.

Specification 6: Similar offense involving an insured package identified as article number I-18, at Fort Dix, New Jersey, on or about 27 October 1948.

He pleaded not guilty to and was found guilty of the Charge and its Specifications and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as the proper authority may direct for a period of six (6) months. No evidence of previous convictions was introduced. The reviewing authority approved the sentence, designated the Post Stockade, Fort Dix, New Jersey, 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 50g.

3. Accused was convicted of six specifications under Article of War 96, which alleged that he knowingly and wrongfully failed to properly list four registered letters and two insured packages on War Department Adjutant General's Office Form 922. These offenses are each most closely related to the offense of false official report or statement knowingly made by any soldier other than a noncommissioned officer, the punishment for which is limited by the Table of Maximum Punishments, Manual for Courts-Martial, 1949, to three months confinement and partial forfeitures for three months (par. 117c, p. 140, MCM, 1949). Since accused was convicted of six such violations, the sentence may include a bad conduct discharge and total forfeitures (par. 117c, p. 143, MCM, 1949). Notwithstanding the fact that the offenses of which the accused stands convicted were committed prior to 1 February 1949, the dishonorable discharge was not authorized for the reason that arraignment on charges involving these offenses was not had until after 1 February 1949 (E. O. 10020, 7 December 1948; CM 336493, Fry, 8 Bull. JAG 75 and 76).

4. 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 a 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 six months.

Murphy, J.A.G.C.

SICK IN QUARTERS, J.A.G.C.

Jackson R. Judy, J.A.G.C.

CSJAGI CM 337082

1st Ind

28 AUG 1948

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

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

1. In the case of Private Albert H. Center (RA 35789016), Headquarters Company, 60th Infantry Regiment, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for 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 six months. 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 337082)

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.

23

CSJAGK - CM 337318

3 AUG 1949

UNITED STATES)

FORT BRAGG, NORTH CAROLINA

v.)

Trial by G.C.M., convened at Fort Bragg,
North Carolina, 23 June 1949. Dismissal,
total forfeitures and confinement for
five (5) years.

First Lieutenant PHILIP G.
SHEARMAN (O-1595828), Head-
quarters and Headquarters De-
tachment Section One, 3420 Area)
Service Unit, Fort Bragg, North)
Carolina.)

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

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to the Judicial Council and The Judge Advocate General.
2. The accused was tried upon the following charges and specifications:

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

Specification 1: In that First Lieutenant Philip G Shearman, Transportation Corps, Headquarters and Headquarters Detachment Section One, 3420 Area Service Unit, did, at Kirtland Air Force Base, New Mexico, on or about 30 November 1948, for the purpose of obtaining approval and payment of a claim against the United States, present to Lieutenant Thomas A Gentry, Finance Department, Agent Finance Officer for First Lieutenant J. M. Smith, United States Air Force, duly authorized to approve and pay such claims, War Department Form 336, Pay and Allowance Account Voucher, in the amount of \$337.00, for base and longevity pay, subsistence and rental allowance for the period 1 November 1948 to 30 November 1948, inclusive, less a Class "N" allotment of \$6.60, and did receive in payment therefor the sum of \$330.40 from the disbursing office of the said Lieutenant Thomas A Gentry, Finance Department, Agent Finance Officer, which claim was false and fraudulent, in that the said First Lieutenant Philip G Shearman was not entitled to base and longevity pay, subsistence and rental allowance for the period 1 November 1948 to 24 November 1948,

inclusive, he then not being on active duty, as he, the said First Lieutenant Philip G Shearman, then well knew.

Specification 2: In that First Lieutenant Philip G Shearman, ***, did, at Fort Bragg, North Carolina, on or about 8 December 1948, for the purpose of obtaining approval and payment of a claim against the United States, present to Lieutenant Colonel A W Farwick, Finance Department, United States Army, duly authorized to approve and pay such claims, War Department Form 336, Pay and Allowance Account Voucher, in the amount of \$67.40, for base and longevity pay, subsistence and rental allowance, for the period 25 November 1948 to 30 November 1948, and did receive in payment therefor the sum of \$67.40 from the disbursing office of the said Lieutenant Colonel A W Farwick, Finance Department, United States Army, which claim was false and fraudulent, in that the said First Lieutenant Philip G Shearman had formerly, on 30 November 1948, been paid by Lieutenant Thomas A Gentry, Finance Department, on Voucher Number 6336, accounts of First Lieutenant J M Smith, United States Air Force, for the period 25 November 1948 to 30 November 1948, inclusive, as he, the said First Lieutenant Philip G Shearman, then well knew.

Specification 3: In that First Lieutenant Philip G Shearman, ***, did, at Boston, Massachusetts, on or about 21 December 1948, for the purpose of obtaining approval and payment of a claim against the United States, present to Major J B Monk, Junior, Finance Department, United States Army, duly authorized to approve and pay such claims, War Department Form 336, Pay and Allowance Account Voucher, for a partial payment for the period ending 21 December 1948, in the amount of \$160.00, and did receive in payment therefor the sum of \$160.00 from the disbursing office of the said Major J B Monk, Junior, Finance Department, United States Army, which claim was false and fraudulent, in that the said Lieutenant Philip G Shearman had formerly, on 30 November 1948, been overpaid on Voucher Number 6336, accounts of First Lieutenant J M Smith, United States Air Force, Roswell, New Mexico, and had nothing due him from the United States, as he, the said First Lieutenant Philip G Shearman, then well knew.

Specification 4: In that First Lieutenant Philip G Shearman, ***, did, at Fort Devens, Massachusetts, on or about 23 December 1948, for the purpose of obtaining approval and payment of a claim against the United States, present to Major J B Monk, Junior, Finance Department, United States Army, duly authorized to approve and pay such claims, War Department

Form 336, Pay and Allowance Account Voucher, for a partial payment for the month of December, in the amount of \$150.00, and did receive in payment therefor the sum of \$150.00 from the disbursing office of the said Major J B Monk, Junior, Finance Department, United States Army, through First Lieutenant Patrick J Sojka, Finance Department, which claim was false and fraudulent, in that the said First Lieutenant Philip G Shearman had formerly, on 30 November 1948 and 23 December 1948, been overpaid on Voucher Number 6336, accounts of First Lieutenant J M Smith, United States Air Force, and Voucher Number 1338, accounts of Major J B Monk, Junior, Finance Department, United States Army, and had nothing due him from the United States, as he, the said First Lieutenant Philip G Shearman, then well knew.

Specification 5: In that First Lieutenant Philip G Shearman, ***, did, at Fort Bragg, North Carolina, on or about 31 December 1948, for the purpose of obtaining approval and payment of a claim against the United States, present to Lieutenant Colonel A W Farwick, Finance Department, United States Army, War Department Form 336, Pay and Allowance Account Voucher, for base and longevity pay, subsistence and rental allowance, for the period 1 December 1948 to 31 December 1948, totaling \$338.40, with Class "N" and Class "E" allotments totaling \$206.60, and due United States overpayment, notice of exception, Voucher Number 46953, June 1947, accounts of C W Conklin, \$91.80, and did receive in payment therefor from the disbursing office of the said Lieutenant Colonel A W Farwick, Finance Department, United States Army, the sum of \$40.00, which voucher was false and fraudulent, in that the said First Lieutenant Philip G Shearman had received partial payments in the amount of \$160.00 on 22 December 1948 from Major J B Monk, Junior, Finance Department, United States Army, and \$150.00 on 23 December 1948 from the disbursing office of Major J B Monk, Junior, Finance Department, United States Army, on Voucher Number 8987 and Voucher Number 1338, both accounts of Major J B Monk, Junior, Finance Department, United States Army, as he, the said First Lieutenant Philip G Shearman, then well knew.

Specification 6: In that First Lieutenant Philip G Shearman, ***, did, at Fort Bragg, North Carolina, on or about 31 January 1949, for the purpose of obtaining approval and payment of a claim against the United States, present to Lieutenant Colonel A W Farwick, Finance Department, United States Army, War Department Form 336, Pay and Allowance Account Voucher, for base and longevity pay, subsistence and rental allowance, for the period 1 January 1949 to 31 January 1949, inclusive,

totaling \$338.40, with deductions for income tax and partial payment totaling \$223.30, which voucher was false and fraudulent, in that it failed to include a partial payment in the amount of \$150.00, received by the said First Lieutenant Philip G Shearman on 23 December 1948 on Voucher Number 8987, accounts of Major J B Monk, Junior, Finance Department, United States Army, Boston, Massachusetts, as he, the said First Lieutenant Philip G Shearman, then well knew.

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

Specification 1: In that First Lieutenant Philip G Shearman, ***, did, at Fort Bragg, North Carolina, on or about 7 December 1948, wrongfully supply false information to the disbursing office of Lieutenant Colonel A W Farwick, Finance Department, United States Army, to be incorporated in a Pay and Allowance Account Voucher, to wit: that he, the said First Lieutenant Philip G Shearman, had not been paid by a Finance Officer for services rendered during the period 25 November to 30 November 1948, which statement he, the said First Lieutenant Philip G Shearman, then well knew to be false.

Specification 2: In that First Lieutenant Philip G Shearman, ***, did, at or near Kirtland Air Force Base, New Mexico, on or about 30 November 1948, with intent to deceive the Disbursing Officer, Walker Air Force Base, Roswell, New Mexico, falsely make and use a certain writing in words and figures as follows, to wit:

HEADQUARTERS
3420 ASU, Fort Bragg, N.C.

SPECIAL ORDERS
NUMBER 152

17 November 1948

EXTRACT

17. UP of AR 600-115, 1st Lt Philip G Shearman, 01595828, TC, this comd, is granted twenty-five (25) days ord lv eff on or about 17 November 1948. AR 600-115 requires officer to keep record of lv used.

BY ORDER OF LIEUTENANT COLONEL JONES:

L. M. HARRIS
Captain, AGD
Asst Adj Gen

OFFICIAL:

L. M. HARRIS
 Captain, AGD
 Asst Adj Gen

CERTIFIED A TRUE EXTRACT COPY:

/s/ Philip G. Shearman

PHILIP G. SHEARMAN
 1st Lt, TC
 O-1595828

which said document was, as the said First Lieutenant Philip G. Shearman then knew, false as to all information set forth therein.

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, 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 ten years. The reviewing authority approved the sentence, but reduced the period of confinement to five years and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

Paragraph 17, Special Orders No. 265, Headquarters Fourth Army, dated 12 November 1948, placed the accused on extended active duty as a first lieutenant effective 25 November 1948. This order provided that the accused would be discharged from his enlisted status prior to 25 November 1948 (R 13, Pros Ex 2).

On 30 November 1948 the accused signed and presented a pay voucher to the finance office, Kirtland Air Force Base, New Mexico, which voucher was paid. First Lieutenant Thomas A. Gentry, Agent Finance Officer, identified a photostatic copy of Voucher No. 6336 as being a copy of the voucher submitted by the accused (Pros Ex 1). This photostatic copy was received in evidence as Prosecution Exhibit No. 9 without objection by the defense. On the back of this exhibit is a typed certificate signed by R. Silverman, Colonel, Finance Department, to the effect that he is the official custodian of the original voucher and that the original is on file in the Accounting Division Army Finance Center, Office Chief of Finance, St. Louis, Missouri.

In Voucher 6336 the accused claimed the sum of \$337.00, less \$6.60

as a Class "N" deduction for National Service Life Insurance, as due him for pay and allowances for the period 1 November 1948 to 30 November 1948. The signature of the accused appeared on lines 33 and 45 of this voucher. Line 31 contains a certificate that "the foregoing statement and account are true and correct" and line 45 is a receipt for cash payment of the net balance (R 12, Pros Exs 1,9). Other photostatic copies of pay vouchers duly certified by Colonel R. Silverman as being true copies of original vouchers in his custody were received in evidence without objection by the defense. It was also shown that these vouchers were signed and submitted to finance officers of the Army by the accused (Pros Exs 3-9). These exhibits show pay and allowances claimed by the accused as follows:

| <u>Date submitted</u> | <u>Pay for period of</u> | <u>Total Credits</u> | <u>Total Debits</u> | <u>Net Balance</u> | <u>Exhibit No.</u> |
|-----------------------|-----------------------------|----------------------|---------------------|--------------------|--------------------|
| 8 Dec 1948 | 25-30 Nov 1948 | \$ 67.40 | -- | \$ 67.40 | 10 |
| 21 Dec 1948 | Partial pay to 21 Dec 48 | 160.00 | -- | 160.00 | 11 |
| 23 Dec 1948 | Partial pay in Dec 1948 | 150.00 | -- | 150.00 | 12 |
| 31 Dec 1948 | 1-31 Dec 48 | 338.40 | \$298.40 | 40.00 | 13 |
| 31 Jan 1949 | 1-31 Jan 49 | 338.40 | 223.30 | 115.10 | 14 |

The net amounts claimed on these vouchers were paid to the accused except the one shown as Exhibit No. 14. A check drawn to pay this amount was cancelled by the finance officer upon "receipt of evidence" that the accused had received a partial payment which he had not disclosed. The debits shown on Exhibit 13 in the total sum of \$298.40 were itemized as \$6.60 National Service Life Insurance, \$200.00 Class E Allotment; \$91.80 due U.S. overpayment in June 1947. The debits shown on Exhibit 14 in the total sum of \$223.30 were itemized as Income Tax deduction \$8.30; partial payment \$160.00 (Exhibit No. 11), \$55.00 due U.S. Stoppage Circular, Department Army, 15 January 1949.

A "War Department Signature Card" signed by the accused in the presence of Major K. C. Browning was introduced into evidence without objection as Prosecution Exhibit 16 (R 19).

Lieutenant Colonel A. W. Farwick, Finance Department, Fort Bragg, North Carolina, testified without objection that he had had 9-1/2 years experience in the Army Finance Department and that during this time he had compared thousands of signatures for the purpose of identifying soldiers. He compared the signature of Philip G. Shearman appearing on War Department Signature Card (Pros Ex 16) with the signatures of Philip G. Shearman appearing on Prosecution Exhibits 9,10,11,12,13 and 14 and concluded that they were written by the same person (Pros Ex 7).

Captain Walker F. Nolan, Finance Department, Fort Bragg, North Carolina, testified without objection that for eight years he had been comparing

signatures on War Department signature cards with signatures on public vouchers in disbursing public funds and had compared thousands of signatures during this time. He compared the signature of the accused appearing on War Department signature card (Pros Ex 16) with the signatures of the accused on Prosecution Exhibits 9,10,11,12,13 and 14 and was of the opinion that they were all signed by the same person (Pros Ex 8).

Master Sergeant Earl S. Belcher, Chief Clerk, Pay and Allowance Section, Post Finance Office, Fort Bragg, testified that on 7 December 1948 the accused came to the office to make application for regular pay. He gave the accused the necessary forms which the accused completed, signed and returned. One of these forms completed and signed by the accused was a "Pay and Allowance Sheet." This pay and allowance sheet was received in evidence without objection as Prosecution Exhibit No. 15 (R 15,16,17). This exhibit contains statements that accused was on duty by virtue of Paragraph 17, Special Orders No. 265, Headquarters Fourth Army, dated 12 November 1948 and the information relative to "Last paid to include" was left blank. It also contains a certificate that he had not signed a pay voucher covering the period stated or any portion thereof. Lieutenant Colonel A. W. Farwick was the disbursing officer of the Fort Bragg Finance Office (Pros Ex 7).

On 30 November 1948 the accused presented to First Lieutenant Thomas A. Gentry at Kirtland Air Force Base, New Mexico, an extract copy of Paragraph 17, Special Orders No. 152, Headquarters 3420 Area Service Unit, Fort Bragg, North Carolina. This order was presented as a basis for a request for pay for the period 1 November 1948 to 30 November 1948. The order was filed with the retained duplicate voucher in the office of the accountable disbursing officer, Walker Air Force Base, Roswell, New Mexico (Pros Ex 1). This order was received in evidence as Prosecution Exhibit No. 19 without objection by the defense. This order is as follows:

"HEADQUARTERS
3420 ASU, Fort Bragg, N.C.

SPECIAL ORDERS
NUMBER 152

17 November 1948

EXTRACT

17. UP of AR 600-115, 1st Lt. Philip G Shearman O-1595328, TC, this Comd, is granted twenty-five (25) days ord lv eff on or about 17 November 1948. AR 600-115 requires officer to keep record of lv used.

BY ORDER OF LIEUTENANT COLONEL JONES:

L. M. HARRIS
 Captain, AGD
 Asst. Adj. Gen.

OFFICIAL:

L. M. HARRIS
 Captain, AGD
 Asst. Adj. Gen.

CERTIFIED A TRUE EXTRACT COPY:

/s/ Philip G. Shearman
 PHILIP G. SHEARMAN
 1st Lt, TC
 O-1595828"

Major Robert C. Browning, Assistant Adjutant of Headquarters V Corps and Headquarters Fort Bragg, and Lieutenant Colonel F. V. Johnston, Commanding Officer Headquarters Special Troops, 3420 Area Service Unit, Fort Bragg, each testified that there was no unit known as "Headquarters 3420 ASU, Fort Bragg, North Carolina," on 17 November 1948, commanded by a Lieutenant Colonel Jones. Special Orders No. 152, Headquarters, Special Troops, 3420 ASU, dated 31 July 1948, contained only one paragraph which appointed a special court-martial. Special Orders issued on 17 November 1948, same headquarters, contain a paragraph Number 17 which pertains only to an enlisted man not the accused (R 18-24, Pros Exs 17,18).

4. Evidence for the Defense

It was stipulated that on 4 January 1949 the accused repaid \$330.40 paid to him on Voucher 6336 (Pros Ex 9) and that the partial payments of \$160.00 (Pros Ex 11) and \$150.00 (Pros Ex 12) were collected from the accused's pay during the period 1 January 1949 to 28 February 1949 (Def Ex A).

The accused elected to remain silent.

5. Discussion

a. Charge I and Specifications thereunder

Under Charge I and its specifications the accused was found guilty of presenting for approval and payment six false and fraudulent claims against the United States for services allegedly rendered by him during the months of November and December 1948 and January 1949. In support of these allegations the court received in evidence certified copies of six pay vouchers which had been presented to various finance officers of the Army by the accused. Each of these vouchers was allegedly signed by

the accused. The accused did not object to the introduction of these vouchers. A failure to object to a proffered document on the ground that its genuineness has not been shown may be regarded as a waiver of that objection. The court was therefore justified in finding that these vouchers were in fact signed by the accused (par 129b, MCM 1949; In re Goldberg, 91 F (2d) 996; CM 324725, Blakeley, 73 BR 307,325; CM 320478, Vance, 71 BR 415,430).

The evidence also shows that the net amounts claimed on five of these vouchers were actually paid to the accused. The amount claimed on the sixth voucher was not paid because the finance officer to whom the accused presented the voucher discovered that the accused had failed to disclose a partial payment received by him.

Paragraph 150a, Manual for Courts-Martial, 1928, provides in part:

"It is not necessary that the claim be allowed or paid ***. The claim must be made or caused to be made with knowledge of its fictitious or dishonest character."

The fact that the amount claimed on one of these vouchers was not paid after it was presented for payment has no bearing upon this case.

That these vouchers were false and fraudulent when presented for payment by the accused is without question. False and fraudulent claims include not only those containing some material false statement, but also claims that the person presenting knows to have been paid or for some other reason knows he is not authorized to present or to receive money on (par 150b, MCM 1928). It was established that the accused was ordered to active duty as a first lieutenant as of 25 November 1948. Therefore, when he claimed pay and allowances for the period of 1 November to 30 November 1948 the claim was false and fraudulent because he was not entitled to any pay as an officer for any time prior to 25 November 1948. After this voucher was paid he claimed and was paid pay and allowances for the period of 25 November 1948 to 30 November 1948. This claim was false and fraudulent because he had been paid for his service for this period of time. During the month of December 1948 the accused drew partial payments in the sum of \$160.00 (Spec 3) and \$150.00 (Spec 4). Having been paid full pay and allowances for the month of November 1948 in addition to his pay and allowances for that part of November 1948 during which he had actually performed duty as an officer, the accused did not have any money due him in the month of December 1948 at the time he drew these partial payments.

In CM 302964, Strickland, 59 BR 247, the accused was charged with 47 specifications alleging the making of false claims against the United States by presenting false vouchers for pay and allowances knowing that such claims were in excess of the amount due. The evidence showed:

"On 19 January 1944 he received \$60 by partial payment voucher (Pros. Ex. 2) and debited this amount when he presented his pay and allowance voucher for the month of January 1944, claiming a net balance of \$76.70. However, on 31 January 1944, the date on which the monthly pay and allowance voucher for January 1944 was presented, he still owed the United States \$60 for the partial payment received on 20 December 1943 so that on 31 January 1944 there was due him \$16.60 instead of \$76.60 which he claimed and received (R. 42; Pros. Ex. 3). On 5 February 1944 he drew \$60 by partial payment voucher (Pros. Ex. 4) although nothing was due him on that date because his then existing indebtedness to the Government (\$60) was greater than the amount of his earned pay and allowances thus far accrued in the month of February 1944 (R.44). On 29 February 1944 by his pay and allowance voucher for that month he made net claim for \$133.80 after deduction of Class E and N allotments plus other deductions but failed to debit his account with either of the two previous \$60 partial payments and, accordingly, received \$133.80 instead of \$13.80 to which he was then entitled. As of 29 February 1944 he had been overpaid \$120 (R.44; Pros. Ex.5).

"Thereafter accused continued to present partial payment vouchers from time to time and to receive the amounts claimed therein. He also submitted his monthly pay and allowance vouchers on the last day of each month and in each instance received the net balance claimed. Each time after 29 February 1944 that accused presented a partial pay or monthly pay and allowance voucher and received the amounts claimed therein, his indebtedness to the United States was greater than the amount due him for accrued pay and allowances, as shown by the following table, viz: ***"

The Board of Review said:

"It was clearly shown that on the dates and at the places alleged/^{accused}made and presented to the finance officers named his partial payment and monthly pay and allowance vouchers and in each instance received in cash the net balance claimed. Starting with his voucher for the month of December 1943 he failed to debit amounts which he had previously received as partial payments and continued this practice until 30 March 1945 when his indebtedness to the United States by overpayments stood at \$1775. In each instance where money was drawn on partial payment voucher or by monthly pay and allowance voucher the proof shows that there was either less money due accused than claimed or nothing at all due him as alleged in the respective Specifications of which accused was found guilty. The prosecution's evidence was in no manner contradicted by the defense. Indeed,

the accused admitted that he presented each of the vouchers and received the amounts claimed. He said, 'The facts are as they are presented. The pay vouchers are here, I drew the money, the money was at home, and it has been available for repayment ever since overpayment originally occurred back in 1943.'

"From his testimony given at the trial, it is apparent that accused realized he was requesting and receiving money which was not due him when he presented these partial and monthly pay and allowance vouchers. He admitted that he knew he was indebted to the United States but sought to exculpate himself by stating that he believed he could overdraw and reimburse the Government later. Yet the record shows that he continued to draw partial and monthly payments even after he had appeared before the Board of Officers in connection with an investigation pertaining to his indebtedness to the Government because of the prior overpayments. The court was therefore justified in inferring that accused was aware of circumstances such as would induce an ordinary intelligent and prudent man to believe his vouchers to be false and hence that he had knowledge of the falsity of these claims. Subsequent to the offenses complained of and while in confinement awaiting trial, accused made restitution of his indebtedness to the United States. While restitution may be considered in mitigation it is no defense. To make and present pay vouchers containing such false and fraudulent statements for the purpose of obtaining claims asserted against the United States constituted offenses under the express provisions of Article of War 94. The evidence fully sustains the findings of guilty of Charge I and its Specifications." (Underscoring supplied.)

In CM 302966, Baker, 59 BR 269, the accused was charged with ten specifications alleging the making of false claims against the United States by presenting false vouchers for pay and allowances knowing that the amounts claimed were in excess of the amounts of pay and allowances due. The evidence showed:

"Accused's pay credits and debits for the month of April 1945 were as follows:

| <u>Credits</u> | | <u>Debits</u> | |
|--------------------|---------------|--------------------|---------------|
| Base and Longevity | \$240.00 | Class N Insurance | \$6.66 |
| Subsistence | 42.00 | Class E Allotment | 250.00 |
| Rental Allowance | 90.00 | Class B Allotment | 18.75 |
| | <u>372.00</u> | 93 meals @ .25 for | |
| | | March, 1945 | 23.25 |
| | | | <u>298.66</u> |

Of the \$73.34 balance due him on the above account he obtained \$70 on a partial payment voucher on 10 April 1945. Although this practically exhausted his balance, he submitted to the finance officer, Major R. E. Powell, two more partial vouchers during the month, one for \$20 on 21 April and another for \$50 on 23 April, resulting in an overpayment of \$66.66 (R.8; Pros. Exs. 8,10).

"His pay account for May 1945 was as follows:

| <u>Credits</u> | | <u>Debits</u> | |
|--------------------|---------------|-------------------|---------------|
| Base and Longevity | \$240.00 | Class N Insurance | \$6.66 |
| Subsistence | 43.00 | Class E Allotment | 250.00 |
| Rental Allowance | 90.00 | Class B Allotment | 18.75 |
| | <u>373.00</u> | Meals for April | 22.50 |
| | | | <u>297.91</u> |

As shown by these figures the amount due him for May was \$75.49, which, when reduced by the \$66.66 overpayment from the preceding month, left only \$8.83 due him. Nevertheless during the month he submitted partial pay vouchers for \$25, \$50, \$50, and \$140. The voucher for \$140 was submitted on 22 May to First Lieutenant V. L. Blakly and the others, on dates not shown, to Major Powell (R. 6-8; Pros Exs. 1,2,3,8,10).

"For the month of June 1945 his account showed these items:

| <u>Credits</u> | | <u>Debits</u> | |
|--------------------|---------------|-------------------|---------------|
| Base and Longevity | \$240.00 | Class N Insurance | \$6.66 |
| Subsistence | 42.00 | Class E Allotment | 250.00 |
| Rental Allowance | 90.00 | Class B Allotment | 13.75 |
| | <u>372.00</u> | Meals for May | 23.25 |
| | | | <u>298.66</u> |

The excess of credits over debits for June, amounting to \$73.34, was more than cancelled by his indebtedness to the Government from the overpayments in April and May. Despite this fact he submitted three partial pay vouchers during June, each in the sum of \$100. One voucher was submitted to Lieutenant Blakly and the others to Major D. B. Conley (R. 6-8; Pros Exs. 4,5,6, 10).

"In the month of July the excess of his credits over his debits was \$75.49. With the overpayments of the previous three months taken into consideration he was in fact indebted to the Government. But once again he presented a partial payment voucher

by means of which, on 11 July 1945, he secured \$150. This voucher was presented to Major Joseph Marshall (R. 6-8; Pros. Exs. 7,10)."

The Board of Review said:

"The Specifications of Charge II allege that on various dates between 21 April 1945 and 11 July 1945 accused presented to finance officers ten pay and allowance claims in the total amount of \$785 which he knew were false and fraudulent in that the amounts claimed were in excess of what was due him. The Specifications are laid under Article of War 94.

"It is clearly shown that during the months of April, May, June, and July 1945 accused presented claims for partial pay in amounts varying from \$25 to \$150 and totalling \$785 and was paid the respective amounts claimed. The specific dates on which some of the claims were submitted is not shown but they correspond generally to the dates alleged in the Specifications. The capacity of the officers, to whom these claims were submitted, to approve and pay them, was established by stipulation.

"The authority by which an officer may secure a partial payment on his pay and allowances in advance of his regular pay day is contained in par. 7a, Army Regulations 35-1360, 11 April 1944, which states:

'Commissioned officers and other personnel enumerated in paragraph 1a may, upon submission of proper vouchers therefor (unless payment is precluded by the provisions of AR 35-1740), be paid as partial payments the pay and allowances due and earned to and including the date of payment ***.'

The amounts claimed by accused were not 'due and earned' in the months in which the claims were presented. Some of the amounts claimed were earned by accused in the months subsequent to their payment but the net result was that by 31 July 1945 he had been overpaid \$557.34. The circumstances afford ample basis for the conclusion that he knew the claims were false or fraudulent. Not only was he charged with responsibility for the correctness of the claims he presented, but because of the size of his allotments and other fixed charges he must certainly have known that a partial payment of any size would not only exhaust the balance due him on his account but would result in an overpayment. All of the elements of the offense are proven beyond reasonable doubt." (Underscoring supplied.)

See also CM 279653, Boyer, 52 BR 289; CM 270052, Gibney, 7 BR (ETO), 91, 101.

The undisputed evidence in the instant case further shows that accused had two allotments effective 1 December 1948, namely, a Class "N" allotment of \$6.60, and a Class "E" allotment of \$200.00.

Pay and allowances of officers of the Army are fixed by statutes enacted by the Congress of the United States. These statutes are published in official Department of the Army publications (AR 35-1465; Official Army and Air Force Register, 1948). The prescribed mode of payment also is so published (AR 35-1360). The court was authorized to take judicial notice of all Federal statutes and all official Department of the Army publications. So, also, the Board of Review may take such judicial notice upon appellate review (par 125, MCM 1928; CM ETO 4054, Carey et al., 11 BR (ETO) 293). This the Board does.

Army Regulations 35-1360, 31 January 1947, provide inter alia:

"*** 14.a. *** commissioned officers and others who certify their own pay vouchers may, upon submission of proper vouchers therefor, be paid as partial payments the pay and allowances due and earned to and including the date of payment ***.

"b. *** Such partial payments will, in all cases, be, in even dollars, for the amounts of accrued pay and allowances at date of payment, as will provide a sufficient balance to be due on the last day of the month to satisfy all allotments, deductions, and other charges for the current month ***.

"8. *** It is the responsibility of the officer or other person who certifies his own pay voucher to state all appropriate deductions on each voucher. This responsibility cannot be transferred to the personnel officer or to the disbursing officer because of assistance rendered in the preparation and processing of pay accounts. The individual will be held liable in the case of certification and submission of duplicate pay accounts. Commanding officers will bring the provisions of this paragraph to the attention of each person who certifies his own pay voucher. ***" (Underscoring supplied.)

Army pay tables show that the total pay and allowances accruing to an officer of the accused's rank and length of service, with dependents, for the period 1 to 31 December 1948, was \$338.40.

The evidence shows that for the month of December 1948 the allotments by the accused totaled \$206.60. The net amount which would accrue

to the accused during this period was therefore \$131.80. Simple computation shows that the amount of pay and allowances which accrued to the accused's account from 1 December 1948 to 21 December 1948 was \$92.19. On 21 December 1948 when the accused presented the partial pay voucher for \$160.00 there was no money due him as pay and allowances. On 30 November 1948 he was paid the sum of \$330.40 as pay and allowances when as a matter of fact he was only entitled to pay and allowances for the period of 25 November 1948 to 30 November 1948 in the sum of \$67.40. On 8 December 1948 he drew the \$67.40 which he had earned between 25 November 1948 and 30 November 1948. Therefore, on 21 December 1948 the accused had been overpaid on his pay and allowance account in the sum of \$330.40. After crediting the accused's pay account with \$92.19 as of 21 December 1948 there is still nothing due the accused as pay and allowance because he was overdrawn in the sum of \$238.21. Under the above cited Army Regulations and opinions, partial payments may be made from pay due and earned as of the date of payment, from the amounts of accused's pay and allowances (due) at the date of payment, provided a sufficient balance is retained in the pay account to satisfy allotments, deductions and other charges for the current month. The accused is also charged with certifying his pay vouchers and at the time he submitted this voucher for a partial payment he could not help but know that his pay account was overdrawn and that there was no money due him for services rendered. The court was, therefore, justified in concluding that the voucher presented 21 December 1948 was false and fraudulent.

The partial pay voucher presented by accused on 23 December 1948 in the sum of \$150.00 is, therefore, likewise false and fraudulent.

The accused received two partial payments during December 1948 at a time when he did not have anything due him. Nevertheless he signed and presented a claim (Spec. 5) for service rendered during the period 1 December 1948 to 31 December 1948 without disclosing that he had already received two partial payments amounting to \$310.00. This claim was also false and fraudulent. The accused also presented a claim for pay and allowances for the period 1 January 1949 to 31 January 1949 (Spec 6) without disclosing that he had drawn a partial payment of \$150.00 during the month of December 1948. When the accused presented this pay voucher he undoubtedly knew that this \$150.00 partial pay had not been deducted from his pay account. He had embarked upon a course of conduct of presenting pay vouchers which he knew to be false and fraudulent and when he failed to include this partial payment in his January voucher the court was justified in finding that such omission was deliberate upon the part of the accused and done with an intent to collect more money than was due him and that this voucher was also false and fraudulent (CM Strickland, supra, CM Baker, supra). The accused had repaid some of the money received by him on these false and fraudulent claims and the Government subsequently withheld some money due the accused in order to reimburse itself. These facts were admissible in evidence in mitigation

of the offenses but such facts are not a defense to the offenses charged (CM 276703, McNeely, 51 BR 1,17; CM 325705, Fredrick, 75 BR 4).

b. Specification 1, Charge II

Under this specification the accused was found guilty of wrongfully supplying false information to a finance office, which information was to be incorporated into a pay and allowance voucher. The evidence discloses that on 7 December 1948 the accused filled in a form headed "Pay and Allowance Date Sheet" and after signing this form delivered it to the chief clerk in the finance office. Subsequently a pay voucher was prepared for the period 25 November 1948 to 30 November 1948 based on this information. The accused did not fill in the dates showing the time that he was last paid, thereby indicating that he had not been paid while on duty. Above the accused's signature was a certificate, "I have not previously signed a pay voucher covering the period stated in this voucher or any portion thereof." Prior to the time this information was submitted to the finance office the accused had presented a pay voucher to a finance officer and had received pay for a period of time which included the time claimed in the voucher based upon the information submitted by the accused (see Spec 1, Chg I). The supplying of false information to be used in the preparation of a false and fraudulent claim against the United States is conduct unbecoming an officer and a gentleman and a violation of Article of War 95.

c. Specification 2, Charge II

In this specification it was alleged that the accused did on 30 November 1948 with intent to deceive the disbursing officer, Walker Air Force Base, Roswell, New Mexico, falsely make and use at Kirtland Air Force Base, New Mexico, a certain writing, namely, leave orders. The evidence discloses that these leave orders were given to the Agent Finance Officer at the Kirtland Air Base in order to secure payment of a false and fraudulent pay voucher. These orders were filed with the original voucher and became a part of the records of the accountable finance officer at Walker Air Force Base.

The accused had certified these leave orders as "a true extract copy." It was also shown that these orders were false and necessarily forged in that there was no unit at Fort Bragg known as "Headquarters 3420 ASU, Fort Bragg, North Carolina," on 17 November 1948, commanded by the officer who purportedly authorized such orders. There was a unit at Fort Bragg known as "Headquarters Special Troops 3420 ASU" on 17 November 1948, but it was shown that this latter headquarters had not issued leave orders dated 17 November 1948 pertaining to the accused.

The possession and use of a forged instrument under the circumstances

as shown herein raises a presumption that the accused forged the instrument and in the absence of any explanation on the part of the accused as to how such instrument came into his possession the presumption becomes conclusive (CM 278011, Fox, 51 BR 285-291; CM 322979, Leonard, 71 BR 357-378).

In CM 315736, Risoli, 65 BR 91,95, the Board of Review said:

"The proof shows that this certificate was presented to a clerk, in the Finance Office, Second Replacement Depot, named Ralph H. Neuville. Relying upon the certificate, Mr. Neuville converted German marks into Belgian francs. There is no showing in the record that this certificate was ever actually presented personally to Captain Francis Harkins. The false certificate was made by the accused and presented to a clerk in the finance office which was under the supervision of Captain Harkins. The certificate became a part of the official records of this finance office and the accused knew and intended that the finance officer would rely upon it. This false certificate was a false official statement made to Captain Francis Harkins, the officer in charge of the finance office, the same as if accused had uttered it orally in the officer's presence (CM 270061, Shenidan, 45 BR 190)."

The Board of Review concludes that when the accused made and presented the false leave orders to the agent finance officer at Kirtland Air Force Base in support of a false and fraudulent pay voucher he knew that they would become a part of the accountable finance officer's records and that such officer would rely upon them and that such false orders were presented with the intent to deceive the accountable finance officer, the same as if such orders had been personally delivered to him by the accused.

6. Department of the Army records show that the accused is 29 years of age and married. He attended Ohio Military "Institution" for one year. His Personnel Placement Questionnaire shows his father was an Army colonel. This statement has not been verified. He enlisted in the Army on 16 September 1940 and attained the grade of staff sergeant. He completed the Quartermaster Officer Candidate School and was commissioned a second lieutenant, Army of the United States, on 13 August 1943. He was promoted to first lieutenant on 12 June 1944 and to captain on 18 July 1947 upon relief from active duty. He enlisted as a master sergeant on 4 October 1947 and was recalled to active duty as a first lieutenant on 25 November 1948. His adjectival efficiency ratings average "Very Satisfactory."

The Staff Judge Advocate's review states that the accused is heavily

in debt and that many of his obligations are represented by bad checks.

Records from the Retained Accounts Division, Army Finance Center, show that the accused is indebted to the United States for overpayment of salary during the years 1946 and 1947. These overpayments were made on presentation of duplicate and triplicate pay vouchers for various months during these years.

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 authorized upon conviction of a violation of Article of War 94 and is mandatory upon conviction of a violation of Article of War 95.

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

Joseph F. Beach , J.A.G.C.

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

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

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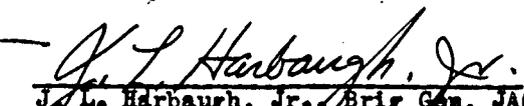
THE JUDICIAL COUNCIL

CM 337,318

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

In the foregoing case of First Lieutenant Philip G. Shearman
(O-1595828), Headquarters and Headquarters Detachment Section One,
3420 Area Service Unit, Fort Bragg, North Carolina, 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

10 August 1949


E. M. Brannon, Brig Gen, JAGC
Chairman

I concur in the foregoing action.
The period of confinement is re-
duced to three (3) years.



THOMAS H. GREEN
Major General
The Judge Advocate General

11 August 1949

GCMO 52, August 12, 1949

CSJAGV CM 337333

AUG 25 1949

UNITED STATES)
) v.
Recruit GLENN S. BURTON)
(RA 18315834))
Recruit JAMES C. BAKER)
(RA 13271851), both of)
Service Company, 188th)
Parachute Infantry)
Regiment.)

7TH INFANTRY DIVISION

Trial by G.C.M., convened at
Camp Schimmelpfennig, Honshu,
Japan, 20 May 1949. BURTON -
Bad conduct discharge, total
forfeitures after promulgation
and confinement for one (1) year.
BAKER - Bad conduct discharge,
total forfeitures after promulgation
and confinement for nine (9) months.
Disciplinary Barracks for both.

HOLDING by the BOARD OF REVIEW
GUINOND, 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 Specifications:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Recruit Glenn S. Burton, Service Company, 188th Parachute Infantry Regiment, did, in conjunction with Recruit George P. Slater, 7th Quartermaster Company, 7th Infantry Division, at Camp Schimmelpfennig, Honshu, Japan, on or about 19 February 1949, feloniously steal about two hundred and seventy (270) pounds of sugar, of the value of about twenty one dollars and sixty cents (\$21.60), property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Recruit Glenn S. Burton, Service Company, 188th Parachute Infantry Regiment, and Recruit James C. Baker, Service Company, 188th Parachute Infantry Regiment, acting jointly and in

pursuance of a common intent, did, at Sendai, Honshu, Japan, on or about 21 February 1949, wrongfully dispose of by selling about two hundred and seventy (270) pounds of sugar, of the value of about twenty one dollars and sixty cents (\$21.60), property of the United States, furnished and intended for the military service thereof.

Each accused pleaded not guilty to the Charge and the Specifications as they pertained to the respective accused and were found guilty as charged. Evidence of one previous conviction was introduced as to the accused Burton and two previous convictions were introduced as to the accused Baker. Burton 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 year, and Baker 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 nine months. The reviewing authority approved the sentences as to each accused, designated the Branch, United States Disciplinary Barracks, Camp Cooke, California as the place of confinement, withheld the order directing execution of the sentences, 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 as to the accused Baker. The only questions that will be considered by the Board of Review are the propriety of the admission in evidence of the confession of the accused Burton and the consequent legality of the findings and sentence as to Burton, since the compelling evidence aliunde the confession is sufficient to support such findings and sentence.

4. Concerning the voluntary character of Burton's confession, being a statement dated 25 February 1949, taken 23 February 1949, (R. 21), and admitted in evidence as Pros. exhibit 2 (R. 32), CID agent Daniel Lyons, accompanied by agent Spradlin, apprehended the accused shortly after 1430 hours on 22 February 1949 (R. 20), and after informing the accused of his rights under Article of War 24, without threat or abuse (R. 21), or promises of reward or immunity (R. 22), took accused's statement on 23 February 1949, which was acknowledged on 25 February 1949 (R. 22). In response to inquiry as to the two day delay CID agent Lyons testified:

"The statement was taken on the twenty-third of February. On the twenty-fourth of February, I returned to Camp Schimmelphennig with the statement, and I took Burton to his Company Commander, to Lt. Pickett, who is on his way to the Z.I. I presented the statement to Lt. Pickett and I requested that he swear Burton in. He returned the statement and he read the 24th Article of War to Burton

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and explained it to him. Lt. Dunham was in the office at the time, and after Lt. Pickett and Lt. Dunham had consulted about something of which I don't know what it was, I was asked to leave the room and I did. Later, I was called back, and Lt. Pickett informed me that he had appointed Lt. Dunham as Private Burton's Defense Counsel, and both Lts., advised Burton and told him not to sign the statement. I returned to the office with the statement. On the following day, the twenty-fifth of February, 1949, I picked Burton up and took him to the office of the 19th CID where I further questioned him, and I told him if the statement were not true not to sign it. Burton was taken up to Lt. Sensor's, who once again read him the 24th Article of War and explained it to him, and Burton did voluntarily, in my presence, sign these statements" (R. 22).

The record of trial thereafter reflects the following:

"Q: Did you attempt to get a statement from Baker?

A: I asked him to give me a statement which he refused to do under his rights under the 24th Article of War.

Q: How long did you keep Baker and Burton at the CID Headquarters?

A: Baker was kept at the headquarters about.....

PROSECUTION: Objection, the statement of Baker is not under question.

LAW MEMBER: Objection overruled.

Q: Complete your answer.

A: The CID Headquarters until about 1930 hours, at which time he was taken to the 172nd Station Hospital for treatment. He was returned to the office of the CID at about 2030 hours and was placed in the North Sendai Police Station for protective custody. The following morning at 0800 hours he was returned to the hospital for treatment and held there.

Q: What was the matter with him?

A: I never did get the results from the hospital.

Q: I believe the hospital records indicated he had a broken jaw.

A: He perhaps did, I did not see the records from the hospital.

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Q: How did this injury occur?

A: I believe while coming into the office, he refused to obey Agents Brown and Spradlin, and the sworn statement executed by Agents Brown and Spradlin included in this particular case.....

DEFENSE: I don't want you to state anything about Agent Spradlin's statement.

A: (Witness continuing) Well then, Agent Spradlin was the cause of Baker's going to the hospital. I did not touch either one of them.

Q: Did you tell Burton that he could be tried for aiding an AWOL, or Perjury, if he did not sign the statement?

A. I did not.

Q: What date was Baker injured?

A: Baker was injured on the 22nd of February, 1949.

Q: And the statement taken from Burton was taken the 23rd of February, the following day? And you have testified that Lt. Pickett and Lt. Dunham the Company Commander was Defense Counsel of Burton and advised him not to swear to this statement. The following day you returned him to the 19th CID office and at that time he voluntarily swore to the statement. Do you have any explanation as to why Burton swore to the statement on the 25th of February contrary to the advice of his company commander and his defense counsel?

A: Well, I told Burton that if the statement is true, to swear to it, and if it was not, not to swear to it. I told Burton if the statement he had written on the 23rd was true that he should swear to it. If it wasn't true, I told him not to swear to it" (R. 23, 24).

"DEFENSE: Did you tell Burton that if the statement was true, to swear to it?

WITNESS: I told him if his statement was true, he should have no objections to signing it" (R. 24).

"Questions by Law Member:

Q: Did you hear anyone, including yourself, make any threats or promises to Burton before the statement was made by him?

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A: No, sir, I did not.

Q: Did you or anyone else tell Burton that he did not have to make a statement if he did not want to?

A: I did, sir.

Q: Did you tell him that if he made a statement it could be used against him?

A: I covered that part, sir, in my explanation of the 24th Article of War after I had read it to him.

Q: But did you tell him that any statement he made might be used against him?

A: Yes, sir, I did in the explanation which followed my reading of the 24th Article of War.

Q: Did you obtain the statement through questioning or did he make the statement as a whole without prompting?

A: He voluntarily told me he would give me a statement containing how he had acquired the sugar and how he had disposed of the same.

Q: And this is the statement, and this Prosecution Exhibit 2, the statement which he handed you?

A: It is" (R. 25).

This statement made by Burton was acknowledged as a sworn statement by 1st Lt. Clarence W. Sensor, 19th CID, after Lt. Sensor had warned accused of his rights under Articles of War 24 (R. 26) and without threats, abuse, promises of reward or immunity (R. 26), accused Burton and agent Lyons being present at the time (R. 27). Prior to the introduction of the statement in evidence accused Burton, sworn to testify on the limited question of the alleged voluntary character of his statement, informed the court:

"Q: Was the statement that we have been talking about here originally intended for a sworn statement?

A: Yes, sir, all except that I was told by Agent Lyons that if I did not sign the statement I would be charged with Perjury, aiding an ~~ATOL~~ ATOL, Grand Larceny, and other charges I cannot recall at the present, and several other charges. There were

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seven charges in all he had had written up on the typewriter and if I signed the statement all of the charges were destroyed and put in the waste paper basket by one of the clerks which I can identify in the 19th CID office.

Q: Why did you sign the sworn statement after your Company Commander and Counsel told you to remain silent?

A: Because Agent Lyons had said I'd be tried on these other charges, and I was a little afraid because he held, (sic) and I heard them beating Baker several times. (sic)

PROSECUTION: Objection, as it is not pertinent.

LAW MEMBER: Objection overruled

Q: Did you see them beat Baker?

A: I saw them when they broke his jaw. After he had got out of the jeep, and started for the office, the CID office. He was hit from behind with the butt of a pistol by Agent Spradlin. After that, they went inside, and I was put in one room and Baker in the other room. I heard them beating him, but I could not see it. I heard him hollering.

Q: Did Agent Lyons say it would be easier on you if you signed the statement?

A: Yes, sir" (R. 28, 29).

"Q: Burton, what were the exact words Lyons used to you pertaining to the charges?

A: Well, he said that if I did not sign the statement, that I would be tried for all these other charges which I have mentioned before in one of my statements.

Q: Where were you when Agent Lyons made these statements about charges to you?

A: He and I were in the Room 1 that I had been located in the night before.

Q: What date did this happen, when he told you this?

A: Three days before, when I made the statement. The morning of the 25th.

Q: Did Agent Lyons tell you that he had preferred charges against you himself?

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A: Yes.

Q: What time of day was this Burton?

A: He came to the company and got me about 0800.

Q: Are you quite sure that he didn't tell you that he was merely listing charges which might be against you?

DEFENSE: I object. It was a leading question.

LAW MEMBER: Objection overruled.

A: He said that he would press charges that would be used against me.

Q: The charges which Lyons mentioned to you indicated what? Will you repeat them again?

A: Sir, he said I would be tried for perjury, aiding an AWOL, grand larceny, and several other charges I cannot recall. There were seven charges in all.

Q: Had you committed perjury?

A: No, sir.

Q: Do you know what perjury is?

A: Yes, sir" (R. 29, 30).

Q: How soon after Agent Lyons told you this, did you sign the statement?

A: I didn't sign the statement sir, and then he called me back about noon and I signed it after he had written the charges against me.

Q: Now these written charges you saw, when did you first see them?

A: When they were being written up.

Q: What kind of paper were they written on?

A: First they were written in hand-writing, then typed on a typewriter.

Q: Whose hand-writing?

A: One of the agents. I can identify him.

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Q: What kind of paper were they typed on?

A: Regular typing paper.

Q: Was there anything else on the paper?

A: No, sir.

Q: Did you think that you could be tried for those charges Lyons mentioned?

A: I didn't know, sir" (R. 29, 30).

"Q: (Prosecution continuing its questioning) Is it correct that Lt. Pickett and Lt. Dunham advised you not to sign this statement?

A: Yes, sir.

Q: Was the 24th Article of War read to you?

A: Not by Agent Lyons.

Q: Was it read to you by someone else prior to signing the statement?

A: It was read to me two days before I signed the statement.

Q: Did you understand the 24th Article of War?

A: Yes, sir, I did.

Q: Did you understand that it was not necessary to sign any statement?

A: I did when it was read to me, sir.

Q: Did Lt. Sensor, the officer before whom you signed the statement inform you of your rights under the 24th Article of War?

A: Yes, sir, but I am not sure whether he read it to me or not.

Q: But, he did explain it to you?

A: Yes, he asked me if I understood my rights under the 24th Article of War.

Q: What did you reply?

A: Yes, sir" (R. 30, 31).

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- "Q: Recruit Burton, when you made this statement, did they take it down in writing at that time?
- A: No, sir, I wrote it down in my own hand-writing, sir.
- Q: Did they use any other influence on you, other than what you have stated?
- A: No, sir, not that I recall.
- Q: If Agent Lyons had not threatened to persecute you on these seven charges you told about, and if he had not, or rather, you had not heard them beating Baker, would you have made a statement?
- A: No, sir, because I was advised by my Counsel and Company commander not to sign.
- Q: Had you made a statement all ready, but not signed it when your company commander advised you not to sign?
- A: Yes, sir, I had already made the statement, but it was not sworn, sir.
- Q: Well, was it made voluntarily up to that point?
- A: Yes, sir.
- Q: Is it the swearing-to-it-part that they influenced you in?
- A: Sir?
- Q: Is it the other part of the statement that they forced you to execute?
- A: Yes, sir, he said that if I did not swear to it, that the other charges would be pressed against me.
- Q: Was the statement voluntary on your part up to the point of swearing to it?
- A: Yes, sir, until I was advised by my Company Commander not to, two days before I signed it" (R. 31).

The Board of Review has carefully considered the testimony of the accused Burton to the effect that he had all ready made his statement but had not signed it when his company commander advised him not to, that it was the "swearing to it" part upon which he was influenced; and that the statement was voluntary on his part up to the point of swearing to it. (R. 31 supra). Had the undue influence related only to the signing and

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swearing of the confession, that part of it preceding the signing and swearing would have been properly admissible in evidence.

However, the testimony is undisputed that Baker and Burton were taken to CID Headquarters on 22 February 1949, where Agent Spradlin broke Baker's jaw. Burton's testimony that "I was put in one room and Baker in the other room. I heard them beating him, but I could not see it. I heard him hollering", was not disputed.

It is difficult to perceive how Burton could have been unaffected by such a display of force and violence against his co-accused. The pattern of brutality, compulsion, and duress in evidence, denoted a determination to secure confessions, if possible, irrespective of the obvious implications of the involuntary character thereof. Even in case of gross and wilful disobedience it is not customary for the delinquent soldier to be the recipient of a broken jaw by reason of his recalcitrance.

The day following the events mentioned above the accused Burton wrote out his confession. That his motivation was to avoid the treatment that had been meted out to his co-accused is certainly a reasonable inference. On the 24th of February on the advice of his Company Commander and Lieutenant Dunham, his "defense counsel", he declined to sign the said confession. It does not appear why Burton changed his mind and signed the confession on 25 February, other than Agent Lyons' statement that "I told Burton if the statement he had written on the 23rd was true that he should swear to it", and Burton's testimony regarding the additional charges with which he alleged he had been threatened by Agent Lyons.

The Board of Review considers it significant that at no time during the trial were the two CID Agents Spradlin and Brown called as witnesses to contravene any part of Burton's testimony.

5. The Manual for Courts-Martial, 1949, paragraph 127, (page 157) in part provides:

"A confession or admission may not be received in evidence if it was not voluntarily made.....No statement, admission, or confession of an accused person obtained by the use of coercion or unlawful influence shall be received in evidence by any court-martial."

Consequently, the Board of Review is of the opinion that the pattern of brutality, compulsion, duress, and threats evidenced by the breaking of Baker's jaw was in direct violation of the rules and principles announced in the above cited paragraph of the Manual for Courts-Martial, 1949, and so taints Burton's confession as to render it involuntary and inadmissible.

CSJAGV CM 337333

The Board of Review has firmly established the controlling principles respecting confessions in CM 328584, Yakavonis, 77 B.R. 131, where, citing Filson v. United States, 166 U.S. 613, Wan v. United States, 266 U.S. 1, Bram v. United States, 168 U.S. 532, Lyons v. Oklahoma, 332 U.S. 596, Malinski v. New York, 324 U.S. 401, Kotteakos et al v. United States, 328 U.S. 750, Lisenba v. California 314 U.S. 219, Lee v. Mississippi 332 U.S. 742 and Haley v. The State of Ohio 332 U.S. 596, the Board held that a confession induced by compulsion or inducement is involuntary, compels an accused to be a witness against himself in violation of the Fifth Amendment to the Constitution of the United States, is contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States, and, notwithstanding the existence of so called "harmless error statutes," requires reversal because of fatal error although accused's guilt is clearly established by evidence independent of an erroneously admitted confession.

Applying these principles to the facts and circumstances appearing in the present case, the Board must conclude that admission of the accused Burton's confession was such manifest error as to require reversal. The error is one incapable of being held harmless under the curative provisions of Article of War 37. While, as to accused Baker, the findings and sentence may be sustained, as to the accused Burton the findings and sentence must be set aside because of the erroneous reception in evidence of his statement prejudicial to his substantial rights within the meaning of Article of War 37.

6. For the reasons stated the Board of Review holds the record of trial as legally sufficient to sustain the findings of guilty and the sentence as to the accused Baker and legally insufficient to support the findings of guilty and the sentence as to the accused Burton.

J. F. Guinn, J.A.G.C.
Harold P. Chambers, J.A.G.C.
George B. Spangston, J.A.G.C.

CSJAGV CM 337333

1st Indorsement

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

To: Commanding General, 7th Infantry Division, APO 7; c/o Postmaster,
San Francisco, California.

1. In the case of Recruit Glenn S. Burton (RA 18315834) and Recruit James C. Baker (RA 13271851), both of Service Company, 188th Parachute Infantry Regiment, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as to the accused Baker, and legally insufficient to support the findings of guilty and the sentence as to the accused Burton. Under Article of War 50e(3) this holding and my concurrence therein vacate the findings of guilty and the sentence as to the accused Burton. A rehearing is authorized as to the accused Burton.

2. 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 sentence as to the accused Baker, 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 as to the accused Baker.

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

(CM337333).



THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl:
Record of trial

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

AUG 22 1949

CSJAGI CM 337486

UNITED STATES)

v.)

Corporal JULIAN V. BROOKS
(RA 38039503), Medical
Detachment, 124th Station
Hospital.)

ZONE COMMAND AUSTRIA

Trial by G.C.M., convened at
Camp McCauley, Linz, Austria,
22 June 1949. Dishonorable
discharge, total forfeitures
after promulgation and confine-
ment for three (3) years.
Penitentiary.

HOLDING by the BOARD OF REVIEW
JONES, ARN 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 50g.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Corporal Julian V. Brooks, Medical Detachment, 124th Station Hospital, did, at Linz, Austria, on or about 11 May 1949, feloniously steal fifteen hundred and ten dollars and thirty cents (\$1,510.30), in United States Military Payment Certificates, value about fifteen hundred and ten dollars and thirty cents (\$1,510.30) property of the United States.

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

Specification: In that Corporal Julian V. Brooks, Medical Detachment, 124th Station Hospital, did, at Linz, Austria, on or about 11 May 1949, feloniously steal one thousand dollars and no cents (\$1,000.00), in United States Military Payment Certificates, value about one thousand dollars and no cents (\$1,000.00) property of the Radio Communications America (RCA).

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 dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor, at such place as proper authority may direct, for three years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50g.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Additional Charge and its specification and the sentence. The only question to be considered is whether the record of trial is legally sufficient to support the findings of guilty of the Charge and its specification. Accordingly, the summary of evidence and discussion thereof are limited to the Charge and its specification.

4. Evidence for the Prosecution.

On 12 May 1949 the accused was the postal clerk at Postal Unit #1, 124th Station Hospital, APO 174 (Linz, Austria), in charge of the issuance of post office money orders (R. 9-11, 15; Pros. Ex. 3a). Military payment certificates were the only medium of exchange for the purchase of post office money orders except other post office money orders (R. 12, 21). All military payment certificates received in payment for issuance of post office money orders were the property of the Post Office Department, an agency of the United States Government (R. 12). On 12 May 1949 the accused issued fifteen post office money orders in the amount of \$100.00 each, payable to himself (R. 9, 16; Pros. Ex. 3d, 3e and 3f), without putting \$1505.25 in military payment certificates into the post office money order fund as payment for the post office money orders and fees therefor (R. 9, 10, 15; Pros. Ex. 3 and 3a). On 12 May 1949 the accused indorsed and cashed at the American Express Office, Camp McCauley (Linz) Austria, fifteen post office money orders, each payable to himself in the amount of \$100.00, and received therefor \$1500 in military payment certificates (R. 18-20, 23). An audit of the post office money order fund of Postal Unit #1, 124th Station Hospital, APO 174, conducted by a board of officers for the purpose of transferring the funds from one postal officer to another, revealed a shortage in such funds for 12 May 1949 in the amount of \$1510.30 (R. 9, 13-16; Pros. Exs. 1 through 1u, 2, and 3 through 3g). Accused voluntarily admitted losing the money (military payment certificates) either in a poker game or by having it "taken" from him (R. 12).

Evidence for the Defense.

On 8 June 1949 the accused transmitted by registered mail to the Fidelity and Deposit Company of Maryland, New York, New York, which had bonded accused as a postal clerk, a letter in which he assured the company that he would make good the sum of \$1510.30, which the company would be required to pay due to a shortage, which was the accused's responsibility, discovered in postal funds (R. 35, 36; Def. Exs. A and B). The accused had the sum of \$1500.00

in Soldier's Deposit (R. 38; Def. Ex. H). The accused's commanding officer testified that he had known him thirteen months, that he had been a good soldier, had never been given any company punishment, had never missed reveille or formations, was always neat in appearance, had no court-martials during that entire period, had never given any cause to be reprimanded, did an excellent job in soldiering, and that he would be "happy to retain accused in his command from here on out" (R. 40). The chaplain of accused's unit had known accused twenty-three months and stated that he had found accused to be very much of a gentleman, and one whom he would believe under oath (R. 41). After being duly advised of his rights, accused elected to be sworn as a witness in his own behalf. He testified that he had served eight years in the Army, part of such time with the 36th Division, had received battle stars for the Naples-Foggia, Rome-Arma Arno, and Southern France campaigns, and possessed the Good Conduct, American Defense and Bronze Star Medals. He was 37 years old (R. 42-43).

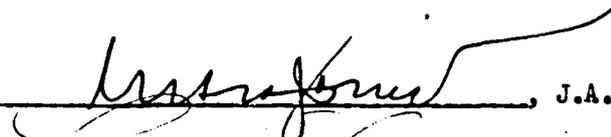
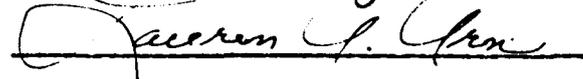
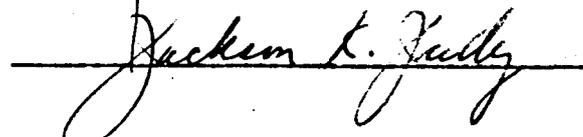
5. Discussion.

The Specification of the Charge properly alleges the offense of larceny without distinguishing it from embezzlement (par. 180g, MCM 1949). Of the total amount of \$1510.30, allegedly appropriated unlawfully by the accused, \$1500 was for 15 separate post office money orders, each in the amount of \$100, \$5.25 was for post office money order fees, at the rate of .35¢ per \$100 post office money order, and \$5.05 was unexplained shortage in the post office money order funds.

Since the proof shows that the \$1500.00 in military payment certificates which accused received for the money orders had never been physically present in the post office money order fund, it might be contended that the unlawful appropriation alleged was not committed and that there is a fatal variance between such proof and the allegations of the specification. Such contention is based on the theory that the larceny was of the post office money orders rather than of military payment certificates. The Board of Review does not subscribe to such contention. For the reason that the accused had not paid the postal department for the post office money orders, the accused constructively, that is, by operation of law, held such post office money orders in trust for the United States Government, and when he cashed the money orders at the American Express Company, the military payment certificates obtained thereby belonged to the United States Government and were held in trust for the United States Government by the accused in the same manner as were the post office money orders themselves (Cooper v. United States, 30 Fed 2d 567; Peck v. United States 65 Fed 2d 59, 62; par. 180g, p. 240, MCM 1949). In effect, by means of the wrongful use of the post office money orders, with which accused as postal clerk had been intrusted, he withdrew \$1500.00 from the funds of the Post Office Department, an agency of the United States Government, through the American Express Company, an innocent intermediary (Cooper v. United States, supra).

The accused failed to account for the proceeds thus procured, raising the presumption that he stole them. The accused likewise failed to account for the \$5.25 for fees for the post office money orders and the remainder of the shortage of \$5.05 of military payment certificates shown to have been in the post office money order fund thereby raising the same presumption (par. 125a, pp. 151-152, MCM 1949). The facts giving rise to these presumptions are uncontradicted and the presumptions stand unrebutted.

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


_____, J.A.G.C.

_____, J.A.G.C.

_____, J.A.G.C.

CSJAGI CM 337486

1st Ind

SEP 9 1949

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

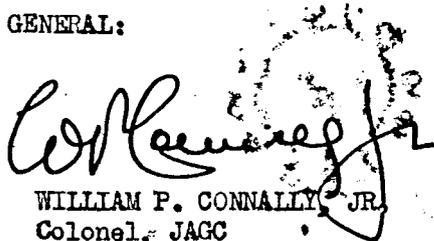
TO: Commanding General, Zone Command Austria, APO 541, U. S. Army,
c/o Postmaster, New York, New York.

1. In the case of Corporal Julian V. Brooks (RA 38039503), Medical Detachment, 124th Station Hospital, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and 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 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 337486)

FOR THE JUDGE ADVOCATE GENERAL:



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

1 Incl
Record of trial

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

CSJAGN-CM 337496

16 AUG 1949

UNITED STATES)

1ST INFANTRY DIVISION

v.)

Private WILLIAM N. RAUPP)
(RA 12313286), Medical)
Detachment, 32nd Field)
Artillery Battalion.)

Trial by G.C.M., convened at
Grafenwohr, Germany, 7, 16 and
30 June 1949. Dishonorable dis-
charge (suspended), total for-
feitures after promulgation and
confinement for one (1) year.
Disciplinary Barracks.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that William N. Raupp, Private, Medical Detachment, 32nd Field Artillery Battalion, did, at Eisligen, Germany, on or about 17 March 1949, wilfully injure himself in the left hand by severing three of his fingers with an axe, thereby unfitting himself for full performance of military service.

The accused pleaded not guilty to the Charge and the Specification thereof. He was found guilty of the Charge and guilty of the Specification "as rewritten: 'In that William N. Raupp, Private, Medical Detachment, 32nd Field Artillery Battalion, did at Eisligen, Germany, on or about 17 March 1949, wilfully injure himself in the left hand by severing a portion of three of his fingers with an axe, thereby temporarily unfitting himself for full performance of military service.'" He was sentenced to be

dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority might direct, for one year. The reviewing authority approved the sentence and ordered it executed, but suspended that portion of the sentence adjudging 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 promulgated in General Court-Martial Orders No. 66, Headquarters, 1st Infantry Division, APO 1, US Army, 11 July 1949.

3. The table of maximum punishments in the 1949 Manual for Courts-Martial lists no specific maximum penalty for a willfully self-inflicted injury which results in a temporary impairment of the ability to perform military service. The table does, however, authorize confinement at hard labor for seven years upon conviction of the offense of mayhem under Article of War 93 or self-maiming under Article of War 96 (MCM, 1949, par. 117c, pp. 137 and 141). Similarly, under the Federal statutes, imprisonment for seven years is authorized upon conviction of certain acts "with intent to maim or disfigure" (Act of 25 June 1948 (c. 645, 62 Stat. ____; 18 U.S.C. 114)). The court, in adjudging confinement at hard labor for one year, presumably concluded that accused was guilty of self-maiming. The word "maim" is not defined in the Manual, nor is there any indication that its meaning may be derived from any modern statute (Black's Law Dictionary, 3rd Ed., p. 1142). That being the case, resort must be had to the common law. As there employed, "maiming" and "mayhem" are synonymous, and the gravamen of both offenses is a permanent disabling which renders the injured soldier less able to fight or to protect himself on the field of battle (CM 323046, Main, 72 BR 13, VI Bull JAG 244; Winthrop's Military Law and Precedents, Rep. 1920, p. 676). With reference to mayhem, the Manual for Courts-Martial provides:

"Mayhem is an injury of any part of the body of a person whereby he is rendered less able in fighting either to defend himself or to annoy his adversary. The hurt must result in a loss or permanent disability of the part of the body injured.

"It is mayhem to put out a man's eye, to cut off his hand, foot, or finger, or even to knock out a front tooth, as these injuries render the individual less able to fight; but it is otherwise if an ear lobe is cut off or a back tooth is knocked out, as these injuries merely disfigure him.

"To constitute mayhem the injury must be willfully and maliciously done, but need not be premediated. * * * A.

person inflicting such an injury upon himself is guilty of this offense; * * *(MCM, 1949, par. 180b, p. 235). (Underscoring supplied).

Conceivably a conviction under such a specification as involved in the instant case would support the sentence here adjudged on the theory that the averment and the proof clearly show the common law offense of self-maiming, the injury being permanent and such as to decrease the ability of the accused to protect himself in battle. However, such a theory is untenable here. By finding that the accused only "temporarily" unfitted himself for full performance of military service, the court has specifically removed the element of permanent injury implicit in the offense of self-maiming.

Conceding that the term "self-maiming" as inserted in the table of maximum punishments must be limited to its common-law meaning, the Board is nevertheless of the opinion that the table furnishes the appropriate guide for the offense here involved. The Manual for Courts-Martial provides:

"Maximum punishments. — The punishment stated opposite each offense listed in the table below is hereby prescribed as the maximum punishment for that offense, and for any lesser included offense if the latter is not listed, and for any offense closely related to either if not listed" (MCM, 1949, par. 117c, p. 132). (Underscoring supplied).

A willfully self-inflicted injury resulting in the loss of portions of three fingers, although strangely described by the court as only "temporarily unfitting himself for full performance of military service," is clearly an offense closely related to that of self-maiming (Cf CM Main, supra). Dishonorable discharge, total forfeitures and confinement at hard labor for one year is included within the maximum limit prescribed for self-maiming, and for the offense under consideration is not considered an excessive punishment. (MCM, 1949, par. 117c, p. 141).

In concluding that the punishment adjudged in the instant case is not excessive, the Board is not unmindful of the provision in the 1949 Manual for Courts-Martial which provides that "Any willfully and wrongfully self-inflicted injury which results in a temporary or permanent impairment of the ability of a person to perform military duty may be punishable under Article 96 as a disorder to the prejudice of good order and military discipline" (MCM, 1949, par. 183a, p. 256). (Underscoring supplied). The employment of the permissive or discretionary language was clearly intended to authorize but not to require that such conduct be punished as a mere disorder. To construe this language otherwise would necessitate charging every such injury resulting in "permanent impairment of the ability of a person to perform

military duty" as a mere disorder although it may be at the same time fully cognizable as the common-law mayhem condemned by Article of War 93 (MCM, 1949, par. 180b, p. 235). No such absurd result can be presumed to have been intended.

4. For the foregoing reasons the Board of Review holds the record of trial legally sufficient to support the findings and sentence.

C. P. Young J. A. G. C.
C. H. Bonds, Jr. J. A. G. C.
DISSENT J. A. G. C.

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

CSJAGN-CM 337496

30 SEP 1949

UNITED STATES

1ST INFANTRY DIVISION

v.

Private WILLIAM N. RAUPP
(RA 12313286), Medical
Detachment, 32nd Field
Artillery Battalion.

Trial by G.C.M. convened at
Grafenwohr, Germany, 7, 16 and
30 June 1949. Dishonorable dis-
charge (suspended), total for-
feitures after promulgation and
confinement for one (1) year.
Disciplinary Barracks.

DISSENTING OPINION by TAYLOR, Judge Advocate

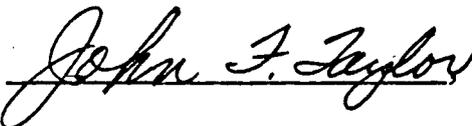
1. With due respect for the holding of the majority of the Board of Review I find myself unable to concur therein.

2. As pointed out in the holding of the majority of the Board, "mayhem" and "maiming" are synonymous terms at common law, both involving the requisite permanent disability through which one is rendered less able to defend himself. In eliminating the permanent character of the injury by finding that the accused "thereby temporarily" unfitted himself for full performance of military service, the court precluded itself from using as the criterion for punishment the offenses of mayhem or self-maiming. The United States Code, "Crimes and Criminal Procedure" (Title 18, U.S.C., Sec. 114), relied on by the majority, authorizes imprisonment for seven years upon conviction of certain acts "with intent to maim or disfigure," but the language employed in the Specification here does not approach that used in the Federal statute nor that used in the model specifications for "disfiguring" or "maiming" under Article of War 96, which are derived from that statute (MCM, 1949, Nos. 140 and 161, App. 4, pp. 323 and 330). On the contrary it accurately follows the prescribed form of specification for a "self-inflicted injury" under Article of War 96 (MCM, 1949, No. 177, App. 4, p. 332), the only material change being that the court, in its finding, added that the accused only "temporarily" unfitted himself for full performance of military service. Such a finding is completely inconsistent with the permanent injury implicit in the offense of self-maiming.

Confinement at hard labor for one and one-half years for willfully causing serious temporary injury to himself was not deemed excessive in CM 323046, Main, 72 BR 13, VI Bull JAG 244, decided under the 1928 Manual for Courts-Martial. However, the 1949 Manual, unlike the 1928 Manual, provides in part:

"For a discussion of willful self-inflicted injury which results in a permanent impairment of the ability of a person to fight, see 180b (Mayhem). Any willfully and wrongfully self-inflicted injury which results in temporary or permanent impairment of the ability of a person to perform military duty may be punishable under Article 96 as a disorder to the prejudice of good order and military discipline" (par. 183a, pp. 255-256, MCM 1949) (Underscoring supplied).

By following the form of specification prescribed for a self inflicted injury and by specifically finding that the injury resulted only in temporary unfitness for full performance of military service, the court has found the accused guilty of no more than a disorder, punishable by not to exceed four months confinement at hard labor and forfeiture of two-thirds of his pay per month for four months (CM 318430, Turgeon et al, 67 BR 295; CM 326588, Sattler, 75 BR 259; CM 329200, Staley, Bone, 78 BR 1; par. 117c, p.139, MCM, 1949).

 Judge Advocate.

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

66 a

Board of Review

CM 337496

16 AUG 1949

UNITED STATES)

1ST INFANTRY DIVISION

v.)

Trial by g. c. m., convened at Grafenwohr, Germany, 7, 16 and 30 June 1949. Dishonorable discharge (suspended) and confinement for one (1) year. Disciplinary Barracks.

Private WILLIAM N. RAUPP)
(RA 12313286), Medical)
Detachment, 32nd Field)
Artillery Battalion.)

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

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the findings of guilty and the sentence.

Charles B. Young, J.A.G.C.
B. B. Cordes, J.A.G.C.
DISSENT, J.A.G.C.

1st Indorsement

Dept. of Army, J.A.G.C. **OCT 31 1949** To the Commanding General,
1st Infantry Division, APO 1, c/o Postmaster, New York, N. Y.

1. In the case of Private William N. Raupp (RA 12313286), Medical Detachment, 32nd Field Artillery Battalion,

66b

attention is invited to the foregoing authenticated copy of the holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence . Confirming action is not by The Judge Advocate General or the Board of Review deemed necessary.

FOR THE JUDGE ADVOCATE GENERAL:



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

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

CSJAGN-CM 337508

17 AUG 1949

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

1ST CAVALRY DIVISION

v.)

Trial by G. C. M., convened at
Camp Drake, Tokyo, Japan, 31 May
1949. Dishonorable discharge
(suspended) and confinement for
nine (9) months. Disciplinary
Barracks.

Recruit WAYNE M. HOSTETLER
(RA 13222330), 925th Army
Postal Unit, APO 925)

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

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

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

CHARGE I: Violation of the 84th Article of War.

Specification: In that Recruit Wayne M. Hostetler, 925th Army Postal Unit, APO 925, did, at Tokyo, Honshu, Japan, on or about 20 December 1948, unlawfully sell to Sadako Sato, Japanese National, one olive drab, wool blanket of the value of \$8.11 and two (2) sheets of the value of \$3.00 property of the United States Government issued for use in the military service thereof.

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

Specification: In that Recruit Wayne M. Hostetler, 925th Army Postal Unit, APO 925, did, at the New Kaijo Building, Tokyo, Honshu, Japan, on or about 16 February 1949, feloniously steal four (4) olive drab, wool blankets, of the value of \$32.44 and one (1) sheet of the value of \$1.50 of the total value of \$33.94, property of the United States Government furnished and intended for the military service thereof.

The accused pleaded not guilty to all Specifications and Charges. He was found guilty of the Specification, Charge I, except the words "two (2) sheets of the value of \$3.00," substituting therefore, respectively, the words "one (1) sheet of the value of about \$1.50,"

of the excepted words, Not Guilty, of the substituted words, Guilty, and guilty of Charge I. He was found guilty of the Specification, Charge II and Charge II. The 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 approved sentence, and to be confined at hard labor at such place as the proper authority might direct for nine months. Two previous convictions were considered. The reviewing authority approved only so much of the findings of guilty of the Specification of Charge I and Charge I as involved finding that the accused did, at the time and place alleged, in violation of the 84th Article of War, unlawfully sell to Sadako Sato, a Japanese national, one olive drab, wool blanket of the value of \$8.11, property of the United States Government, issued for use in the military service thereof. The reviewing authority approved the sentence and ordered it executed, but suspended the execution of the dishonorable discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army might direct, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 56, Headquarters 1st Cavalry Division, APO 201, 1 July 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 sentence insofar as it relates to forfeitures.

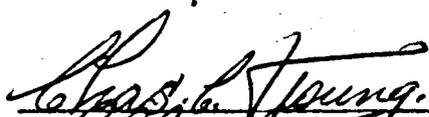
4. Article of War 16, in part, provides:

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

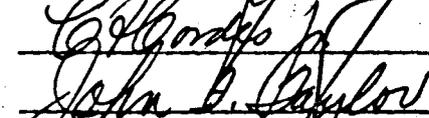
The accused was tried on 31 May 1949. Executive Order No. 10020, promulgating the Manual for Courts-Martial, 1949, provides that it shall be in force and effect on and after 1 February 1949 with respect to all court-martial processes taken on or after that date. Paragraph 115, page 126, Manual for Courts-Martial, 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; CM 335823, Griswold, 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 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 nine months.



J. A. G. C.



J. A. G. C.



J. A. G. C.

GENERAL COURT-MARTIAL

HEADQUARTERS 1ST CAVALRY DIVISION

ORDERS NO. _____

APO 201 _____ 19 _____

Proceedings of the general court-martial in the case of Recruit Wayne M. Hostetler (RA 13222330), 925th Army Postal Unit, APO 925, including the findings of guilty of the Charges and Specifications and the sentence, having been published in General Court-Martial Orders No. 56, Headquarters 1st Cavalry Division, APO 201, dated 1 July 1949, and the record of trial having been examined by the Board of Review in accordance with Article of War 50, and the record of trial having been held by the Board of Review, with the concurrence of The Judge Advocate General, to be legally insufficient to support so much of the sentence relating to forfeitures only 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, so much of said sentence pertaining 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 is thereby vacated, pursuant to Article of War 50g(3). All rights, privileges and property of which the accused has been deprived by virtue of that portion of the sentence so vacated will be restored.

(CM 337508).

25 AUG 1949

CSJAGN-CM 337508

1st Ind

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

TO: Commanding General, 1st Cavalry Division, APO 201, c/o Postmaster, San Francisco, California.

1. In the case of Recruit Wayne M. Hostetler (RA 13222330), 925th Army Postal Unit, APO 925, 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 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 nine 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 337508).



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.

73

CSJAGQ CM 337548

AUG 9 1949

| | | |
|-------------------------------|---|----------------------------------|
| UNITED STATES |) | AAA AND GUIDED MISSILE CENTER |
| |) | |
| v. |) | Trial by G. C. M., convened at |
| |) | Fort Bliss, Texas, 1 July 1949. |
| Private First Class MILTON |) | Dishonorable discharge and |
| M. TOY (RA 35527956), |) | confinement for two (2) years |
| Enlisted Detachment, 4001st |) | and six (6) months. Disciplinary |
| Area Service Unit, Station |) | Barracks. |
| Complement, Fort Bliss, Texas |) | |

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.

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 Milton M. Toy, Enlisted Detachment 4001st Area Service Unit Station Complement, Fort Bliss, Texas, then Technician Fifth Grade, attached unassigned to the 24th Quartermaster Training Company, 9136th Technical Service Unit Quartermaster Corps, Camp Lee, Virginia, did, at Camp Lee, Virginia, on or about 12 July 1946, desert the service of the United States, and did remain absent in desertion until he was returned to military control at Davis Monthan Air Force Base, Tucson, Arizona, on or about 20 May 1949.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of no previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor, at such place as proper authority may direct, for two years and six months. 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 forwarded the record of trial pursuant to Article of War 50e.

3. The only question requiring consideration is whether the record of trial is legally sufficient to support that portion of the sentence imposed by the court and approved by the reviewing authority providing for confinement for two years and six months.

The Specification alleges that the desertion was terminated when accused "was returned to military control at Davis Monthan Air Force Base, Tuscon, Arizona on or about 20 May 1949." The court found the accused guilty as charged and imposed a sentence including confinement for two and one-half years which was approved by the reviewing authority.

The maximum confinement authorized for desertion terminated by surrender is one and one-half years and for desertion terminated by apprehension, two and one-half years (Par 117c, MCM 1949). The question to be determined is whether the Specification may be considered as alleging termination by apprehension.

It has been held that the words "was returned to military control" imply some degree of involuntary action but are not equivalent to apprehension." (CM 325603; Cote, 74 BR 359; CM 325621, Lyle 74 BR 367). It has also been held that unless termination of desertion by apprehension is alleged and proved in a desertion case, the findings of the court and the maximum punishment authorized must be that of the lesser degree of desertion terminated by surrender (See Cote and Lyle; supra). Although the evidence establishes that the desertion in the present case was terminated by apprehension, such a termination was not alleged.

The record is, therefore, legally sufficient to support only so much of the findings of guilty of the Specification and the Charge as finds accused 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 fixed for desertion under similar circumstances terminated by surrender. Since the accused was absent for more than sixty days, the authorized punishment for his offense is dishonorable discharge, total forfeitures and confinement at hard labor for one and one-half years (MCM 1949, par 117c).

4. For the reasons stated above, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for one and one-half years.

Abner E. Lefcombs, J.A.G.C.
Lewis T. Hull, J.A.G.C.
Samuel S. Love, J.A.G.C.

17 JUL 1948

CSJAGQ CM 337548

1st Ind

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

TO: Commanding General, Antiaircraft Artillery and Guided
Missile Center, Fort Bliss, Texas

1. In the case of Private First Class Milton M. Toy (RA 35527956), Enlisted Detachment, 4001st Area Service Unit, Station Complement, Fort Bliss, Texas, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence and confinement at hard labor for one and one-half years. Under Article of War 50g 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 and confinement at hard labor for one and one-half years.

2. When copies of the published order in the 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 337548).

1 Incl
R/T



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.

AUG 18 1949

77

CSJAGH CM 337651

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

FIRST ARMY)

v.)

) Trial by G.C.M., convened at
) Fort Jay, Governors Island,
) New York, 5 July 1949. For-
) feiture of ten dollars (\$10.00)
) pay, remitted.
)

Recruit JESSE E. TAYLOR,
20821462, assigned (pipeline)
Headquarters and Headquarters
Detachment, 1201st Area Service
Unit.)

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

1. The record of trial in the case of the soldier named above has been examined 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 Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Recruit Jesse E. Taylor, assigned (pipeline), Headquarters and Headquarters Detachment, 1201st Area Service Unit, then Private, then a member of Troop "C", 112th Cavalry, did, at Fort Clark, Texas, on or about 4 March 1942, desert the service of the United States, and did remain absent in desertion until he was apprehended at Rome, New York, on or about 16 December 1948.

The accused stood mute and the court directed that a plea of not guilty to the Charge and Specification be entered. He was found guilty of the Specification and the Charge. Evidence was introduced of one previous conviction by special court-martial for absence without leave from 14 September 1941 to 15 October 1941, in violation of Article of War 61. He was sentenced to forfeit ten (\$10.00) dollars of his pay. The reviewing authority approved only so much of the findings of guilty

of the Specification and the Charge as involved findings that the accused absented himself without leave at the time and place alleged and remained so absent until he was returned to military control on 16 December 1948, in violation of Article of War 61, and approved the sentence, but due to accused's long and honorable service during the war, remitted it. The result of trial was published in General Court-Martial Orders No. 162, Headquarters First Army, Governors Island, New York 4, New York, 26 July 1949.

3. The principal question to be considered in this case is the legality of the findings of guilty as approved by the reviewing authority. Since the reviewing authority remitted the entire sentence we must initially decide whether any inquiry into the validity of the findings is required.

Under military justice practice and procedure no action is taken by the reviewing authority with respect to the findings except in those instances in which corrective action with respect to part of the findings is appropriate. An approval of the sentence effects a corresponding approval of the findings. Similarly a disapproval of the sentence constitutes a disapproval of the findings.

An action tantamount to a partial disapproval of the sentence may be accomplished by simultaneously approving the sentence and remitting a part under the rule contained in the Manual for Courts-Martial reading as follows:

"The action of a reviewing authority in approving a sentence and simultaneously remitting a part thereof is legally equivalent to approving only the sentence as reduced." (Par 87b, MCM 1949, p 96)

Extending the above rule it may be said that approving a sentence and simultaneously remitting it is in effect a disapproval of the sentence. Action of this character, although in effect a disapproval, does not constitute a disapproval of the findings. It has been so held by The Judge Advocate General in an informal opinion rendered in connection with the case of CM 214121, Reynolds (1940). The opinion was there expressed that an action reading, "The sentence is approved but remitted in its entirety," did not disturb the findings of guilty of desertion upon which the sentence was based.

This conclusion is particularly cogent in this case in which the reviewing authority has taken specific action with respect to the findings in addition to taking action on the sentence. The language of the action denotes no intent on the part of the reviewing authority to disapprove the findings but on the contrary unmistakably indicates

their approval in part. There is, in our opinion, nothing in the action with respect to the sentence which nullifies the action taken on the findings. Since accused stands convicted of absence without leave the validity of such conviction must be considered. Aside from the sentence, the conviction may conceivably entail certain disabilities and should not be allowed to stand, if invalid.

4. The question of the validity of the approved findings requires no extended discussion. Although accused was absent without leave for the period specified in the findings it appears that more than two years had elapsed between the date of the initial absence (4 March 1942) and the date on which accused was arraigned (5 July 1949). Article of War 39 as it read at the time of the offense and until 1 February 1949 provides in pertinent part:

"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: * * *."

There is nothing in the record to indicate that the statute had been tolled or in any manner waived. Trial and punishment for the absence without leave being barred by Article of War 39 the approved findings are consequently invalid (CM 217172, Rosenbaum, 11 BR 225; CM 329581, Lemley, 78 BR 103). The correct procedure in such instance is prescribed by the Manual for Courts-Martial as follows:

"* * * When only so much of a finding of guilty of an offense charged as involves a finding of a lesser included offense would otherwise be approved and it appears from the record that punishment for such lesser included offense is barred by Article 39, the reviewing authority will disapprove that finding, and he may order a rehearing if he also disapproves the entire sentence. * * *." (Par 87b, MCM 1949, p 91)

5. For the reasons stated we hold that the record of trial is legally insufficient to support the findings of guilty as approved by the reviewing authority.

Robert J. Cannon, J.A.G.C.

On Leave _____, J.A.G.C.

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

CSJAGH CM 337651

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 91742

TO: Commanding General, First Army, Governors Island, New York & New York

1. In the case of Recruit Jesse E. Taylor, 20821462, assigned (pipeline) Headquarters and Headquarters Detachment, 1201st Area Service Unit, 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 as approved by the reviewing authority. Under Article of War 50a(3) this holding and my concurrence therein vacate such findings of guilty.

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 so vacated. A draft of a general court-martial order designed to carry into effect the foregoing 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 337651)

2 Incls

1 Record of trial
2 Draft of GCMO



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

CSJAGK - CM 337701

15 AUG 1949

UNITED STATES

MILITARY DISTRICT OF WASHINGTON

v.

Major WILLARD O. FOSTER, JR.
(O-24483), Plans and Operations
Division, General Staff,
US Army, Washington 25, D. C.)

Trial by G.C.M., convened
at Fort Belvoir, Virginia,
2 August 1949. Dismissal,
total forfeitures after pro-
mulgation, and confinement
for ten (10) years.

OPINION of the BOARD OF REVIEW
McAFEE, BRACK and CURRIER

Officers of The Judge Advocate General's Corps

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

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

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

Specification 1: Nolle prosequi by direction of the appointing authority.

Specification 2: In that Major Willard O. Foster, Junior, Plans and Operations Division, General Staff, United States Army, did, at Washington, District of Columbia, between the dates of 1 April 1949 and 15 June 1949, the exact date to affiant unknown, wrongfully and unlawfully commit a lewd and lascivious act upon the body of Robert Turner, a male under sixteen years of age, by taking the penis of the said Robert Turner in his, the said Major Willard O. Foster Junior's mouth, with intent to gratify the sexual desires of the said Major Willard O. Foster, Junior.

Specification 3: In that Major Willard O. Foster, Junior, ***, did, at Washington, District of Columbia, between the dates of 1 May 1949 and 15 June 1949, the exact date to affiant unknown, wrongfully and unlawfully commit an indecent act with the body of Robert Turner, a male under sixteen years of age, by encouraging and permitting the said Robert Turner to take into his mouth the penis of the said Major Willard

Incl. # 3

O. Foster, Junior.

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

He pleaded guilty to, and was found guilty of, the specifications and the charge. 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 might direct for ten years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

It was stipulated between the prosecution, defense, and the accused that if Mrs. Marge M. Turner, Washington, D. C., were present in court she would testify that her son, Robert M. Turner, was born on 18 June 1940, that he knows the difference between the truth and a lie, that Robert Turner visited the accused at his home several times between 1 April 1949 and 15 June 1949 and that on some of these occasions she saw accused personally invite the boy into his (accused's) house (R 9).

It was further stipulated between the parties that Robert Turner, Washington, D.C., is nine years old, understands the difference between truth and falsehood and is aware of his obligation to tell the truth and if he were present in court he would testify as shown in a statement to a policewoman (R 10). This statement, dated 21 June 1949, outlines several incidents of accused inviting the child into his house, fondling his privates and taking Robert's penis into his mouth. It also relates that on several occasions the accused made or induced the boy to take his (accused's) penis into his mouth (Pros Ex 1).

Without objection by the defense, a voluntary statement made by the accused in the presence of a Criminal Investigation Division agent was admitted into evidence (R 10-13). In his statement, accused admits "to acts of homosexuality with one Robert Turner, a minor, on more than one occasion during the months of April and May. *** During this period *** I drank very heavily - up to a fifth of whiskey daily. *** In amplification of the term 'homosexual acts' I recollect handling the genital organs of the individual concerned and exposing mine to him and requesting him to handle mine. *** Motivation of the above acts can be described as a desire for sexual satisfaction ***" (Pros Ex 2).

For the Defense

The defense offered in evidence a stipulation between the prosecution, defense and accused relative to accused's service which was received in evidence as Defense Exhibit A (R 13). The exhibit shows that accused

served overseas from 26 February 1942 to 10 November 1943 in the Pacific Theater, and from 17 March 1945 to 20 August 1948 in Hawaii; that he has been awarded seven medals, decorations or citations and that his efficiency reports from January 1942 to June 1947 reflect ratings of one "excellent," and all others, fifteen in number, "superior."

Also offered was a stipulation concerning the recent duty of accused. This was admitted into evidence as Defense Exhibit B (R 13,14). The exhibit reads as follows:

"It is hereby stipulated and agreed by and between the prosecution, the defense and the accused that if Colonel Frank T. Folk, GS, Department of the Army were called and sworn, he would testify as follows:

"I was the immediate supervisor of Major Willard O. Foster, the accused, during the period 3 November 1948 to 5 June 1949. During the period 13 April 1949 through 5 June 1949 Major Foster performed duties which called for exertions not normally expected of an individual. The office in which he worked was ordinarily manned by two persons. During the period last mentioned, Major Foster was required by circumstances beyond my control to carry the work load without assistance. During that period he performed this work in a superior manner."

The law member explained to the accused his rights as a witness and, after consultation with counsel, accused elected to remain silent (R 14,15).

At the request of the defense the arguments of counsel were incorporated in the record of trial (R 15-18,20).

Comment by the Court

After argument, the following colloquy took place:

"President and Law Member: There is just one thing in the mind of the law member that I want to get clear in the record. The accused has pleaded guilty to Specification 2 and 3 of Charge I. He has elected to let his plea stand after being warned. He has stipulated the testimony of all the witnesses. The law member is frank to state that this is the first case in which he has sat in which the accused joined practically in stipulating all the testimony. I just want it to appear as a final word from the accused--all of this is of his own free will and accord and that he thinks he is in his right mind?

"Accused: Yes, sir." (R 19)

4. Discussion

The accused was charged and convicted of committing two separate offenses involving indecent acts with a child under the age of 16 years in violation of Article of War 96. Paragraph 183c, Manual for Courts-Martial, 1949, at page 258, defines this offense and the elements of proof thereof as follows:

"INDECENT ACTS WITH A CHILD UNDER THE AGE OF 16 YEARS

"Discussion. - This offense consists of taking any immoral, improper, or indecent liberties with, or the commission of any lewd or lascivious act upon or with the body of, any child of either sex under the age of 16 years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of the person committing the act, or of the child, or of both. Consent by a child to any such act or conduct is not a defense.

"Proof. - (a) That the accused took certain immoral, improper, or indecent liberties with a certain child as alleged; or that he performed certain lewd or lascivious acts upon or with the body of a certain child as alleged; (b) that the child was under the age of 16 years as alleged; and (c) facts and circumstances indicating that the intent of the accused was to arouse or gratify the lust or passion or sexual desires of the accused or the child or both, as alleged."

Specification 2 of the charge is legally sufficient to allege the foregoing offense. Specification 3 of the charge alleges an indecent act with a child under the age of 16 years but it fails to allege that such act was done with the intent of arousing or gratifying the lust or passion or sexual desires of either the child or the accused. The indecent act alleged in Specification 3 is an offense in violation of Article of War 96. The accused's plea of guilty and the evidence adduced is legally competent to establish the commission of the alleged offenses.

Before the court accepted the accused's plea of guilty the law member clearly and concisely explained the meaning and effect of the plea of guilty and the accused personally stated that he understood the effect of such plea and that he wished his plea of guilty to stand. This, coupled with the admission of other independent evidence of guilt negates any thought that the guilty plea was improvidently entered.

Except for the direct testimony of an agent of the Criminal Investigation Division regarding the voluntary nature of the accused's confession, the evidence adduced consists entirely of two stipulations. In view of the plea of guilty, however, and the fact that the stipulations related to matters of proposed testimony and not to conceded facts, it is deemed unnecessary to inquire into the regularity of such proffered proof. Suffice it to say that in CM 317233, Martin, 66 BR 259,262, where a somewhat similar situation was presented, the Board of Review resolved this matter as follows:

"It is important to note that the stipulations in the instant case are not stipulations 'of facts' but are stipulations 'of testimony' and as such are not binding on the court even though uncontradicted by any other evidence in the case. Further the court may be more liberal in accepting stipulations as to 'testimony' than as to 'facts' ***."

That the stipulations were received with due caution is amply indicated in the record of trial. Thus, after the defense rested its case, the law member explained to accused the condition of the record and again asked him if the stipulations were entered into of "his own free will and accord," to which accused answered, "Yes, Sir" (R 19). The closing argument of defense counsel reveals also that accused wished to be spared the embarrassment of facing the witnesses in open court (R 16).

The accused was sentenced to dismissal, total forfeitures, and confinement at hard labor for ten years.

Paragraph 116c, Manual for Courts-Martial, page 128, provides:

"*** in no case shall a sentence to confinement in the case of an officer *** exceed the maximum prescribed for soldiers by the Table of Maximum Punishments. ***"

The maximum limit of punishment for each offense of which the accused was convicted, viz., "Indecent acts or liberties with a child under the age of sixteen years," is fixed by the Manual for Courts-Martial at dishonorable discharge, forfeiture of all pay and allowances and confinement at hard labor for seven years (MCM, 1949, par 117c, page 140). Accordingly, for both offenses of a similar nature of which the accused was convicted the authorized maximum punishment in confinement is 14 years. Therefore, it is concluded that the sentence of dismissal, forfeiture of all pay and allowances and confinement at hard labor for ten years in the instant case is legal.

It might appear that each specification alleges but a different aspect of the same offense.

"*** If an accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court will impose punishment only with reference to the act or omission in its most important aspect." (MCM, 1949, par 80a, p 80).

Specification 2 alleges one act as having been committed "between the dates of 1 April 1949 and 15 June 1949," while Specification 3 alleges another act as having been committed "between the dates of 1 May 1949 and 15 June 1949."

Notwithstanding the fact that the acts of the accused are alleged to have occurred between certain dates which overlap, the evidence clearly establishes two or more separate offenses which although of the same nature, nevertheless occurred at different times during the periods alleged in the specifications. Thus we conclude that accused was found guilty of two offenses arising out of different acts and that the sentence of the court is within the maximum prescribed limits.

5. Prior to his trial, accused was examined by a Board composed of three medical officers pursuant to the provisions of paragraph 111, Manual for Courts-Martial, 1949. The Board found:

"1. The accused at the time of the alleged offense was so far free from mental defect, disease, or derangement as to be able to distinguish right from wrong.

"2. The accused at the time of the alleged offense was so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged to adhere to the right.

"3. The accused at the present time is sufficiently sane to intelligently conduct or to cooperate in his own defense."

6. Department of the Army records show that the accused is 33 years of age, married, and has two children. He was graduated from Massachusetts State College with a Bachelor of Science degree in 1940 and commissioned a second lieutenant of Cavalry (Reserve) the same year. On 11 February 1942 he was promoted to first lieutenant (AUS) and on 20 February was commissioned a second lieutenant, Regular Army. He was successively promoted to captain and major (AUS) on 17 August 1942 and 22 May 1943, respectively. Since 1942 his efficiency ratings have been uniformly "Superior." He served overseas from 26 February 1942 to 10 November 1943 in the Pacific Theater, and from 17 March 1945 to 20 August 1948 in Hawaii. He has been awarded the following decorations: Legion of Merit (in the degree of Legionnaire), Bronze Star Medal, Navy Presidential Unit Citation, Asiatic-Pacific Theater Medal, American Defense Medal, American Theater Medal and World War II Victory Medal.

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

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

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

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

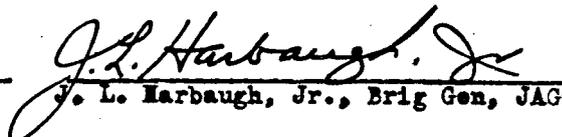
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

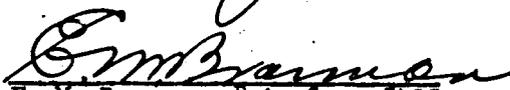
Brannon, Shaw and Harbaugh
Officers of The Judge Advocate General's Corps

In the foregoing case of Major Willard O. Foster, Jr.,
(O-24483), Plans and Operations Division, General Staff, U.S.
Army, Washington 25, D. C., 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

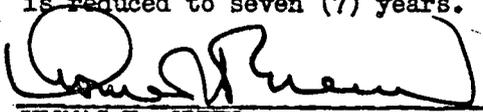

J. L. Harbaugh, Jr., Brig Gen, JAGC

23 August 1949


E. M. Brannon, Brig Gen, JAGC
Chairman

I concur in the foregoing action.
Under the direction of the Secretary
of the Army, the period of confinement
is reduced to seven (7) years.

29 September
1949.


THOMAS H. GREEN
Major General
The Judge Advocate General

CG, Ft. Belvoir, Va
notified of final action per letter
of 16 Oct 49 - RRR

Incl. #2

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

89

CSJAGH CM 337720

1 September 1949

UNITED STATES)

SECOND ARMY

v.)

Second Lieutenant WILLIAM C.
HENEAGE, AUS 01318545,
Reception and Processing
Detachment #2 (Operating),
2101st Area Service Unit,
Fort George G. Meade, Maryland.)

Trial by G.C.M., convened at
Fort George G. Meade, Maryland,
15 June 1949. Dismissal, total
forfeitures after promulgation,
and confinement for five (5)
years.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Second Lieutenant William C. Heneage, Reception and Processing Detachment #2 (Operating) 2101st Area Service Unit, then a member of Company "T" 3rd Battalion, 1st Parachute Training Regiment, Fort Benning, Georgia did, at Fort Benning, Georgia on or about 17 May 1943 desert the service of the United States and did remain absent in desertion until he surrendered himself at Philadelphia, Pennsylvania on or about 1 April 1949.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for fifteen years. The reviewing authority approved the sentence but reduced the period of confinement to five years, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

There was offered in evidence by the prosecution and received by the court over objection by the defense (R 6,7,11,12), an extract copy of the morning report of Company "T", 3rd Battalion, 1st Parachute Training Regiment, Fort Benning, Georgia, containing the following entry:

"19 2nd Lt AUS, Heneage, William C. 01318545,
Fr duty to AWOL 5-17-43, 8:00 AM: WRD." (Pros Ex 1)

Major William Vincent Zandri identified accused as a student member of the 1st Parachute Training Regiment, Fort Benning, Georgia, a military unit in which Major Zandri had served as Regimental Adjutant, from 1942 through April 1944 (R 8). In May 1943, in the performance of his official duties, Major Zandri made an investigation "as to the whereabouts of accused." He searched the company area, all quarters, and the regimental area, and determined that accused was not present for duty and had absented himself on 17 May 1943. To Major Zandri's knowledge as Regimental Adjutant, and "as the person in charge of the publication of the Special Orders of the regiment," no special orders had been published authorizing accused's absence on 17 May 1943. Up to the time of Major Zandri's transfer therefrom in April 1944, accused had not been returned to the regiment (R 9,10,11). Major Zandri further stated that the initials "WRD" appearing on Prosecution Exhibit 1 were those of Lieutenant Pickenhoffer, Adjutant General of the Parachute School, and that on instruction from the Commanding General, Lieutenant Pickenhoffer was charged with the duty of initialling the morning reports of accused's unit. (R 12)

A duly authenticated extract copy of morning report of the 2302nd Army Service Unit containing the following entries was offered by the prosecution:

"1 Apr 49
Heneage William C 01318545 2d Lt
AWOL to conf 1530 atchd fr 1st Prcht
Tng Regt Ft Benning Ga
/s/ ROBERT SLEPIAN CAPT INF

2 Apr 49
Heneage William C 01318545 2d Lt
Conf to trfd in conf post stockade
Ft Geo G Meade Md 1100
/s/ ROBERT SLEPIAN CAPT INF." (R 7; Pros Ex 2)

The above exhibit was received in evidence over objection by the defense for the limited purpose of showing "that the accused was returned to military control on 1 April 1949" (R 8).

4. Evidence for the defense.

According to Thomas H. Heneage, father of the accused and sole witness for the defense, accused first manifested an abnormal and irregular behavior pattern in May 1929 at the age of 15. On this occasion it was discovered that accused had attended ball games for a two week period instead of going to school. When he was questioned about his actions he could not explain them (R 16).

A school in Pennsylvania, the Gill School, which afforded more supervision, was then chosen for accused in the hope that it would excite his interest in his work. This parental effort to correct accused's behavior proved futile for in October 1930 he left the school. His whereabouts remained unknown to his parents until, with the aid of police circularization of his picture and description as a "missing person", he was located in California and returned to his home. Accused traced his aimless wanderings, which he described as "a hitch hiking affair," for his father, but as usual, could not explain or offer a reason for his actions (R 17-19).

Accused was, thereafter, successively sent to a preparatory school in New Jersey for one year and to a "refresher school" in Chicago. He completed his preparatory education at the latter and matriculated at Dartmouth College in the fall of 1932. His attendance at Dartmouth was of short duration and sudden termination when early in the school year, without notice, he again left school and again hitchhiked to California. When asked to explain his second nomadic adventure upon his voluntary return home some three or four months later, accused stated that it was "unaccountable;" that "He just seemed to have some sort of irresistible impulse and out he would go" (R 20,21).

Upon his return in 1934 after another absence from home, he worked for the "Chicago Daily News" as "Service Store Manager" and with a stove manufacturing firm in which his mother's family had an interest. He did very well for a while.

In 1935, he married without consulting his parents. He was 21 years of age at the time. The marriage, of which two female children were born, lasted until 1939 when accused's wife divorced him on the grounds of cruelty (R 21).

Because he wanted to get out of Chicago following the divorce, accused secured a position with a stove manufacturing company in Harrisburg, Pennsylvania. His former wife visited him there and held out some encouragement that a reconciliation could be effected between them. Later, however, when she advised him that it was "no deal," he borrowed \$2,000.00 from his employers under the pretext that he had some bills

to pay and, without notice, left his position and commenced a third extensive peregrination that took him to California, Nevada, Florida, Washington, D.C., and Texas (R 22-24).

Accused's father did not see accused again until 1943. In the meantime, accused worked sporadically with a chemist who was a friend of the family, for the Ringling Brothers Circus, for a concern that manufactured pipe fittings, and as a truck driver (R 24). While working for a Detroit trucking company in August 1942, accused, after collecting some money for his employer, was arrested when found sleeping in the street in an intoxicated condition. He was not prosecuted as he made restitution to his employer of the money collected by him. He contacted George D. Wilkinson, a Chicago lawyer who was a nephew of his father. Mr. Wilkinson went to Detroit and took charge of accused. Through Wilkinson's intervention with the Detroit police in accused's behalf, accused was inducted into the Army and sent to Camp Robinson (R 25; Def Ex G). In six weeks, accused was an officer candidate at Fort Benning, Georgia, which course he successfully completed. After he was graduated he came home on a ten day leave in May 1943 at the termination of which he left home. When he left his father believed that he was returning to his unit at Fort Benning, but instead accused went to see his former wife where "things evidently didn't go so well * * and this impulse hit him /accused/ again and he went." Between the time accused left home and 10 November 1943 accused's father knew that accused was roaming around the East by reason of the checks which he made out and cashed. Thereafter, and until accused telephoned his home in the last part of March 1949, his parents were completely out of touch with him (R 25,26). When he called at this time they suggested to him that he give himself up and this accused did (R 27). He subsequently told his father that during his absence of almost six years he had worked as a short order clerk, restaurant counterman and truck driver (R 27).

Accused's father further related that his concern over accused's mentality caused him to consult a psychiatrist who interviewed accused in 1939. The psychiatrist's report dated 19 April 1949 in part contained the following:

"This young man seemed to be emotionally immature, had a greatly exalted ego, and his personality was poorly unified.

"Because of the chaotic condition of his control of his conduct and his utter inability to profit by experience, he presented such a clear-cut clinical picture of personality disorder that even at this date, 1939 (10 years ago), we made a tentative diagnosis of 'psychopathic personality' and advised you accordingly of our fears and misgivings.

"His continued misbehavior from the time of these interviews in January 1939, before he dropped out of sight and I ceased to get reports of his conduct, further contributed to the confirmation of my opinion and overall diagnosis of this case as being embraced in the category of psychopathic personality." (Def Ex I)

Accused's father expressed his opinion concerning accused's mental responsibility as follows:

- "Q. Based on the habits and conduct of your son as you have described to this court, would you say your son can distinguish right from wrong?
 A. No, sir, I don't think he can - not when he has something that disturbs him.
- Q. Do you think he can control his conduct so as to adhere to the right?
 A. Absolutely no.
- Q. Then you regard him as a mental case?
 A. Yes, sir, and I believe I can prove it in any court in the land." (R 30).

Accused, after having his rights as a witness fully explained to him by the law member, elected to remain silent. (R 31).

5. Rebuttal by the prosecution.

A stipulation to the effect that if Donald M. Kerr, Captain, M.C. Psychiatrist, Station Hospital, Fort George G. Meade, Maryland, were present in court he would testify as indicated by his attached certificate dated 2 May 1949, was offered in evidence by the prosecution. The stipulation was received by the court when defense counsel stated that there was no objection thereto (R 32). The certificate appears in the record as follows:

"STATION HOSPITAL
 Fort George G. Meade, Maryland

AIDMH

2 May 1949

C E R T I F I C A T E

"I certify the following to be true and correct to the best of my knowledge:

I saw non-sentenced prisoner, HENEAGE, WILLIAM, 2nd Lt.

Post Stockade, in neuropsychiatric consultation 2 May 1949 at the request of the Judge Advocate's Office prior to contemplated court martial.

"Based on my examination of the soldier, I have reached the following conclusions:

1. At the time of the alleged offense the soldier (was) ~~(was)~~ so far free from mental defect, disease, or derangement as to be able, concerning the particular acts charged, to distinguish right from wrong.

2. At the time of the alleged offense the soldier (was) ~~(was)~~ so far free from mental defect, disease or derangement as to be able, concerning the particular acts charged, to adhere to the right.

3. At the present time, the soldier is sufficiently sane to conduct or cooperate intelligently in his defense.

/s/ Donald M. Kerr
DONALD M. KERR, CAPT. MC
Psychiatrist" (Pros Ex 3)

6. Discussion.

The specification, charged as a violation of Article of War 58, alleges that accused deserted the service of the United States at Fort Benning, Georgia, on 17 May 1943, and remained absent in desertion, until he surrendered himself at Philadelphia, Pennsylvania, on 1 April 1949.

Whether the record of trial in the instant case is legally sufficient to sustain the findings of guilty of the Charge and Specification and the sentence as modified, depends upon the manner in which we dispose of the two legal questions presented. These questions are:

(a) Was the admission of the morning reports (Pros Exs 1 and 2) over objection of the defense prejudicial error? and

(b) Did the prosecution fail to fulfill that part of its burden of proof which requires it to establish beyond reasonable doubt that the accused was mentally competent at the time of the commission of the alleged offense?

With respect to (a) above, the record shows that the defense persistently challenged the propriety of the court's action in admitting

in evidence the extract copy of the morning report which purported to show that accused's alleged unauthorized absence commenced on 17 May 1943 (Pros Ex 1). The declared basis of the numerous and repeated objections was that the extract copy of the morning report was undated and unsigned in the manner prescribed by controlling Army Regulations.

Army Regulations pertaining to morning reports, in effect at the time of the alleged commencement date of accused's unauthorized absence (17 May 1943), provided that morning report entries be made as soon as possible after the morning report day and that the commanding officer, adjutant or an officer designated by the commanding officer authenticate such morning reports (AR 345-400, 7 May 1943, Pars 5a and 6a; underscoring supplied).

The uncontradicted testimony of Major Zandri to the effect that the initials "WRD" appearing on the extracted morning report entry were those of Lieutenant Dickenhoffer, Adjutant General of the Parachute School, and that Lieutenant Dickenhoffer was charged with the duty of initialing the morning reports of accused's unit by instructions from the Commanding General, establishes that the challenged extract copy of a morning report was an extract portion of an official statement in writing concerning certain facts or events, made by a person who had an official duty imposed upon him by law, regulation or custom to record the fact or event. As such, it was admissible in evidence when duly authenticated as in the instant case, and competent prima facie evidence of the fact or event therein recorded (MCM, 1949, Pars 129a and 130a).

Nor do we find any merit to the defense's contention that the incomplete manner in which the date of the morning report entry was indicated on the otherwise admissible duly authenticated extract copy of morning report rendered it inadmissible as prima facie evidence that accused commenced his unauthorized absence on 17 May 1943. It is our view that the same presumption of regularity applicable to extract copies of morning reports from which the signature of the officer making the original entry has been omitted applies to situations such as the instant case where the date of the making of the entry has been omitted or incompletely indicated (CM 320478, Vance, 71 BR 415,428). Thus, in the absence of proof to the contrary, it must be presumed in the instant case that the original morning report, of which the extract is but a copy of a part, was made as prescribed by regulation, on a date as soon as possible after the morning report day of 17 May 1943 and that such date appeared on the original in another and proper place. The bald objection of the defense to the admission of the extract copy with the innuendo that the entry might possibly have been made prior to 17 May 1943, totally unsupported by any proof that the entry was irregular in any manner, cannot be regarded as such an evidential showing as would effectively

destroy the presumption of regularity. It follows then that since a duly authenticated extract copy of morning report is admissible to the same extent that the original would be (MCM, 1949, Par 129a, p.163).the extract copy offered and received over objection, in the absence of a contrary showing of irregularity or patent defect, was admissible and competently established that accused commenced a status of absence without leave on 17 May 1943, which continued until accused's return to military control. It should also be noted that the fact that accused commenced his unauthorized absence on the date alleged was amply corroborated, not only by the uncontroverted testimony of Major Zandri, but also by accused's father who testified with accused's express consent.

With respect to the extract copy of morning report of the 2302d Army Service Unit, Eastern Pennsylvania Military District (Pros Ex 2), it might very well have been that so much thereof as purports that accused was "AWOL" was hearsay. But it must be noted that the document under consideration is otherwise in proper form and that it was admitted for the limited purpose of showing accused's return to military control at Philadelphia, Pennsylvania on 1 April 1949. We believe that it was admissible for this limited purpose and that the law member by limiting its effect, removed from it any characteristics which could have been the subject of objection (CM 289776, Pierce, 19 BR(ETO) 21,24). Moreover, the subsequent testimony of accused's father conclusively and competently established that accused did, in fact, surrender to authorities at Philadelphia, Pennsylvania.

Thus it is that the competent evidence of record probatively establishes that accused was absent without leave for the period and from the place alleged and that his said absence was terminated in the manner and at the time and place alleged. The court was completely justified in inferring that accused intended to absent himself permanently from the military service from the fact that his unauthorized absence was continuous and uninterrupted for a period of almost six years. This inference was especially warranted in view of the defense testimony provided by accused's father to the effect that accused admitted engaging in civilian employment during the period of unauthorized absence (Par 146a, MCM, 1949; CM 286579, Pfeiffer, 56 BR 265,268).

With respect to the legal question posed by us in (b) above it is to be noted that accused's only affirmative defense was that at the time of the commission of the offense charged he did not possess the mental capacity to distinguish right from wrong and to adhere to the right. This defense was interposed for accused by the testimony of accused's father as the sole defense witness. The elder Heneage's judicial statement made with accused's express consent amounted, on the

one hand, to a complete acknowledgment and admission of accused's unauthorized absence, and in addition, described in detail accused's nonmilitary activities from the inception of his unauthorized absence to its termination. On the other hand, the defense witness assertively stated in exculpation of accused's responsibility for the commission of the alleged offense that accused did not possess the mental capacity to distinguish right from wrong or control his conduct so as to adhere to the right. Apparently, the basis for the asserted opinion by accused's father was accused's abnormal conduct manifested in his impulsive running away from home, school and finally the Army, and accused's inability to explain his behavior thereafter. In further support of the defense's contention that accused lacked mental capacity to be responsible for a criminal offense, there was introduced in evidence the letter of a psychiatrist confirming a previously expressed opinion that accused was a "psychopathic personality." The question then simply is, did the foregoing defense evidence dissipate the presumption of accused's sanity and create a reasonable doubt as to his mental responsibility despite the presence in the record of the stipulation that if Captain Kerr, Psychiatrist, were present he would testify in accordance with his certificate (Pros Ex 3) that accused was so far free from mental defect, disease or derangement at the time of the commission of the alleged offense as to be able to distinguish right from wrong and to adhere to the right.

We are of the opinion that the evidence introduced by the defense did not create a reasonable doubt as to accused's sanity, and that the court's determination that he was legally responsible for his criminal act, implicit in its findings of guilty, was correct.

The evidence in support of accused's mental responsibility and that challenging it consists of a layman's opinion that accused cannot distinguish right from wrong or control himself so as to adhere to the right; an expert's opinion that accused is a psychopathic personality; the stipulated expert opinion of Captain Kerr that accused's mentality enables him to distinguish right from wrong and adhere to the right; and the presumption of accused's sanity.

The test for determining an accused's mental responsibility in a criminal sense for an offense alleged to have been committed is expressed and explained in the manual for Courts-Martial 1949, as follows:

"* * A person is not mentally responsible in a criminal sense for an offense unless he was, -at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right. The phrase 'mental defect, disease, or derangement' comprehends those

irrational states of mind which are the result of deterioration, destruction, or malfunction of the mental, as distinguished from moral, faculties. Thus a mere defect of character, will power, or behavior, as manifested by one or more offenses or otherwise does not necessarily indicate insanity, even though it may demonstrate a diminution or impairment in ability to adhere to the right in respect to the act charged." (MCM, 1949, Par 110b, p.121) (underscoring supplied)

When the proof relied upon by the defense to exculpate accused of criminal responsibility for his act by reason of lack of mental responsibility is analyzed and considered in the light of the requirements announced in the above test, it is clearly seen that the defense has completely failed to establish that accused's criminal act was caused by a state of mind resulting from "deterioration, destruction or malfunction" of his mental faculties and at best has only proved that accused is a psychopathic personality. Such a bare showing that an accused is a psychopathic personality is not sufficiently persuasive to impair the presumption that he was sane when he committed the alleged offense and is not inconsistent with an opinion that accused at the time of the commission of the alleged offense was able to distinguish right from wrong and to adhere to the right (CM 292432, Swan, 57 BR 189,194; CM 280581, Campbell, 53 BR 227,231). Further, the existence in an accused of such a state of mind has been held not to constitute a valid defense to commission of crime (CM 301324, Chaddock, 31 BR(ETO) 229,232).

For the reasons stated, the Board of Review is of the opinion that the court's findings of guilty of desertion are fully sustained by the evidence.

7. Records of the Department of the Army show that accused is 35 years of age, divorced and the father of two children. He completed his college preparatory education at a private school and attended Dartmouth College for approximately one semester. Until he was inducted into the Army on 6 November 1942, he was employed by the Chicago Daily News, two stove manufacturing concerns and the Ringling Brothers Circus. He also worked as a truck driver and for a company that made pipe fittings. He was accepted as an officer candidate in the grade of corporal, successfully completed the course and was appointed and commissioned a second lieutenant, Army of the United States on 29 April 1943. No efficiency ratings for the accused as an officer appear on record.

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

of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal, total forfeitures, and confinement at hard labor for five years is authorized upon conviction of an officer of violation of Article of War 58.

Robert J. O'Connor, J.A.G.C.

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

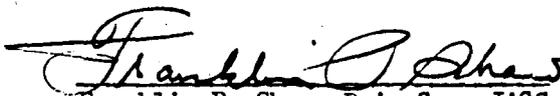
W. H. Hynes, J.A.G.C.

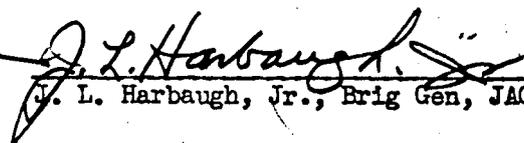
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

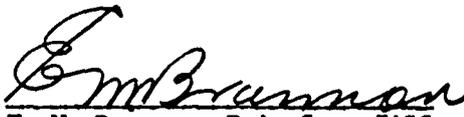
THE JUDICIAL COUNCIL

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

In the foregoing case of Second Lieutenant William C. Heneage (O-1318545), Reception and Processing Detachment #2 (Operating), 2101st Area Service Unit, Fort George G. Meade, Maryland, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.


Franklin P. Shaw, Brig Gen, JAGC


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


E. M. Brannon, Brig Gen, JAGC
Chairman

16 November 1949

I concur in the foregoing action.

17 November 1949 
THOMAS H. GREEN
Major General
The Judge Advocate General

LAW BRANCH
JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

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

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CSJAGH CM 337734

9 November 1949

UNITED STATES)

24TH INFANTRY DIVISION

v.)

Trial by G.C.M., convened at

Private GEORGE L. HUMPHREY,
RA 17195007, Medical Company,
19th Infantry Regiment.)

Beppu, Kyushu, Japan, 23,24 June
1949. Dishonorable discharge,
total forfeitures after promulga-
tion and confinement for thirty

(30) years. United States
Penitentiary, Leavenworth, Kansas.)

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

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private George L. Humphrey, Medical Company, 19th Infantry did, at Beppu, Kyushu, Japan, on or about 25 May 1949, forcibly and feloniously, against her will, have carnal knowledge of Fujihara Masako, a Japanese National.

He pleaded not guilty to, and was found guilty of, the Charge and Specification thereunder. (Evidence of one previous conviction by summary court-martial for a traffic violation was considered.) He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor, at such place as proper authority may direct for thirty years. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, or elsewhere as the Secretary of the Army may direct, as the place of confinement, and pursuant to Article of War 50a withheld the order directing execution of the sentence.

10007

3. Evidence.

a. For the prosecution.

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

At approximately 9:30 on the morning of 25 May 1949, Fujiwara Masako, a 31 year old spinster, hereinafter referred to as the prosecutrix, was returning on foot to her home at Soen, Beppu Shi, Midorigaoka, from the ration store at Nakazuru. She had secured rice at the ration store and was carrying it in a pack on her back. At a point in the road bounded by woods she saw accused, a white person, clad only in shoes and socks. Accused seized the prosecutrix, and against her resistance, dragged her into the woods and pushed her to the ground. She cried out in a loud voice but accused covered her mouth with his hand. She pushed with her hands, held her legs together, and "shook all around" (R 6-9, 18). Accused grabbed her by the legs to prevent her "wobbling", opened her skirt, and pulled off her pants. The prosecutrix did not recall scratching or slapping accused but testified that she pinched him where she could on his arm and "penus." (R 18,20-22). Accused, nevertheless, rolled the prosecutrix and her pack on the ground, and holding his "penus" came "at" her. On his first attempt he was unsuccessful in penetrating her (R 19). The prosecutrix lost consciousness and when she revived she felt pain in "her bowel" caused by the penetration of her "organ" by accused's "penus" (R 9-10). The prosecutrix had not consented to accused's acts (R 10). She told accused that he was hurting her and he arose, said "Arigato" (thank you), and went to secure his clothes (R 9-10). The prosecutrix observed that accused's clothing was similar to an Army uniform (R 11), and was of the color of grass (R 16).

The prosecutrix continued on to her home, and when she arrived was crying, and saying "Help me, Save me." Her face was dirty, she "stooped" and it seemed that she was in pain. She said that she had been violently treated by an American soldier and indicated her vaginal area. Her mother asked her if she had been raped and she answered, "Yes." Her father observed blood coming down her leg, and so took her into the house, bathed her and put her to bed (R 39-41). He reported the matter to the military police and accompanied Corporal Miller and Sergeant Blevins to the place where he thought the incident took place. They found the accused near the "Minami-tateishi Primary School," and, upon being asked what he had been doing, accused stated he had been to his girl's house (R 41,43). Accused was brought to the prosecutrix' home and confronted by the prosecutrix. She was asked if the accused was the person who attacked her and she responded, "Ah, well," by which she meant she "was not sure" (R 13-14,69).

Dr. Hatano Sumihike, "a woman's specialist" was called to the home of the prosecutrix and examined her. He found two places broken on the hymen with bleeding, and a "3 cm split" at the right wall of the vagina cavity. In addition, he observed that the prosecutrix was upset emotionally and seemed very "unrest" (R 22-24). With reference to the cause of prosecutrix' condition Dr. Sumihike testified:

"Q. Would the fact that the person was apparently a virgin make some difference in this case?

* * *

A. Because she was a virgin, it did bleed by the broken hymen and whether the person is a virgin or not by intercourse, the wall can be injured but when it is injured it means it was a rough intercourse." (R 25)

On 26 May the prosecutrix was examined by First Lieutenant Leon Levine. Lieutenant Levine found a laceration through the hymenal ring and two symmetrical tears on each side of the midline, extending from the skin on the outside to the hymenal ring. Lieutenant Levine was of the opinion that the lacerations were caused by forceful intercourse (R 25-26).

Lieutenant Levine also examined accused on 26 May and found numerous scratches on accused's buttocks, and expressed the opinion they were of the type one would receive from running through bushes. Accused also had what were probably fingernail scratches on the left side of his chest. Lieutenant Levine found that accused was normal mentally (R 73-75).

At a time and place not disclosed by the record of trial accused was interviewed by Richard W. Myrodes and Harry Duket, CID Agents. Duket read, and Myrodes explained, the 24th Article of War to accused. Myrodes identified Prosecution Exhibit A for identification as a sketch which accused drew for him during the interrogation to familiarize Myrodes with the scene of the offense. The sketch was admitted in evidence as Prosecution Exhibit 1 (R 27-34). The writing on the sketch, "Sketch that Humphrey drew at 1630 hours 28 May 1949. Witnessed by Myrodes." was placed thereon by Duket (R 30). The sketch was marked at various points by numerals. In explaining the significance of the numerals accused admitted that he had dragged a woman from a road into some bushes and had disrobed. Accused claimed that his recollection of what transpired was interrupted by a number of blanks. He admitted that every time he made "a pass" at the woman she made "some type of argument," and accused interrupted his narrative by pulling back his shirt and exhibiting scratch marks. In response to Myrodes' question, "After you left the spot, had you been sexually gratified?" accused responded, "Yes." The only identification afforded by accused as to the woman involved was that she had a pack on her back (R 34-36).

An hour after making the sketch, accused made a statement which was written down by Duket and signed by accused. Myrodes identified Prosecution Exhibit B as the statement made by accused, and testified that he read the 24th Article of War to accused and explained his rights. Myrodes needed the signature of Captain Greathouse and took accused and the statement to Captain Greathouse. The latter also explained the 24th Article of War at that time. No promises nor threats were made to induce accused to sign the statement. During his interrogation accused was allowed to smoke and to eat. The longest period he was questioned was $3\frac{1}{2}$ to 4 hours (R 57-60,66,68).

Accused after being apprised of his rights therein elected to testify concerning the circumstances under which his pretrial statement was given. He testified that he was very much frightened by being brought before the CID. He also claimed he was told by the CID that if he signed the statement they would help him to the best of their ability. He did not understand from this promise that things would go easier with him, but did understand that if he signed he "would not be around where they would ram and jamb him." He admitted, however, that at the time he was aware that anything he said might be held against him. He explained that he was frightened because he was always frightened in front of strangers (R 61-62).

Prosecution Exhibit B for identification (accused's pretrial statement) was admitted in evidence as Prosecution Exhibit 2, over objection by the defense (R 64). In his statement accused narrated that on 25 May 1949, he left his company area between 0900 and 0930 hours to go to his girl's house about a ten minute walk from the hospital. At a place on the road about 100 yards from the municipal school, he saw a Japanese girl carrying a knapsack on her back coming in his direction. Accused had been thinking of his girl friend in Seattle, Washington, and decided he wanted sexual intercourse with the Japanese girl. Accused was at the time in uniform. He spoke to the girl and she turned and started off in the opposite direction, but retraced her steps and again proceeded toward accused. Accused started to walk with her and when they reached a path leading from the road, he seized her and dragged her into the woods. Accused could not recall taking off his clothes but knew they were hanging on a bush after he and the girl were in the woods. He had sexual intercourse with the girl but did not remember whether she fought him at that time. Prior thereto, while he was dragging her into the woods she had scratched him. After accused had finished he put on his clothes and went to his girl's house. Accused did not know what motivated his conduct toward the girl but felt that difficulties with his parents and dizzy spells and memory lapses which he had been experiencing had something to do with it (Pros Ex 2).

b. For the defense.

Accused, after explanation of his rights as a witness, elected to remain silent as to the merits (R 56).

Corporal Douglas Blevins testified that on 25 May 1949 he accompanied Corporal Miller to the home of the prosecutrix. Miller asked her if she could identify the accused as the man who had "committed the crime." She was crying and nervous and on the verge of a nervous breakdown and said she could not identify him (R 47-48).

Lieutenant Colonel William C. Tippens testified that he interviewed the prosecutrix a week or two weeks after the incident and that at the interview the prosecutrix stated she would be unable to identify the person who committed the offense. He identified Defense Exhibit A as a statement which he secured from the prosecutrix and it was admitted in evidence without objection. The statement was in substantive accord with her testimony at the trial as to the rape committed upon her on 25 May, but the statement concluded with her assertion " * * * it will be impossible to identify the man who raped me if I see him again." At the time of the interview, the prosecutrix appeared to be slow thinking and shy (R 49-53).

Private First Class Boyd testified that between 10 and 10:30 on 25 May he saw accused with his girl friend near a schoolhouse on the road going to the hospital from the sulphur pit. The girl who was with accused was not the prosecutrix (R 54-55).

c. Evidence for the court.

Corporal Kenneth Gouldner testified that between 10 or 10:30 on the morning of 25 or 26 May 1949 he saw accused, clad in suntan uniform, close to the school on the road leading to "D Clearing Hospital." On cross-examination Gouldner testified that he had been told by Corporal Boyd that the day he (Gouldner) had seen accused was the 25th (R 70-72).

4. Accused has been found guilty of rape as alleged in the Specification of the Charge. "Rape is the unlawful carnal knowledge of a woman by force and without her consent. * * * Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient if there is no consent" (Par 180a, MSM 1949). It is established in this case that Rajinder Shaha, the victim of the rape alleged, was in fact raped at the time and place indicated in the Specification of the Charge. The evidence shows that while returning to her home on the morning of 25 May 1949 the prosecutrix was seized

by a male person, and against her active resistance, dragged into woods bordering the road, thrown to the ground, divested of an article of clothing impeding the accomplishment of the desires of her assailant, and, after she had fainted and revived, experienced the penetration of her genitals by the penis of her assailant. Medical examinations of the prosecutrix on the day of the offense and the day following disclosed lacerations to her vaginal cavity for which the probable explanation was forceful intercourse. The aforementioned circumstances sustain the allegations of rape and negative any inference of consent. That the prosecutrix' resistance commensurate with her physical capabilities was ineffectual does not afford a basis for an inference of consent (CM 333860, Haynes, et al, 81 BR 375,384).

The testimony of the prosecutrix that accused was the person who raped her was considerably weakened by the showing that on the day of the offense she was unable to identify accused as the person who had raped her, and that at other times she had stated that it would be impossible to identify her assailant.

Whatever doubts might be engendered by prosecutrix' pretrial statements, which are inconsistent with her identification of accused at the trial, are dispelled by other evidence and circumstances in the record. Accused prior to trial admitted in a written statement that on the morning of 25 May 1949 he raped a Japanese woman who was carrying a knapsack on her back, as did the prosecutrix on the day in question. While the locale set forth in accused's pretrial statement is not shown to be the locale described by the prosecutrix the evidence does show that accused was apprehended a short while after the rape, in the neighborhood where prosecutrix resided. We experience no doubt that both the prosecutrix in her testimony, and accused in his pretrial statement, were discussing the same incident.

That accused's pretrial statements, oral and written, were voluntarily made after due warning of his rights under the 24th Article of War, may be fairly inferred from the evidence pertaining thereto adduced by the prosecution, and corroborated by accused's testimony that he was aware that anything he said might be held against him.

5. The question of accused's mental responsibility was not raised at the trial. The only testimony touching upon the issue was that of accused's commanding officer, First Lieutenant Leon Levine, Medical Corps, who stated that he examined accused on 26 May 1949, and that accused appeared normal mentally at that time. In view of accused's pretrial statement (Pros Ex 2) that he could not remember clearly what transpired at the time of the rape because of "blank" spells, and that he felt difficulties with his parents resulting in dizzy spells and memory lapses

had something to do with his conduct, a mental examination of accused by a medical board was requested while the record of trial was under examination by the Board of Review. Accused was brought before a board of three medical officers at the 361st Station Hospital, APO 1055, Tokyo, Japan, on 18 October 1949. The board found that at the time of the alleged offense accused was so far free from mental defect, disease or derangement as to be able concerning the act charged to distinguish right from wrong and adhere to the right, and that he possessed sufficient mental capacity to understand the nature of the proceedings against him and was able intelligently to conduct, or cooperate in his defense.

6. Accused at the time of the commission of the offense was 20 and 7/12 years of age. He had prior service from 11 April 1946 to 17 September 1947. His current enlistment extends from 6 January 1948, and presently he is serving in Japan. His service prior to the commission of the offense in question has been characterized by his commanding officer as below average.

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to confinement at hard labor for thirty years is authorized upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Title 18; U.S.C., Section 2031.

Robert J. Clonon, J.A.G.C.
Charles J. Desbaurty, J.A.G.C.
W. Lynch, J.A.G.C.

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

109

CSJAGN-CM 337782

9 SEP 1949

UNITED STATES)

ZONE COMMAND AUSTRIA)

v.)

) Trial by G.C.M., convened at
) Salsburg, Austria, 8 July 1949.
) Dishonorable discharge (suspended),
) total forfeitures due or to be-
) come due after promulgation and
) confinement for one (1) year.
) Disciplinary Barracks.

Recruit ROBERT E. LEE
(RA 44181679), 68th
Military Police Company,
APO 541.

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

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

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

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

Specification 1: In that Recruit Robert E. Lee, 68th Military Police Company, did, at Salsburg, Austria, during the month of November 1948, feloniously embezzle by fraudulently converting to his own use, United States Military Payment Certificates of the value of \$30.00, the property of Private First Class Humberto P. Alayon, entrusted to him by the said Private First Class Humberto P. Alayon for the purpose of purchasing a United States Postal Money Order.

Specification 2: In that Recruit Robert E. Lee, 68th Military Police Company, did, at Salsburg, Austria,

during the month of November 1948, feloniously embezzle by fraudulently converting to his own use, United States Military Payment Certificates of the value of \$100.00, the property of Private George Bibiloni, entrusted to him by said Private George Bibiloni for the purpose of purchasing a United States Postal Money Order.

Specification 3: In that Recruit Robert E. Lee, 68th Military Police Company, did, at Salsburg, Austria, during the month of November 1948, feloniously embezzle by fraudulently converting to his own use, United States Military Payment Certificates of the value of \$10.00, the property of Private First Class Willis I. Cates, entrusted to him by the said Private First Class Willis I. Cates for the purpose of purchasing a United States Postal Money Order.

CHARGE II: Violation of the 61st Article of War.
(Disapproved by Reviewing Authority).

Specification: (Disapproved by Reviewing Authority).

CHARGE II: Violation of the 96th Article of War.
(Disapproved by Reviewing Authority).

Specification: (Disapproved by Reviewing Authority).

The accused pleaded not guilty to all Specifications and Charges. He was found guilty of all Specifications, Charge I, and Charge I, and guilty with exceptions and substitutions of the Specification, Charge II and Charge II, and guilty with exceptions and substitutions of the Specification, Charge III and Charge III. The accused was sentenced to be dishonorably discharged from 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 might direct for a period of one year. No previous convictions were considered. The reviewing authority disapproved the findings of guilty of the Specifications of Charges II and III and Charges II and III. He approved the sentence and ordered it executed, but 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, or elsewhere as the Secretary of the Army might direct, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 23, Headquarters Zone Command Austria, APO 174, 22 July 1949.

3. The record of trial is legally sufficient to support the

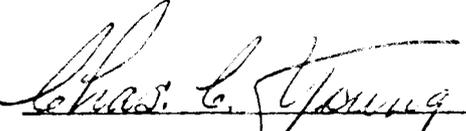
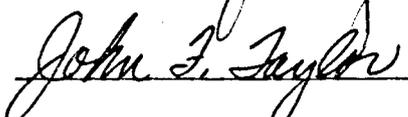
findings of guilty as approved by the reviewing authority. The only question for consideration is the legality of the sentence insofar as it relates to forfeitures.

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 8 July 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; CM 335823, Griswold, (1949); CM 337508, Hostetler, (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 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.


 _____, J. A. G. C.
 On leave
 _____, J. A. G. C.

 _____, J. A. G. C.

CSJAGN-CM 337782

1st Ind

SEP 30 1949

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

TO: Commanding General, Zone Command Austria, APO 174, c/o Postmaster, New York, New York

1. In the case of Recruit Robert E. Lee (RA 44181679), 68th Military Police Company, APO 541, 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 approved by the reviewing authority 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 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 337782).

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.

CSJAGN-CM 337804

1 SEP 1949

UNITED STATES)

v.)

Recruit OSCAR E. ALBRIGHT
(RA 15414056), Company A,
10th Infantry.)

FORT JACKSON, SOUTH CAROLINA)

Trial by G.C.M., convened at
Fort Jackson, South Carolina,
12 July and 2 August 1949.)

Dishonorable discharge, total
forfeitures after promulgation
and confinement for three (3)
years. Disciplinary Barracks.)

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

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

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

CHARGE: Violation of the 69th Article of War.

Specification: In that Recruit Oscar E. Albright, Company A, 10th Infantry, Fort Jackson, South Carolina, having been duly placed in confinement in the Post Stockade, Fort Jackson, South Carolina, on or about 19 January 1949, did, at Fort Jackson, South Carolina, on or about 23 January 1949, escape from said confinement before he was set at liberty by proper authority.

ADDITIONAL CHARGE I: Violation of the 69th Article of War.

Specification: In that Recruit Oscar E. Albright, Company A, 10th Infantry, having been duly placed in confinement in Post Stockade, on or about 1 February 1949,

did, at Fort Jackson, South Carolina, on or about 8 March 1949, escape from said confinement before he was set at liberty by proper authority.

ADDITIONAL CHARGE II: Violation of the 94th Article of War.

Specification: In that Recruit Oscar E. Albright, Company A, 10th Infantry, did, at Fort Jackson, South Carolina, on or about 8 March 1949, feloniously steal one Carbine caliber .30, of the value of about \$35.50, property of the United States intended for the military service thereof.

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

Specification: In that Recruit Oscar E. Albright, Company A, 10th Infantry, did without proper leave absent himself from his organization at Fort Jackson, South Carolina, from about 1415 hours, 8 March 1949, to about 1850 hours, 9 May 1949.

The accused pleaded not guilty to and was found guilty of all Specifications and Charges. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority might direct for three years. The reviewing authority 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 50a.

3. It was proved by competent evidence that accused was duly placed in confinement on 19 January 1949 (Pros. Ex. 2) and again on 1 February 1949 (Pros. Ex. 3) and that he escaped therefrom on 23 January 1949 (Pros. Ex. 2) and again on 8 March 1949 (Pros. Exs. 3 and 4; R. 13). In order to effectuate this last escape, the accused, a prisoner on a work detail hauling dirt (R. 12), "snatched the carbine from the guard and jumped backwards off the truck" (R. 13). He then held the carbine at port arms (R. 13), told the guard detail "don't follow me" (R. 14), backed off and ran into the woods (R. 13). Thereafter accused remained absent without leave until 9 May 1949 (Pros. Exs. 4 and 5). The carbine was shown to be government property (R. 11), its value stipulated at \$35.50, as alleged (R. 20). In a written statement, admitted without objection, accused stated that after his escape of 8 March that night he "threw the carbine on the ground in a bunch of bushes. I would remember where I put it and think I could remember the place if I saw it again" (Pros. Ex. 1).

4. Whether or not the period of confinement adjudged is excessive is the only question to be considered. Since the escape of 8 March 1949 marked the initial date of the subsequent 62 days unauthorized absence, these two offenses are "different aspects of the same act or omission" punishable only in their most important aspect (CM 313544, Carson, 63 BR 137; CM 323305, Raabe, 72 BR 205; MCM, 1949, par. 80a, p. 80). The more serious aspect of this act is the escape, since the maximum confinement authorized without substitution for an escape in violation of Article of War 69 is one year, which exceeds that permitted for a 62 day unauthorized absence in violation of Article of War 61 (MCM, 1949, par. 117c, pp. 134 and 136). This and the one year period of confinement authorized for the escape of 23 January 1949 authorize a total of two years as the maximum confinement permissible, if we disregard the larceny of the carbine, an offense which taken alone justifies imposition of confinement without substitution of not to exceed one year (MCM, 1949, par. 117c, p. 138).

The Board of Review is of the opinion that the larceny of the carbine was so closely connected with the escape as to be a component phase of the "same act or omission." In military law the essence of confinement is physical restraint (MCM, 1949, par. 19c, p. 15); in the absence of the latter the former does not exist. Normally four walls and iron bars are utilized to effect physical restraint; however, the military has elected in numerous instances to enforce hard labor provisions of confinement sentences outside of the precincts of stockade walls. In these cases universal practice entails a continuity of physical restraint by the employment of armed guards who are instructed to shoot prisoners attempting to escape. Usually the desired result of physical restraint is equally accomplished in both cases. Presuming a case where a prisoner escapes from confinement by cutting bars or knocking a hole in the wall of his cell, it would be unreasonable to anticipate punishment for destruction of government property in addition to that adjudged for his offense of escape from confinement. Application of the same rationale to a case where the prisoner effects the dissipation of the means of physical restraint through disarming a guard by snatching his weapon affords only the compelling conclusion that the theft of the weapon was but an incident of the act of escape, even though the theft was a separate and distinct offense from that of the escape (CM 320152, Carson, 69 BR 245). Concerning this type question, the pertinent portion of the Manual for Courts-Martial referred to in the preceding paragraph provides:

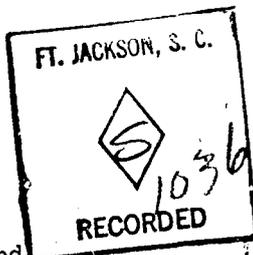
"If an accused is found guilty of two or more

offenses constituting different aspects of the same act or omission, the court will impose punishment only with reference to the act or omission in its most important aspect" (MCM, 1949, par.80a, p. 80).

In the absence of exceptional circumstances of viciousness or other aggravation, or in the absence of a clear showing that the taking of the carbine was motivated by an intent to steal as distinguished from the intent to escape, the Board feels constrained to hold that the larceny of the carbine, the escape and the commencement of the unauthorized absence involved substantially the same act to the extent that to permit splitting it into its different aspects for purposes of increasing the allowable punishment would be a perversion of the spirit of the prohibition against punishment for the same act or omission in its different aspects.

5. For the foregoing reasons, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of all Charges and Specifications 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 years.

W. S. Young, J. A. G. C.
C. H. Ordek, Jr., J. A. G. C.
John F. Taylor, J. A. G. C.



117
REC'D JA 57 DIV.
OCT 24 A.M.

CSJAGN-CM 337804
1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Headquarters Fort Jackson, South Carolina

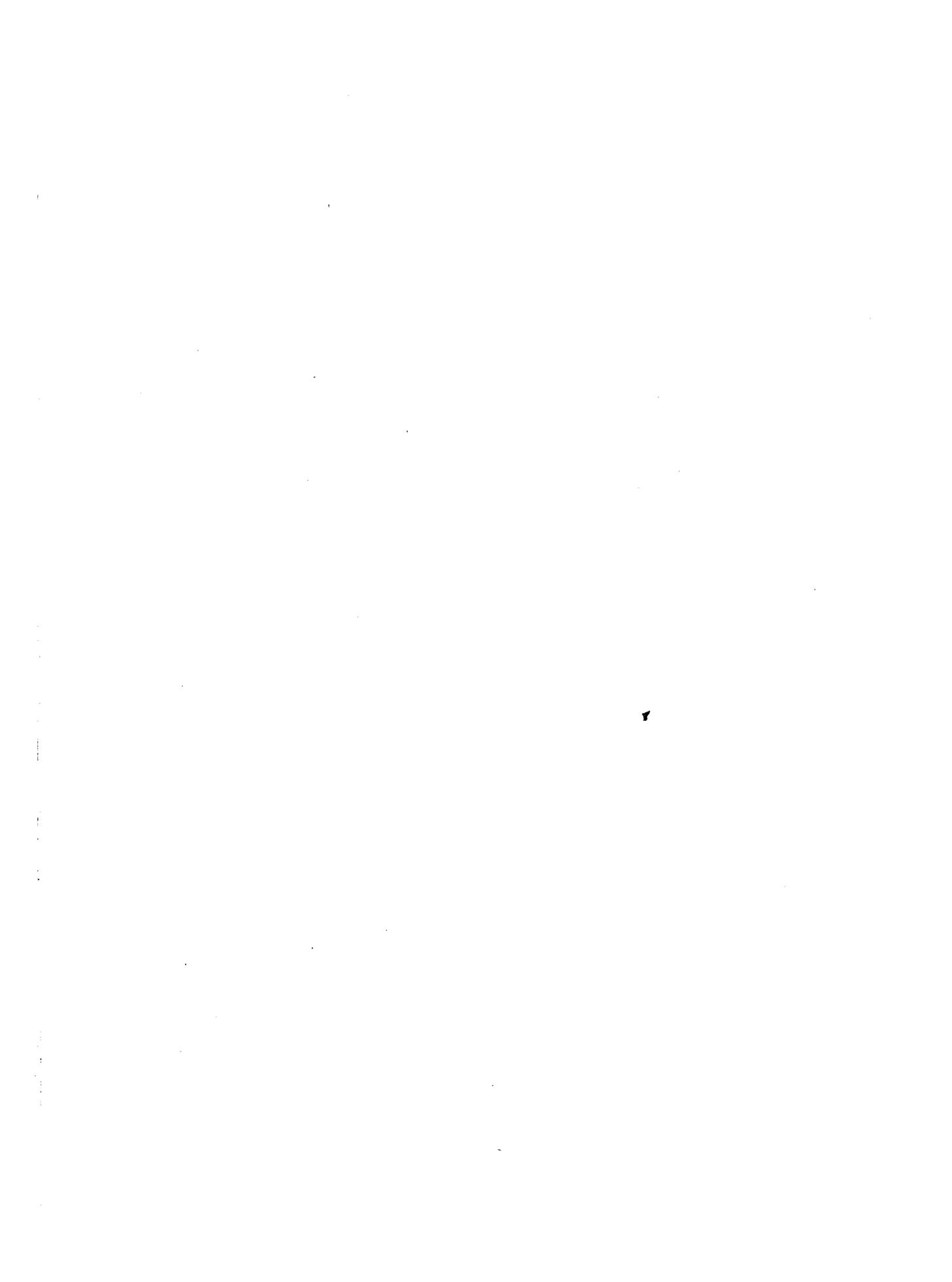
1. In the case of Recruit Oscar E. Albright, (RA 15414056), Company A, 10th Infantry, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for 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(3) this holding and my concurrence vacate so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for two years. Under Article of War 50 you now have authority to order execution of the sentence as modified in accordance with this holding.

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

(CM 337804).

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

1 Incl
Record of trial



CSJAGK - CM 337816

22 SEP 1949

UNITED STATES

FRANKFURT MILITARY POST

v.

First Lieutenant NORMAN E.
SIPPEL (O-1038484), Head-
quarters, 7970th Counter
Intelligence Corps Group,
European Command.

Trial by G.C.M., convened at Frankfurt-
am-Main, Germany, 7,8,9,10,13,14,15,
16,17,20,21,22,23,24 June 1949.
Dismissal, total forfeitures after
promulgation, and confinement for
three (3) years. Penitentiary.

HOLDING by the BOARD OF REVIEW
McAFEE, BRACK 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 officer named above and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50d.
2. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 93d Article of War.

Specification 1: In that First Lieutenant Norman E Sippel, Headquarters, 7970 Counter Intelligence Corps Group, did at, and in the vicinity of, Frankfurt-am-Main, Germany, during the period from about 1 June to about 30 June 1948, on various and sundry occasions, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Guenther Hofmann.

Specification 2: In that First Lieutenant Norman E Sippel, ***, did at or near Landshut, Germany, during the period from about 1 July to about 31 July 1948, on various and sundry occasions, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Guenther Hofmann.

Specification 3: In that First Lieutenant Norman E. Sippel, ***, did at or near Straubing, Germany, during the period from about 29 September to about 15 October 1948, on various and sundry occasions, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Guenther Hofmann.

He pleaded not guilty to and was found guilty of the charge and all specifications. No evidence of any 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, designated the United States Penitentiary, Lewisburg, Pennsylvania, 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 48.

3. The testimony of Guenther Hofmann, the only eyewitness to the acts of sodomy alleged, is transcribed in the record of trial between pages 99 and 269. This testimony was taken over a period of five days. At times this witness testified freely, at other times he refused to testify, wept, made facetious answers and, when pressed for answers to some questions, replied, "I don't remember anymore."

Guenther Hofmann together with several other German youths had been questioned by the German police relative to thefts from automobiles, and during this questioning he made statements concerning the accused. This information was transmitted to the Criminal Investigation Department. During the trial Guenther admitted from the witness stand that he had committed some thefts.

During his testimony the defense made many objections, arguments relative to admissibility of evidence, and offers of proof.

In view of the opinion of the Board of Review as hereafter expressed, only so much of this witness' testimony as pertains to the actual commission of the acts of sodomy alleged will be set forth in the evidence.

4. Evidence.

Guenther Hofmann, a fifteen-year old male German National, testified that he met the accused at Frankfurt, Germany, in April or May 1948 (R 101). Thereafter he went with the accused on numerous automobile rides in and around the city of Frankfurt (R 103,107,122). During one of these automobile rides, the exact time and date unknown to the witness, the accused stepped and committed sodomy with Guenther Hofmann by taking Guenther's penis into his mouth and by Guenther Hofmann taking the accused's penis into his mouth (R 119,122,201,202).

During July 1948 Guenther Hofmann went to Landshut, Germany, with the accused, where they stayed fourteen days. At Landshut the accused took Guenther's penis into his mouth, Guenther Hofmann also took the accused's penis into his mouth. Hofmann did not remember how many times these acts occurred, but they occurred more than one time (R 119, 121,229,232).

During September 1948, the accused was in Straubing, Germany. He wrote Guenther Hofmann and suggested that Guenther visit him. Guenther Hofmann went to Straubing and stayed with the accused for eight days. When questioned about this visit Guenther testified:

"Q We now go to the time that you lived with Lt. Sippel in Straubing. What did you do then?

A There was nothing.

Q You didn't do that at any time at Straubing, is that it?

* * *

A I believe once, but not more than that.

* * *

Q What did you say was done in Straubing, Guenther? When you were staying with Lt. Sippel in Straubing, what did you say just a minute ago was done there?

A Nothing happened there." (R 120,121)

During cross-examination he testified:

"Q Did Lieutenant Sippel take your penis into his mouth while you were at Straubing?

A Yes.

Q And did you take his penis into your mouth while you were at Straubing?

A Yes.

Q On how many occasions?

A Well, in Straubing it was not for long. He was hardly there.

Q How long were you in Straubing?

A Well, I left Saturday evening and I arrived on Sunday morning and until Friday then.

* * *

Q Never mind where he was. How many times did you take his penis in your mouth while you were at Straubing?

A Once.

Q How many times did he take your penis in his mouth?

A He was there only once.

Q Never mind how many times he was there. I asked you how many times Lieutenant Sippel took your penis in his mouth while you were at Straubing?

A Well, I stated that already. Only once. (R 239,240)

Sergeant George H. Wrenn, 52nd "CID," identified a pretrial statement made by the accused on 2 January 1949 (R 270,271). He testified that prior to 2 January 1949, upon orders of Lieutenant Painter, he called Major Collins, the accused's commanding officer, and requested that the accused be "brought to Frankfurt" (R 302).

Major George B. Collins, 7970, CIC, Heidelberg, Germany, had been the accused's commanding officer since November 1948. Major Collins was present in Lieutenant Painter's office at the time the accused was questioned by the CID. On direct examination he stated that prior to the taking of the statement from the accused the following occurred:

"Q Upon Lt. Sippel's arrival, in the presence of you and Lt. Painter, just what did you do?

A It has been quite a long time ago. However, I will try to remember and recall as much as I can. I brought Lt. Sippel into the room, when in the room was Mr. Short, who was my Operations Officer in the 7970 CIC, Lt. Painter, and two other agents, I believe from the CID. When we came into the room I warned Lt. Sippel of his rights under the 24th Article of War. As a matter of fact, as I recall, they were read to him as well. Then I confronted him with the evidence that was on hand, and I took a picture, a photograph, that had been in one of the letters that he had mailed to this lad, and I asked if this was his picture, and he said yes, it was.

Q At that time did Lt. Sippel make any statement with reference to his rights under the 24th Article of War?

A Yes, sir, he said he understood them.

Q Were there any promises of any kind made to him at that time?

* * *

A No, sir, there were no promises made.

Q Did he have anything to say with reference to the accusations against him?

A Yes, sir, he did, he admitted them. He was asked if he wanted to make a written statement, and two CID agents took him out to another room.

Q What did he say with reference to making a statement?

A He denied the frequency of these unnatural acts as compared with the statements that were made by the German boy. He said they didn't amount to that many. I forget now how many he said there were - six or seven, or something like that.

* * *

Q Did the parties return with a written statement?

A Yes, sir.

* * *

Q Did you see the statement signed by anyone?

A I don't recall, sir; it has been so long ago. I think it was signed and witnessed.

* * *

Q Where?

A Right in the room amongst Mr. Painter, Mr. Short, myself, Lt. Sippel, and the CID agents.

Q Signed by whom?

A I believe it was signed, to the best of my recollection, by Sippel, and one of the CID agents, and Lt. Painter.

* * *

Q Did the question of promises or rewards or anything, appear in the conversation?

* * *

Q Do you have any recollection on that point?

A Sippel was sitting in a chair opposite me, as I recall, and when he was confronted with the evidence on hand, as I recall my statement to him it was, 'Well, what about it?' He came right out and said, 'Well, it is the truth.' I asked him if he realized the seriousness of the charge, and the accusation, and yes, he said he did. However, he was concerned about getting dismissed from CIC, and I made no promises to Sippel under any circumstances.

* * *

A Lt Sippel was very much upset at the time, I realize that. I told him, to the best of my knowledge, that he had one of two choices. He could resign his commission and get out of the Army, or stand court-martial charges for sodomy. That was explained to him, and he was cognizant of the seriousness of the charge -- he has had quite a bit of service as an officer. As far as his staying in the Corps was concerned, I told him I thought probably he would be dismissed from the Corps immediately; then I took him to the hospital afterwards, to a room in the hospital for overnight, and next morning I went back and got him out of the hospital. That is the sum and substance of the proceedings." (R 346,347,348, 350.)

On cross-examination, he testified:

"Q Do you remember having a conversation with Lt. Sippel at this time in which you stated that, in substance and effect, there were two alternatives that could be pursued in this case, one of them is that he could remain silent, or he could deny the charges, and stand a court-martial trial with the attendant bad publicity, or the other was that he could admit the charges

and the matter could be handled administratively?

A I think there was some conversation along that line, yes.

Q As a matter of fact, don't you recall that conversation?

A I recall, not word for word. I do recall we did discuss the thing as to his resignation or a court-martial charge.

Q In other words, this whole affair is more or less hazy in your mind at this time, is that a fair statement? Or do you have a sharp and clear recollection?

A Some phases of it I do recall. As far as conversation goes I cannot remember verbatim.

Q Isn't it true, Major, that the discussion as to the manner of handling this was to determine which would be the easiest way out of the matter for Lt. Sippel, and for everyone else?

A Yes, it was discussed.

Q In other words, if he took the administrative procedure, it would be the easiest way for him and everyone else, out of the whole thing?

A Yes, sir, I think so.

Q On this matter of handling this matter from an administrative standpoint, that was discussed with Lt. Painter as well, was it not?

A I believe it was.

Q And there was some discussion between yourself and Lt. Painter about the other cases that you both had been familiar with wherein they were handled as an administrative matter, where a person would agree to admit the charges rather than have a court-martial, isn't that correct?

A There was some conversation along that line.

Q You told him of some of your experiences and he told you of some of his?

A Right.

Q Along the lines that where the person was willing to admit it, they would handle it administratively rather than subject them to a court-martial, is that correct?

A Yes, sir.

Q How long were you, Lt. Sippel, Lt. Painter and Mr. Short there before Lt. Sippel went into the next room to make a statement?

A Offhand I would say 15 or 20 minutes, something like that.

* * *

Q As a matter of fact, you were between 30 and 35 minutes in Lt. Painter's room in the presence of Lt. Sippel and Mr. Short, and yourself, discussing this matter before he finally agreed to make a statement and went into the next room, isn't that correct?

A Yes, sir.

* * *

Q The substance and effect of what was told Lt. Sippel was that you can take one of these two courses. You can elect either to remain silent or deny these charges, and stand courts-martial, or you can give a statement admitting them, and the matter will be handled administratively, and that Lt. Sippel elected to take the first course?

* * *

A Yes, sir." (R 359,360,362)

First Lieutenant Harry J. Painter, 52nd Criminal Investigation Detachment, identified a statement made by the accused on 2 January 1949, and testified:

"Q Will you explain to the court the circumstances under which you saw this statement?

A Agent Stewart and Agent Wrenn, of my organization, came into my office. Agent Wrenn handed me the statement. They were accompanied at the time by Lt. Sippel ***.

* * *

Q This is the document that was handed to you?

A Yes, sir.

Q What did you do with reference to this document?

A I then read the statement and Agent Wrenn advised Lt. Sippel, asked him---he said, 'Lt. Sippel, I want to again advise you of your rights under the 24th Article of War, and I want to ask you if any threats or promises have been made in the taking of this statement?' and he looked at Sippel, and Sippel stated that there had not. I then asked Sippel if the statement was voluntary and he stated that it was. I asked him if he would swear to the statement and he said that he would. I then asked him to raise his right hand and swore him to the statement which he signed in my presence. I then signed it as Summary Court Officer.

Q Did you see him sign it?

A Yes, sir, I did." (R 318,319.)

On cross-examination, he testified:

Q Now, Lt. Painter, when did you first meet Lt. Sippel?

A About 7:00 o'clock in the evening on 2 January 1949.

Q And where?

A At the Carlton Hotel; in front of the Carlton Hotel in Frankfurt.

Q What occasioned your going to the Carlton Hotel at that particular time?

A I was accompanied by Lt. Sippel's commanding officer, Major Collins.

Q For the purposes of picking up Lt. Sippel and bringing him to the C.I.D. Office, isn't that correct?

A Yes.

Q And then you and Major Collins and Lt. Sippel proceeded from the Carlton Hotel to the 52nd C.I.D. Office, is that right?

A Yes, sir.

Q Was anyone else with you at that time?

A Yes, sir, a Mr. Short from the C.I.C. was also with us.

Q Who is Mr. Short?

A I do not know his capacity. I know he was accompanying Lt. Sippel at the time.

*

Q And what time did you arrive at the Office of the 52nd C.I.D.?

A That was approximately 7:00 o'clock--ten or fifteen minutes after.

Q And upon arriving there, just what happened?

A We all went into my office and closed the door, and immediately Major Collins started talking to Lt. Sippel. He told him, said, 'Lt. Sippel, the reason we are here concerns you.' He said, 'The C.I.D. has certain evidence and letters in their possession which lead us to believe that you have been involved in immoral acts with a small German boy.' He said, 'You know your rights and you have two choices. You can either tell me the truth about this matter and I will do all I can to get you out without any publicity, or you can deny it and we will have to court-martial you on the evidence that the C.I.D. has.' Lt. Sippel then stated that it was true. We named the boy Guenther Ludwig Hofmann. He stated that the allegations were true that he had had certain immoral acts with this boy, and he stated that the first time he had met him was at the Bahnhof in Frankfurt, Germany.

Q Now, Lieutenant, didn't Major Collins actually say--- and this may merely be a matter of inadvertance---that he had in giving him the alternative of these two choices, the second alternative being, 'You can deny it or remain silent and we will court-martial you.'?

* * *

Q Didn't he say in that, as the alternative to giving the statement, that 'you can either deny or remain silent'?

A Yes, sir, that is correct.

Q And in that event 'you would be court-martialed', is that correct; 'if you deny it or remain silent you would be court-martialed'?

A He said, 'We will have to try you on the evidence that the C.I.D. has.'

Q Now, didn't he also say in connection with that statement that 'I will take it up with my headquarters and see if I can hospitalize you and get you out of the Army without anyone in the organization knowing anything about it'?

A Yes, sir, he said he would call---

* * *

Q Now, would you complete your answer on that?

A Yes, sir, he said that he would contact some Colonel-- I don't know who--and do the best he could to get him out of the service without any publicity, and he mentioned some other man that had evidently been involved under the same circumstances. He said, 'You know how we handled that case.'

Q He cited that other case as an illustration as to how this case could be handled, is that correct?

A Yes, sir.

Q Now, isn't it true that Lt. Sippel objected to being removed from the C.I.C. Corps, or made some statement about not desiring to be removed from the C.I.C. Corps on that occasion?

A Yes, he---

* * *

A Yes, he asked Major Collins, said, 'Isn't there any way that I can remain in the Corps?'

Q And what was the rest of the conversation on that point?

A I didn't pay too much attention. I really don't remember what else did take place there. I know it was right at that point that I interrupted the Major---

* * *

A Yes, sir, I say it was right at that point I interrupted Major Collins and told Lt. Sippel that the 52nd Criminal Investigation Detachment was charged with the official investigation in the case, and that we could not promise him anything, that we could

merely produce the facts, and would refer the facts, the completed report, to the Staff Judge Advocate who would decide whether it would be tried or not. We did not know.

*
 Q In other words, we are not trying to trick you, I understand from your testimony now that the CID statements had not yet been transcribed, you sent for the file containing the statement, you didn't pay much attention to whether it was the file by the police, but the statement of Guenther Hofmann was shown to Major Collins, the one shown to you by the colonel?

A I am sure that it was.

Q That was given to Major Collins and Major Collins used that in his conversation with Lt. Sippel?

A I can't state that.

Q That was the basis of his discussion with Lt. Sippel?

A That and the letters and the picture." (R 320-325,327.)

Sergeant Wrenn also testified that just prior to the time the statement was taken he entered Lieutenant Painter's office and Lieutenant Painter told him that the accused wanted to make a statement. Sergeant Wrenn, Mr. Stewart and the accused went to an adjoining room. Sergeant Wrenn asked the accused if he was aware of his rights under the 24th Article of War and the accused stated that he was aware of his rights. Wrenn advised the accused that anything that he might say, do or write, during an official investigation which was being conducted, could be used against him in the event of a court-martial and that he did not have to answer any questions which might incriminate him or degrade him. He further advised the accused "that no one present could make him any offers or promises, and that there were no strings attached to this statement, suggested that he read the legend printed on the statement form that I handed to Lieutenant Sippel ***". The accused stated that he wanted to make a statement. Thereupon the accused made the statement which was reduced to writing. The statement was made and reduced to writing in about three quarters of an hour. The group returned to Lieutenant Painter's office where Major Collins, Lieutenant Painter and a Mr. Short were present. Agent Wrenn advised the accused of his rights and also told him "that no one present in the room could make him any offers or promises, that no one in the CID could, that whatever he had written in that statement was voluntary and could be used against him in the event of a courts-martial." The accused signed the statement and "then swore to the statement in the presence of Lieutenant Painter" (R 272,278,295, 305).

When the statement made by the accused was offered in evidence the defense objected to its reception on the grounds that it was involuntary and the accused was sworn and testified only as to circumstances under which the statement was made.

The accused testified concerning the events leading up to the making of the statement as follows:

"Q Now, directing your attention now to the night of the 2nd of January, and in particular to the Carlton Hotel, at the time when as testified to by the previous witness, he and Major Collins came down to bring you out to the C.I.D. Office, will you tell the court what happened on that occasion?

A Well, I was ordered to Frankfurt by my commanding officer, Major Collins, ordered to meet him at the Excelsior Hotel, at which time he told me to go over and get something to eat at the Carlton with Mr. Short who was also there. After having supper, Major Collins came back and he told me to come along with him--to where I didn't know--and when I went out to the car I was introduced to Lt. Painter, whom I met at that time, and they drove me to the 52nd C.I.D. Headquarters. The address I don't know. It was here in Frankfurt. And then---

Q What, if anything, was said to you on this occasion of your first meeting with Major Collins and Lt. Painter?

A Nothing was said to me. They just told me to accompany them.

* * *

Q When you arrived at the Office of the C.I.D., what persons were present in that office?

A The only people who were present was Major Collins, Lt. Painter and Mr. Short and myself.

* * *

Q Now, you go ahead and tell the court what happened after you entered that office--what was said and who said it?

A I was brought in and I was told to sit down on the couch and Major Collins came over and he says, 'We are here because of you.' I looked at him. He says, 'There have been charges of unnatural sex relations brought against you...', he says, 'by a German boy by the name of Guenther Hofmann.' Well, I immediately was astounded that any such charges had been brought against me.

Q And what did you do or say about it?

A He asked me if I knew Guenther Hofmann. I told him I did. He says that, 'we have here several statements of German witnesses and some letters that you wrote.' 'Now', he says, 'do you admit to these unnatural sex relations?' and I told him I didn't want to answer at that time. So then he pulls his chair over close to me. I was at that time--I don't know just how to describe the feelings that I had, such a charge as that brought against me, and it dealt me a nasty blow. So then he said, 'Well, charges of this type are very serious charges.' He says, 'You can remain silent or deny these charges, and you will be court-martialed; or give the statement that the C.I.D.

wants', and he says, 'the thing will be more or less handled administratively.' I still didn't say anything. Then he said--- so he told me then the choices.

Q Tell us what he told you were the choices. What did he say were the choices?

A He said that charges of this type are serious. He says, 'You will be---now, if you make this statement the C.I.D. wants, there will be no publicity. You will be transferred out of the Corps into another outfit and possibly be returned to the States.' He said, 'But if you want to stay silent or deny these charges', he says, 'we will prefer court-martial charges against you and there will be publicity connected with it and a lot of nasty publicity,' and he says, 'I knew you don't want that.' So then---

Q Now, at the time he was talking to you, did he have any papers, or did he show you any papers?

A He showed me, says, 'Here', when he told me he had statements of several witnesses; he showed me the papers and the one he actually showed me was the one I can more or less identify, was more or less of a German statement with an English translation attached, and he pointed out particularly the signature of Guenther Hofmann on the bottom of that paper.

Q Now, I will show you what has been marked Defense's Exhibit L for identification and ask you if that is the document to which you refer as being the German statement to which the English translation was attached? Is that correct?

A Yes, it is.

* * *

Q Go on and tell me what else happened.

A They asked me again if I would make a statement admitting to these unnatural sex relations, and I told them on the conditions made to me by Major Collins I would make the statement.

Q You say, 'I told them'---who did you tell it to? ---Major Collins or more than---

A Well, to Lt. Painter. He at that time asked me if I would elect to make a statement.

Q What did you say to him? What were your exact words to Lt. Painter?

A Well, he asked me if I would admit to the charges of unnatural sex relations.

Q And what did you say?

A I told him that under the conditions that were made to me

and promises that were made to me that I would make the statement admitting these unnatural sex relations.

Q Then what happened?

A And I said to Major Collins, I asked him, or told him I didn't want to leave the C.I.C. I had been with them now for almost three years and I liked the work very much and I didn't want to leave, and he informed me that there was nothing that could be done; when accusations are brought against a member of the Corps, that it is the policy that the man will be transferred out of the Corps. So therefore, I was more broken up about leaving the Counter Intelligence Corps, and the statement of the publicity that would be made if I elected to deny any of these charges or remain silent.

Q What did you do?

A So then I elected to make the statement.

* * *

Q Lt Sippel, it is a fact, isn't it, that Lt. Painter out in on the conversation that you and Major Collins were having and said that the C.I.D. was not interested in and not bound by any promises?

A If he did, I didn't hear him.

* * *

Q In relation to the document marked defense Exhibit L, which is now in evidence, I want to show you that document, particularly page 1. I will ask you to look at the first page, and the reverse page thereof, and page 3 and page 4 of this document, and tell the court which one of the pages were shown to you when you were in the CID office in the presence of Major Collins and Lt. Painter and Mr. Short. What portion of that document was shown to you, if any?

A The portion bearing the signature of Guenther Hofmann and Krebs.

Q That is with both names appearing on that page?

A Yes.

Q Was any other portion of that document shown to you?

A No, it wasn't.

Q In relation to this document, or any other document, will you tell the court where any of these documents were at the time you were being spoken to by Major Collins?

A Those documents were in the possession of Major Collins at the time.

Q What was he doing with them?

A He was reading extracts from the supposed English translation of Guenther Hofmann's statement." (R 334-337,340,368.)

The defense offered and the court received in evidence a statement made by Guenther Hofmann "for the limited purpose of showing what was the basis of the discussion with Lt. Sippel at that time." Both Lieutenant Painter and Lieutenant Sippel testified that this document was the basis for those discussions (Def Ex N, R 342). This statement reads:

"Criminal Police
4th Dec.

CRIMINAL POLICE
OFFENBACH MAIN
DATE: 30th Dec 1948
CASE: #4829/48

Offenbach Main 29.12.48

Being summoned there appears the young pupil Guenther Ludwig Hofmann, class #7 at Mathildenschule, born 5.6.34, at Offenbach Main, residing: Offenbach Main Mathildenstrasse #17, with foster parents Karl Heinz Hofmann, and being questioned states the following:

In June of this year I often went to the Frankfurt Main Railroad Station with my friends Roland SCHULZ from Offenbach and Robert Bischof from Frankfurt, to steal articles out of the cars that were parked there. There we also addressed an American, sitting in a car, and asked him for chewing gum. The American said that he did not have any. BISCHOF asked him if we could take a ride. The man said that he could only take one of us for a ride. I was standing nearest to the door of the car. He requested that I should come along. I did not know where he wanted me to go to. After a while we stopped at the Rhein Main Aerodrome. The American had some sandwiches and milk brought by another man. After 5 minutes we drove off again.

On the way back, the man touched my sexual part, saying I should take some chocolate out of the front compartment. This day the man did not do anything else with me, but took me to the street car stop HYPODROM. The American told me to be at the Frankfurt Main Railroad Station between 1400-1500 hours the next day. Next day I went to the place. On this day we only drove around Frankfurt. The American told me to be at Uferstrasse, Offenbach Main four days later at 1400 hours. On this day we drove again to the Autobahn in the direction of Darmstadt. On this trip he again touched my genitals and requested me to do the same. Although I still hesitated he took my hand and lead it to his genitals. Both his and my trousers were buttoned. On this day he again gave me chocolate. At approximately 1630 hours the American brought me back to Uferstrasse, from where I then walked home.

During the next week I met him four (4) times in Frankfurt, Main Railroad Station, upon his request. We always drove the same way to the Autobahn. On this trip he opened my trousers with his hand the first time and played with my genitals, while he was steering the car with the other hand. The American said I should not be ashamed. On the way back he asked me if I would like to drive with him to Landshut. I said yes, but he first had to ask my uncle. On this day the American drove me to my home and went to my uncle. On this day I learned what the name of the American was and what rank he had with the army. The American showed me his drivers license on which there was written Lieutenant and the name Norman SIPPEL. The American told my uncle that he wanted to adopt me and take me to the States. My uncle said I could drive with him.

A week later, it was on a Sunday, he picked me up with his car. We first drove to Frankfurt and picked up a lady with her child who he took to Landshut. In Landshut we lived in a house where only Americans lived. I cannot state what street it was. We lived in one room with two beds. During the day I was in the house and in the kitchen. At 1800 hours both of us had supper in the large dining room. Most of the times I went to bed at 2100 hours. Often the American went to sleep with me, however, sometimes came later. But I always was still awake when he came. In bed the American then touched my genitals and made movements to and fro what I then also had to do on him. After a few minutes a fluidity flew out of his sexual part. This did not happen to me.

The next day the American was on a business trip. The day thereafter he again touched my penis and I his, too. I told him that I did not like this. Thereupon the American said that I should not tell anybody about it, he even would buy me a suit and shoes. The next day he bought me a suit and shoes. I stayed 14 days in Landshut with him. We touched our genitals in the same way as before. The American never again requested me to do such again. After 14 days he took me back to my foster-parents in Offenbach/M.

In the apartment of my foster-parents the American stated that he would not come back for the next three weeks as he had to make a trip to Luxemburg. During that time I received three letters from him. The letters are still in my possession. In the last letter the American asked me to come to Straubing, he would pay for the costs. From my aunt I got the money for the trip. For 8 days I was with him in Straubing. We again were living in a house where only Americans were living in, in Regensbergerstrasse. We had two rooms which were opposite on

the hallway. In Straubing the American did not make advances toward me and did not request anything that was wrong.

After 8 days I was then taken to Offenbach by the American in his car. In front of my home he bid me good-bye and told me that he would write when he would come back again. Since then I did not see the American nor did he write to me.

During the period of time I have known the American I received the following items from him: 1 suit, 2 pairs of shoes, 1 pair of trousers, 2 pairs of underwear (trousers) 1 shirt. Food, i.e. candy, fruits, cans of meat, cigarettes, chewing gum, cookies and sweets. These items I got from the American only. I gave them to my aunt.

Although I was questioned repeatedly by my aunt and uncle whether he did not do anything wrong to and with me I did not say anything and stated he would give all of this to me merely as gifts.

I knew that I had done something wrong and was ashamed to tell my foster-parents. I cannot state anything more.

Personally read, understood and signed:

Guenther Hofmann

Closed:
/s/ Krebs
(Krebs)
Asst Crim Pol." (R 365,366)

The pretrial statement of the accused was received in evidence as Prosecution Exhibit 8. In admitting this statement the law member ruled:

"*** With reference to the offer of the prosecution of Prosecution Exhibit No. 8 which is the confession of the accused and with reference to the objection by the defense to the introduction of this document, it is the ruling of the law member that in order to determine the voluntariness of the confession offer and, therefore, its admissibility it must first be determined whether or not there was coercion or an unlawful influence used in any manner whatever to obtain the confession. From an examination of the record and from looking at the matter in the light most favorable to the accused it appears that if there were influence present at such time as the accused made his confession its purpose was kindly and with the view to friendly assistance to the accused who found himself involved in a serious matter and it was not for the purpose of inducing a confession. And it would appear, therefore, that if there was such influence present it was not unlawful or improper. Additionally, the confession does

not appear to have been predicated or conditioned upon a promise or inducement. No coercion as such appears. The burden has been sustained by the prosecution. The corpus delicti has been established. The accused appears to have been thoroughly warned of his rights under the 24th Article of War and could have made his confession voluntarily. The objection by the defense to the introduction of the confession offered as Prosecution Exhibit No. 8 will be overruled and the confession will be admitted in evidence. It is understood, of course, that this rule merely places the confession before the court and it is for each court member to come to his own conclusion as to whether the confession is voluntary or not. Please proceed." (R 392)

This statement by the accused was a complete confession of the offenses charged in the specifications (Pros Ex 8).

The accused was informed of his rights as a witness in his own behalf and elected to testify. He testified that he was born on 6 February 1918 in Pittsburgh, Pennsylvania. Upon completion of high school in 1937 he was a representative of the Boy Scouts of American at their World Jamboree in Holland. From September 1937 until the summer of 1938 he worked for his father who was an interior decorator and house painter. During the period of the summer of 1938 to late in 1939 he was the activities director and assistant camp director of a boy scout camp in the city of Pittsburgh. His duties included the giving of first aid and discussion of various subjects including sex. Thereafter he was employed by the Mesta Machine Company until 25 March 1941, at which time he was drafted into the Army. He attended Officer Candidate School and was commissioned a second lieutenant on 6 March 1943. He participated in the Normandy landing on 6 June 1943 and remained in combat until he was wounded in Luxembourg on 10 September 1943. After thirteen months of hospitalization because of his wounds he was returned to active duty. In July of 1946 he was assigned to the "CIC" at Frankfurt, Germany. During the early part of 1948 while he was parking his car in order to go to the Carlton Hotel three German boys came up to his automobile and asked him for cigarette butts, which request was refused. On his return to his automobile the three boys again approached him and asked if he had any candy or gum, to which question he replied, "No." Two of the boys started to leave but the third boy, Guenther Hofmann, asked, "Would you take me for a ride." He took the boy for a ride inasmuch as he did not have anything to do. During the ride he asked the boy his name and other information relative to his family. After this meeting he took Guenther Hofmann on other automobile rides and became interested in his welfare. The boy was an orphan and he decided to adopt him if such procedure was possible. While at Straubing he received "final notice and also from this lawyer" that he could not adopt Guenther and he informed Guenther of this fact. This information disappointed Guenther very much as he appeared to have his "heart and soul on going

to America with me." During July 1948 he took Guenther Hofmann with him to Landshut. While in Landshut they occupied the same room which contained twin beds. They stayed in Landshut about fourteen days. In September 1948 Guenther Hofmann spent a week with him at Straubing. He never took Geunther Hofmann's penis into his mouth. Guenther Hofmann never took his (accused's) penis into his mouth. "That didn't occur."

On two or three occasions, once during an automobile ride around Frankfurt and another time at Landshut, Guenther complained that his (Guenther's) penis was hurting. Lieutenant Sippel examined Guenther's penis and "felt in the groin, the penis and testicles." He told Guenther that he should tell his uncle about his trouble and that he should see a doctor.

Lieutenant Sippel further testified:

"Q I hand you the document and ask you if that is Defense's Exhibit L, the German version of the statement of Guenther Hofmann?

A Yes, sir, this is the document.

Q What portion of this document was shown to you?

A He held the document in his hand and held it out in front of me and said, 'Here's the statement of Guenther Hofmann', and pointed out the fact this was the signature on the document.

Q So it was page three shown to you?

A That is about all I saw.

Q That is the only part of the document that was shown to you, is that right?

A That is right.

Q Now, then what was said? What did you say to that?

A Well, I didn't say anything. I was just dumbfounded; speechless. I couldn't make any statement one way or the other at that time.

Q Then what was said next and by whom?

A I am trying to recall because after these accusations were made the whole recollection now is very hazy and I am trying to pick it out as to what was testified, as to whether it is my knowledge or whether I heard it here in the court.

Q To the best of your ability what was said?

A Major Collins then told me that I could deny these accusations or remain silent. He says, 'If you do that', he says, 'you will be court-martialed on the evidence that the C.I.D. now has',

and he says, 'there will be a lot of nasty publicity in connection with that', and he says, 'or you can give the C.I.D. the statement that they want', he says, 'and the thing will be handled hushed-up. Nobody will know anything about it, and it will be more or less an administrative handling.' Whether he used those words or not, I don't know, but that was more or less the impression or implication that I got and then he said, 'Are these accusations true?'

Q Now, what accusations? Did he just ask in those words, or state the accusations to you?

A Well, he said, 'Are these unnatural'---or--- 'Did you have unnatural sex relations with this boy?'

Q Is this the question that was asked---'Did you have unnatural sexual relations with this boy?'

A As I can recall, to the best of my ability, yes.

Q Was there anything said at that time about taking the boy's penis into your mouth or the boy taking your penis into his mouth?

A No, there was no mention of it.

Q Of your taking his penis in your mouth or his taking your penis in his mouth--no mention of that?

A No mention of that.

Q The words that were used--'Did you have these unnatural sex acts?'-- is that right?

A Yes.

Q And to what unnatural sex acts was he referring, if any?

A Well, I couldn't--I didn't know what unnatural sex act he was referring to and then he again referred to the part---he says, 'We have these statements here from these German witnesses that these acts have been committed', and he proceeded to read extracts from one, from Guenther Hofmann's.

Q Did he read the extracts from any other witness's statement?

A No.

Q Well now, after he read the extracts he asked this question this one time that you just testified to, what happened?

A Then he asked me again, 'Well, did you at any time touch the genitals, or the sexual parts, of this boy?' And I said I had on five or six occasions, and in my mind at that time was the affairs that I just testified to.

Q Now, all right, how long was it, were you in the room, before you finally agreed to make a statement?

A The time was very hazy. It seemed, to be truthful with you, it seemed like hours that I was there.

Q Was there any more conversation that you have just recited?

A There was conversation back and forth between Major Collins and Lt. Painter and Major Collins and myself in discussing the handling of other officers that were accused of such offenses.

Q What was discussed along that line in your presence?

A As to the handling of these cases and how they have handled cases in this way before.

Q What was said? Tell us what was said. Don't describe it-- if you can remember. What was the substance of it?

A The substance of it was that these officers, or not only officers, enlisted personnel, were handled in an administrative manner, administratively.

Q Under what conditions?

A On the condition that they gave a statement and the whole thing would be hushed up. They would be more or less transferred to another outfit and then resign from the service.

Q Now, who made these statements of that substance and effect?

A I believe Major Collins was making most of this conversation. Just who said what, I don't recall, but in sum and substance, that was the general effect of it." (R 424,425,426.)

5. Discussion

The only evidence, aside from the confession introduced during the trial, which tended to show the commission of the offenses charged was the testimony of Guenther Hofmann. It is to be noted that Guenther Hofmann admitted that he was a thief and an accomplice in the commission of the alleged offenses. Although a conviction may be based upon the uncorroborated testimony of an accomplice, such testimony, even though apparently credible, is of doubtful integrity and is to be considered with great caution (MCM, 1949, par. 139a; Sykes v. United States, 204 F. 909 (C.C.A. 8th 1913)). The testimony of the witness Guenther Hofmann was shown to be at variance with the statement he made to the German police. This fact tends to impeach the witness and casts doubt upon the reliability of his testimony.

The pretrial statement (confession) of the accused was received in evidence over the objection by the defense that it was not voluntarily made. Evidence was introduced relating to the making of this statement. This statement was made on the evening of 2 January 1949 in the office of the 52nd Criminal Investigation Detachment. The questioning of the

accused and the making of the statement were completed in about one hour.

In discussing the general principles governing the admissibility of confessions the Manual for Courts-Martial provides in part:

"No statement, admission, or confession of an accused person obtained by the use of coercion or unlawful influence shall be received in evidence by any court-martial. ***

* * *
 "A confession is not admissible in evidence unless it is affirmatively shown that it was voluntary. *** No hard and fast rules for determining whether a confession or admission was voluntary are here prescribed. Some instances of coercion or unlawful influence in obtaining a confession or admission are:

* * *
 (4) Promises of immunity or clemency with respect to an offense allegedly committed by the accused.

(5) Promises of reward or benefit, of a substantial nature, likely to induce a confession or admission from the particular accused." (MCM, 1949, par 127a.)

In CM 284729, Peschiera, 55 ER 409, the Board of Review considered a case where the accused were told that "if they would tell everything they knew about the case, why things would be much easier for them." The Board said:

"*** it was held in CM 183917 that a confession of a private was inadmissible in evidence because induced upon the promise of a sergeant to the effect that, if the accused would produce certain articles alleged to have been stolen, he would receive immunity. In CM 152444, a confession obtained by a sergeant from a private by telling him that he was under suspicion and that it would be best for him to tell the truth and 'come clean' since otherwise his offense would be found out sooner or later and the penalty would probably be more severe, was similarly held to be inadmissible. Dig. Op. JAG, 1912-40, 395 (10). Also in CM 230377, Wilson, 17 ER 361, a case in which a private made a confession upon being told by a sergeant that '*** if you have taken money from anyone else you might as well admit it. The penalty won't be anymore severe', the confession as to the other thefts was held to be improperly admitted.

"These precedents, as well as the principles set forth in the Manual, clearly reveal that it is the purpose of military justice to safeguard both the court and the accused from the consequences of a finding of guilty based upon a confession induced by promise of favor. *** Since the confessions of each accused were clearly induced by a promise of leniency, they were legally inadmissible."

In CM 261242, Willis, 40 BR 163, the Board of Review said:

"In support of Specifications 2, 3 and 4 of Charge II there was introduced in evidence the sworn written statement of accused made to the investigating officer (Ex. 3), in which he confessed that he committed the offenses charged in these Specifications. The officer to whom the confession was made testified on direct examination that he warned accused of his rights at the time the confession was made. However, on cross-examination of this witness by defense counsel the following questions and answers appear in the record:

'Q. Why did you go to see Sergeant Willis to get this confession from him?

'A. Because I thought it would make the preparation of the case much more easier.

* * * * *

'Q. Was Sergeant Willis reminded of his rights?

'A. I explained his rights to him and told him that it would be better for him to sign a confession.

* * * * *

'Q. Did you say that it would be a lot easier on him?

'A. I said that it would be a lot easier on all of us' (R.34).

Obviously a confession obtained under such circumstances was not freely and voluntarily given without hope of reward or fear of punishment, was not competent evidence, and was erroneously admitted. ***"

A similar situation was presented in CM 307004, Butters, 60 BR 1. In that case the Board of Review said:

"*** The prosecution's evidence reveals that before accused Butters made his statement, he was informed by the investigator that the giving of a statement would be better for him and easier for him and everyone concerned. It is settled by the opinions of this office that a confession is not voluntarily made when the investigating officer informs an accused that if he makes a confession 'things would be much easier' on him (CM 264729, DeNoni and Avino, 4 Bull JAG 421), or that making a confession 'would be better for him' and 'a lot easier on all of us' (CM 261242, Willis, 40 BR 163) since such statements constitute promises of leniency. Consequently the confession of accused Butters was improperly admitted in evidence."

In CM 330238, Pursley, 78 BR 319, the evidence disclosed:

"Q. Capt. Higgins, you stated you were present during the interrogation of the three accused by Col. Booch?

A. I was.

Q. During the course of that interrogation were there any statements made indicating a promise of no prosecution providing restitution was made?

A. There was not. Col. Booch made the remark if they owned up to it he would see they got a light sentence.' (R 32)."

The Board of Review said:

"It is undisputed from the testimony of prosecution witnesses that the confessions of the three accused were not made until after a military superior of high rank had promised 'light sentences' or absolute immunity. It is a basic principle, expressly required in our system of military jurisprudence that a confession is generally to be received with caution; that a confession must be shown to be voluntary; that the fact a confession was made to a military superior or his agent or representative '***will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior'; that facts indicating '*** a confession was induced by hope of benefit or fear of punishment or injury inspired by a person competent (or believed by the party confessing to be competent) to effectuate the hope or fear is evidence that the confession was involuntary' (par. 114a, MCM, 1928, pp. 115,116); and that the burden of proving the voluntary character of a confession rests upon the prosecution (CM 233543, McFarland, 20 ER 15,22). Considered in the light of these principles, the facts and circumstances in the present case manifestly show that any statement or confession made by accused to Lieutenant Colonel Booch could not be held voluntary in view of the promises concededly made. ***"

In CM 325329, Holland, 74 ER 147, 156; 6 Bull. JAG 287, the Board of Review said:

"In CM 292716, MacDonald, 4 ER (ETO) 357, 365, a confession was held to be involuntary and inadmissible in evidence because of the actions of Captain Rasmussen. Captain Rasmussen testified that before interrogating the accused he said,

'We wanted his story, and we wanted it honest and straight-forward, and we did not want any beating around the bush, and it would be better for him to make a

clean breast of this thing because the government would find these things out sooner or later, and we wanted him to tell the whole truth of the matter.'

"Although in the instant case the accused was warned of his rights under the 24th Article of War at some time during his interrogation by his military superiors and was again warned of his rights just prior to the time he signed his confession, it also appears that the accused's commanding officer advised the accused to make a statement and that he was 'badly implicated in this thing and that it would be advisable for him to come clean rather than make a prolonged or difficult investigation' and that it would be easier for him if he made a statement. This statement was made during an interrogation which began about 8 p.m., and lasted until about 3 a.m. The testimony relating to the securing of this confession impels the conclusion that the confession was involuntary and secured through a hope of benefit inspired by the accused's military superiors whom accused had every reason to believe could effectuate this proffered benefit. The confession was not admissable in evidence."

In the instant case, it appears from the testimony of Major Collins, Counter Intelligence Corps, the accused's commanding officer, and Lieutenant Painter, 52nd Criminal Investigation Detachment, that at the time the accused was questioned he was informed of the charges made against him and warned of his rights under the 24th Article of War. Major Collins told the accused that he could either remain silent or deny the charges, and stand court-martial with the attendant bad publicity, or he could give a statement admitting them, and the matter would be handled administratively. The accused could choose between the two alternatives. Major Collins also told the accused that he would take the case up with his headquarters and would see if he could get the accused out of the Army without anyone in the organization knowing anything about it, and that he would do his best to get the accused out of the service without any publicity. He also mentioned another case which was handled as an administrative matter as an illustration as to how the accused's case could be handled. Major Collins, Lieutenant Painter and the accused then discussed other cases of a similar nature which had been disposed of administratively when a particular accused had admitted the charges rather than be subjected to a court-martial.

This discussion was admittedly for the purpose of determining the easiest way out of the matter for Lieutenant Sippel and for everyone else.

Lieutenant Painter also testified that during the conversation the accused asked Major Collins if there was any way that he could remain in the Counter-Intelligence Corps and at that time he interrupted Major Collins and told the accused that "We could not promise him anything,

that we could merely produce the facts, and would refer the facts, the completed report, to the Staff Judge Advocate who would decide whether it would be tried or not." The accused testified that he did not hear Lieutenant Painter make any such statement. Major Collins did not testify relative to any such interruption by Lieutenant Painter.

The testimony of the accused relative to the remarks and discussion preceding the making of the pretrial statement with the exception as set out above, is substantially the same as the testimony of Major Collins and Lieutenant Painter. The accused further testified that Lieutenant Painter asked him if he would admit the unnatural sex relations and that he replied that under the conditions and promises made to him he would make such a statement.

The Board of Review is of the opinion that the testimony relating to the securing of the confession impels the conclusion that the confession of the accused was involuntary and secured in an improper manner. The statements of Major Collins and Lieutenant Painter constitute promises of immunity, clemency, reward and benefits of a substantial nature which render the confession of the accused inadmissible in evidence. The discussion relative to how other similar cases had been disposed of was admittedly for the purpose of determining the easiest way out for the accused and every one concerned. The natural result of such discussion was to induce the accused to believe that the persons who made these representations could effectuate the proffered benefits.

The Board of Review is also of the opinion that the statements of Lieutenant Painter, made when the accused was inquiring of Major Collins if he could remain in the Counter-Intelligence Corps, were insufficient to adequately apprise the accused that the inducements held out to him in order to get him to confess could not or would not be complied with and were insufficient to cause him to realize that Major Collins could not effectuate the proffered benefits. The confession was not admissible in evidence.

The Board of Review holds that the erroneous admission of the accused's confession into evidence constituted prejudicial error regardless of the other evidence introduced in the case (CM 329162, Sliger, 77 ER 361, 7 Bull. JAG 13; CM 334790, Cruz, 1949; CM 335632, Reed, 1949).

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

Carlson & McAlfee, J.A.G.C.

(On Leave), J.A.G.C.

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

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CSJAGU CM 337816

7 February 1950

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

FRANKFORT MILITARY POST

v)

First Lieutenant Norman E.)
Sippel, O-1038484, Headquarters,)
7970th Counterintelligence Corps)
Group, European Command)

Tried by G.C.M., convened at)
Frankfurt-Am-Main, Germany,)
7,8,9,10,13,14,15,16,17,20,)
21,22,23,24 January 1949.)
Dismissal, total forfeitures)
after promulgation, and con-)
finement for three years.)

OPINION of the Judicial Council
HARBAUGH, BROWN and MICKELWAIT
Officers of The Judge Advocate General's Corps

1. Pursuant to Article of War 50d(4) the record of trial and the holding by the Board of Review in this case have been transmitted to The Judicial Council which submits this opinion to The Judge Advocate General.

2. The accused was found guilty of three specifications alleging that on various occasions he committed the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Guenther Hofmann during the period from about 1 June to about 30 June 1948 (Specification 1), from about 1 July to 31 July 1948 (Specification 2) and from about 29 September to about 15 October 1948 (Specification 3), all in violation of Article of War 93. No evidence of any 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 the execution of the sentence and to be confined at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The Board of Review held the record of trial legally insufficient to support the findings of guilty and the sentence.

3. The Council finds the evidence to be as stated in paragraph 4 of the holding by the Board of Review. The Board held that a confession made by the accused was not voluntary and that its reception in evidence constituted fatal error.

The accused was vigorously defended by civilian counsel of his own selection. During the course of the trial the defense made numerous objections to the jurisdiction and composition of the court, and the admissibility of evidence. The defense also made several offers of

proof as to matters of evidence which had been excluded by the court. In view of the position taken by the Judicial Council with respect to the admissibility of the accused's confession, it is not necessary to discuss the many other problems presented by the record which would otherwise require serious consideration.

With respect to the circumstances under which the accused's confession was obtained there is no substantial conflict in the evidence. Briefly summarized the record shows that on 2 January 1949, agents of the 52nd Criminal Investigation Detachment notified Major George B. Collins, the accused's commanding officer, of the alleged offenses. The latter arranged to have the accused appear before him and Lieutenant Painter of the 52nd Criminal Investigation Detachment in the latter's office in Frankfurt, Germany, on the evening of 2 January 1949. When the accused appeared at that office, Major Collins started the conversation by apprising him that allegations concerning unnatural sex relations with a minor boy had been brought to his attention. He warned the accused of his rights under the 24th Article of War and told him that he had a choice of two courses:

a. He could make a statement admitting the allegations, in which event Major Collins would do all within his power to obtain an administrative discharge for the accused without any publicity, or

b. He could deny the allegations or remain silent, in which event he would be tried by general court-martial on the evidence available to the CID with resultant unfavorable publicity.

Major Collins adverted to similar cases in which the individual concerned had been discharged administratively.

The accused then admitted that the allegations were true and agreed to make a statement. He was taken to another room where he was interrogated by Agents Wrenn and Stewart. At that time he was again warned of his rights under Article of War 24. Agent Wrenn advised him that "no one in this room" or in the CID could make him any promises. The accused thereupon made a full confession. Some time later he was given an opportunity to resign for the good of the service but refused to tender his resignation.

4. Under the express provisions of Article of War 24 no statement, admission, or confession obtained by the use of coercion or unlawful influence in any manner whatsoever shall be received in evidence by a court-martial.

Among the instances of coercion or unlawful influence in obtaining a confession listed in the Manual for Courts-Martial, are:

"* * * Promises of reward or benefit, of a substantial nature, likely to induce a confession or admission from the particular accused." (MCM 1949, par 127a, p. 158)

Similarly, threats of punishment or other injury have been held to amount to coercion (CM 329162, Slinger, 77 BR 361; CM 280802 Easterly, 53 BR 335).

The problem presented in the instant case is whether the promise to endeavor to secure an administrative separation from the service without publicity in lieu of a trial by court-martial for sodomy with resultant unfavorable publicity is such a substantial benefit as to induce the particular accused to make a confession.

It has long been recognized by the appellate agencies in the office of The Judge Advocate General that a commissioned officer or an intelligent soldier with wide experience is not necessarily induced to make an involuntary confession by the same circumstances which would render involuntary the confession of a less mature or experienced soldier. Thus it has sometimes been stated that a mature and experienced officer must be presumed to know that persons making alleged promises in an effort to secure a confession do not have the authority or influence to effect their fulfillment (CM 320455 Gaillard, Cohen, 69 BR 345, 373, 376; CM 335052 Venerable, 2 BR-JC 32, 36). Similarly it has been held that the degree of inducement inherent in an offer to release the accused from an uncomfortable place of confinement which might be substantial with respect to an inexperienced soldier might not be substantial with respect to an infantry officer who has had extensive combat experience (CM 317064 Johns, 66 BR 169, 186). The foregoing opinions in effect hold that a commissioned officer may be chargeable with a greater awareness of his rights and with a higher degree of sophistication than an inexperienced soldier but they do not imply that a threat of reprisal or promise of a benefit may never render an officer's confession involuntary.

It is clear that Major Collins' remarks to the accused amounted both to a promise of a benefit and a veiled threat of injury to reputation.

The accused had reasonable ground to believe that Major Collins could influence the fulfillment of both the promises and threats which he made. As the accused's commanding officer he had the authority to recommend acceptance of the accused's resignation for the good of the service or to initiate other action to effect his administrative relief from active duty. The accused was undoubtedly aware in general of the Department of the Army policy expressed in WD Circular 179, 10 July 1947, to the effect that under certain circumstances homosexual officers will be given an opportunity to resign for the good of the service. The subsequent opportunity to resign extended to the accused tends to establish that the accused had reason to rely on Major Collins' promise. Similarly as the accused's commanding officer he would normally initiate or process any charges against him.

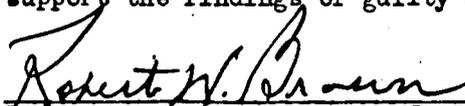
In determining whether the circumstances in this case were such as to induce an involuntary confession, consideration must also be given to the fact that an implied threat to prosecute for an unnatural crime coupled with a promise to avoid disgraceful publicity must be regarded as infinitely more effective intimidation than a threat to prosecute for any other type of offense (Cf. CM 335052 Venerable, supra). The intimidation inherent in a threat to prosecute for an unnatural crime is regarded by the law to be sufficient to constitute the intimidation element of robbery, whereas a threat to prosecute for some other offense would support only the less serious crime of extortion (MCM 1949, par 180, p. 239). It is conceivable that a threat to prosecute for sodomy might induce a person to make an untrue confession rather than to expose himself to the public scandal and irreparable damage to his reputation involved in a trial for the offense.

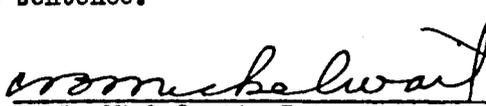
It is apparent from the record that Major Collins' action in the instant case was not motivated by bad faith. Nevertheless he did not have any lawful authority to induce a confession by means of a bargain to effect administrative separation in return for a confession (CM 302675, Tielmans, 26 BR (ETO) 233, 249-250). Nor did he have any lawful authority to hold out as a further inducement to confess the possibility of a trial by court-martial and disgraceful publicity in the event the accused elected to remain silent. Major Collins' mistaken good faith did not render the unlawful influence he exerted any less harmful to the substantial rights of the accused.

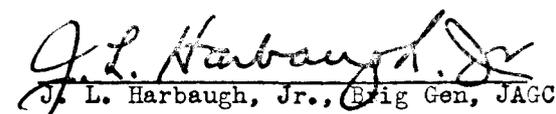
The Council is not unmindful of the fact that the accused's written statement contains an acknowledgment that he was aware of his rights under Article of War 24, that no threat or promise had been made to him and that the statement was voluntarily made. This is not conclusive evidence of the voluntary character of the confession and under the circumstances of this case the acknowledgment was affected by the same taint of unlawful influence as the confession itself (MCM 1949, par 127a; CM 274678 Ellis, 47 BR 271, 284; CM 320230 Huffman, 69 BR 261, 267).

Accordingly the Council is constrained to conclude that the accused was unlawfully induced to make his confession by promises and veiled threats. The reception of such a confession in evidence is forbidden by Article of War 24 and constitutes prejudicial error under the circumstances of this case.

5. For the foregoing reasons the Judicial Council concurs in the holding by the Board of Review that the record is legally insufficient to support the findings of guilty and the sentence.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 337816

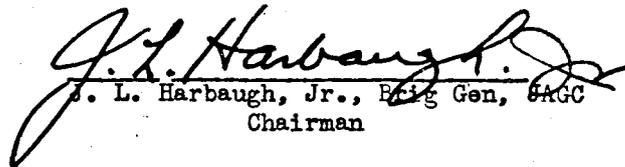
THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant Norman E. Sippel,
O-1038484, Headquarters, 7870th Counterintelligence Corps Group,
European Command, upon the concurrence of The Judge Advocate
General, the findings of guilty and the sentence are disapproved.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

7 February 1950

I concur in the foregoing action


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

7 February 1950



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

149

NOV 8 1949

CSJAGV CM 337847

UNITED STATES)

v.)

Recruit LEROY DONAHOO)
(RA 19099393), Head-)
quarters Detachment,)
6006 Area Service Unit,)
(Post Operating Company),)
Fort Lewis, Washington.)

2D INFANTRY DIVISION

Trial by G.C.M., convened at
Fort Lewis, Washington, 3 June
1949. Dishonorable discharge,
total forfeitures after pro-
mulgation and confinement for
one (1) year. Disciplinary
Barracks.

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

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

2. The accused was tried on 3 June 1949 upon the following Charges and Specifications:

CHARGE I: Violation of the 58th Article of War

Specification: In that Recruit Leroy Donahoo, Headquarters Detachment, 6006 Area Service Unit, (Post Operating Company), Fort Lewis, Washington, then Private in Detachment E, 6006 Area Service Unit, (Post Operating Company), Fort Lewis, Washington, did, at Fort Lewis, Washington, on or about 8 December 1947, desert the service of the United States, and did remain absent in desertion until he was apprehended at Marysville, California, on or about 20 January 1949.

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

Specification: (Nolle prosequi).

He pleaded not guilty to and was found guilty of Charge I and the Specification thereunder, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor for one year. The reviewing authority on 13 July 1949 approved the sentence, 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 accused's absence from military control from about 8 December 1947 to about 20 January 1949 is adequately shown in the record of trial. However, the question presented in this case is whether the court-martial had jurisdiction to try the accused for the alleged offense. Prior to the entry of the accused's plea to the general issue the defense made a motion "to the jurisdiction of the court", alleging that the accused was separated from the service in October of 1947, and was therefore not at the time of the alleged desertion nor at the time of trial amenable to military law, and that the motion was offered as "a plea in bar of trial." Considerable testimony was presented with respect to the accused's "separation" from the service, which may be summarized to the effect that he returned to military control from absence without leave on 5 June 1947 after having been so absent since 1 September 1945; that a temporary service record was initiated for him on 30 July 1947 in the absence of his original service record; that on 4 September 1947 he was ordered to the "Separation Point," Fort Lewis, Washington, was processed for separation and placed on terminal leave of forty-four days prior to being discharged on 22 October 1947, and proceeded to his home; that after his departure from Fort Lewis his original service record was received and it appeared that discrepancies existed between the original and temporary service record which had resulted in the accused being overpaid some three hundred dollars; that the case was then turned over to the CID and no discharge certificate was mailed to the accused on 22 October 1947, or any date thereafter, but instead under date of 16 March 1948 was mailed to The Adjutant General; that accused was returned to Fort Lewis under guard from Southland, Texas, in November of 1947 and on 8 December 1947, without authority, left Fort Lewis, Washington; and, that accused was apprehended at Marysville, California on or about 20 January 1949.

With respect to the defense motion Chief Warrant Officer Eldon M. Schmidt was called as a witness and identified Defense Exhibit A, received in evidence without objection, as an "Enlisted Record and Report of Separation" of Leroy Donahoo, as being a part of a discharge certificate, and that the exhibit was signed by him. On the face of the exhibit appears the statement "7. Date of Separation 22 Oct 47."

Mr. Schmidt further testified upon questioning by a member of the court as follows:

"Q ***Actually, what papers does a man take with him upon his discharge from the service or did he take with him during this period?

A During that period, only the copies of the special orders placing him on terminal leave for so many days.

Q How does that special order read, 'Upon termination of his

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terminal leave'?

A Well, it says like 'Donahoo will be placed on terminal leave for 44 days and proceed to his home', and usually it will give the address of his home and 'will be put on terminal leave for 44 days'. I don't remember whether it stated in the special order whether his discharge certificate would be mailed to him or not because that's so long ago." (R. 20, 21).

Defense Exhibit C, received in evidence without objection was a "WD AGO Form 100, 1 Jul 1945," entitled "Army of the United States, Separation Qualification Record" of Leroy Donahoo. In this document accused's date of separation was indicated as 22 October 1947 and his permanent mailing address as Box 42, Southland, Texas.

Captain Villaescusa, also testifying with respect to the defense motion, stated that he was the Commanding Officer "of the Separation Point at that time"; that Mr. Schmidt was his Adjutant; that accused "was not only told, he was ordered to go home"; and on cross-examination testified:

"Q Now, was this man called back by you before his terminal leave was up?

A I don't know whether he was actually contacted or not, but I do know I reported the fact to the CID before his terminal leave was up, and the orders placing him on terminal leave were revoked prior to his terminal leave expiring. The morning report entries were amended and he was, I believe, transferred back to the Post Operating Company.

* * *

Q When you brief men for separation, do you tell them when they can expect their certificate of discharge and do you also tell them what will be sent to them on the day their terminal leave is over?

A Yes, we told them that their discharge would be mailed to them, and their pay would be mailed to them on completion of their terminal leave." (R. 29, 30).

On redirect examination and examination by the court this witness further testified:

"Q Captain, do you know whether or not any letter was ever sent to this man, which he received, revoking his orders on terminal leave?

A No, I don't know.

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* * *

Q Captain, after the accused was separated on this end and departed this station, was he ever informed his discharge was being held up and he was to return or to be returned to the post?

A Do you mean this particular time --

Q Yes.

A As I stated before, I don't know. It was turned over to the CID.

Q You don't know if he was advised whether his discharge was being held up or not.

A No, I don't.

* * *

Q There is one question I'd like to ask you, Captain, on this order that revoked his terminal leave. Usually, on the distribution on these special orders, they say it will be sent to you. Do you know whether he was included in the distribution of that order revoking his terminal leave?

A I don't recall.

Q Your office published that. Mr. Schmidt signed it as Adjutant?

A Yes.

Q And a copy of that order is available in your files, is that right?

A I know a copy of the revokation would be in the files, in this man's jacket, someplace, I'm sure that I saw it in there."
(R. 30-32).

After a recess for the purpose of securing a copy of the mentioned special order from the files, revoking the accused's terminal leave, the prosecution announced that the special order could not be found. The court thereupon overruled the defense' motion to the jurisdiction of the court and proceeded to hear the case on its merits.

After the prosecution had rested the accused was sworn and testified in his own behalf. In addition to other statements by the accused with respect to being processed for separation, placed on terminal leave, proceeding to his home and never having received any notification of the

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revocation of his terminal leave orders, he stated on examination by the court:

"Q After you were returned to Fort Lewis, and were in the stockade, did you ever receive a special order—or first let me ask this question. Did you receive a special order from the separation center authorizing you forty-five days leave?

A Yes, sir.

Q After you were apprehended, or arrested, did you receive a special order revoking your leave?

A No, sir.

Q Have you since received an order revoking your leave?

A I have not received anything, sir.

* * *

Q You stated that you contacted the Provost Marshal in Lubbock, Texas, I believe, and he had you write a letter to this post and find out why you didn't get the discharge. To whom did you write that letter?

A To the separation center, sir, Fort Lewis, Washington.

Q When was that?

A Well, I couldn't say as to the exact date, but it was sometime in November of 1947.

Q November of 1947, and you say you never received an answer to that letter?

A I never received an answer to anything, sir, nothing.

Q What papers did you have with you at the time you went on your terminal leave?

A Well, I had my separation papers, my form 100, and the papers showing where you ought to be discharged from the U. S. Army.

Q Effective some certain date?

A Sir?

Q Was it to be effective on some certain date?

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A. It would be effective on October the 22nd of 1947.

Q. It would be effective on October 22, 1947?

A. Yes, sir.

* * *

Q. You say you received a special order when you left the separation center?

A. What do you mean, sir?

Q. Giving you a terminal leave of 44 days, you had a special order to that effect did you not?

A. Yes, sir. I had a special order. They gave me a slip of paper.

Q. Did it say what date your last day of duty would be?

A. Yes, sir. It was the 22nd of October, 1947. You would receive your final pay and discharge and you was a free man by mail.

Q. So, your last day of duty was the 22nd of October?

A. That was the last day, I figured that was my last day of terminal leave on the 22nd of October. It showed there how much final pay I would receive at home. It gave me a list of all the men that went through separation center with me and showed me how long my terminal leave would be and said my first check would be mailed to me on or about August the 8th, I am not sure, but I think it was supposed to have been \$92.00. On October 22nd I was to receive another check on my final pay with my discharge.

* * *

Q. Defense's Exhibit "A", was this in your possession when you left Fort Lewis, when you left the separation center?

A. Yes, sir, with my Form 100.

* * *

Q. Were you in Lubbock, or were you in Southland, Texas or were you in Texas on the 22nd of October?

A. Yes, sir.

* * *

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Q Did you understand in addition to that you were going to get a discharge certificate?

A Sir, You mean this—

Q Yes, in addition to that, were you going to get something else? Were you going to get something in the mail?

A In addition to this, they would mail me my discharge.

Q How did you know that was going to come to you?

A They told me at separation center, sir.

Q Oh, they told you?

A Yes, sir, and if anything came up, my terminal leave would be cancelled and I would be notified to return back to the service.

Q And you were never notified?

A No, sir, I was never notified, sir, I never received an Honorable Discharge Certificate, and I never was notified.

Q And you never received any more money?

A No, sir, I most certainly didn't." (R. 52-56).

Neither the prosecution nor the defense offered in evidence either the special order placing the accused on terminal leave or the special order, if such were ever issued, revoking or terminating his terminal leave. It therefore stands uncontradicted that early in September of 1947 the accused was processed through the separation center at Fort Lewis, Washington, was placed by competent orders on forty-four days terminal leave and proceeded to his home in Texas, having been advised that his discharge certificate and final pay would be mailed to him upon the completion of his terminal leave 22 October 1947, and that if for some reason some matter came up requiring his return to the service he would be so notified and his terminal leave cancelled. It is further uncontradicted by any competent evidence that the accused proceeded to his home in Texas, remained there during the period of his terminal leave, did not at any time receive his discharge certificate or final pay, and he was never notified of the cancellation or revocation of his terminal leave, either prior or subsequent to 22 October 1947.

The terminal leave orders received by Donahoo would therefore appear to have been self-executing in form and purported to relieve him from active duty on 22 October 1947. Apparently no attempt was made to recall Donahoo during the period of his terminal leave. A soldier on terminal

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leave is a member of the Army until the end of that leave, and court-martial jurisdiction does not lapse during that period. (Hironimus v. Durant, 168 F. (2d) 288). However, once the terminal leave expires and the discharge is consummated, there remains no court-martial jurisdiction except for offenses in violation of Article of War 94 (U.S. ex rel. Hirshberg v. Cooke, 336 U.S. 210 (1949); par 10, MCM, 1949; SPJGJ:1946/1791, 14 Feb 1946, 5 Bull JAG 35). Such terminal leave orders are self-executing unless they are revoked (SPJGA 1946/1891, 20 Feb 1946; JAGA 1946/10900, 11 Mar 1947; id., 1947/9544, 15 Dec 1947; id., 1948/3881, 19 May 1948). Orders, or revocation of orders affecting individuals are not effective until notice thereof is communicated to the individual concerned (SPJGA 1942/5085, 31 Oct 1942; id., 1944/7651, 1 Aug 1944; id., 1945/6220, 9 Jul 1945; see also par 12, AR 310-50, C2, 26 Jul 1945, then in effect), and an attempt to amend or revoke terminal leave orders is not effective unless notice thereof is communicated, actually or constructively, to the individual concerned (SPJGA 1944/6867, 13 Jul 1944; id., 1945/7031, 31 Jul 1945; id., 1945/7102, 6 Aug 1945).

It is therefore concluded that Donahoo reverted to an inactive status on 22 October 1947, pursuant to the provisions of his terminal leave orders. The Board of Review is not unmindful that Donahoo may have been guilty of fraud in his statements concerning the amount of money due him. However, nowhere in the record of trial does it appear that such statements were the means by which he procured his discharge. In the absence of other information, it does not appear that he procured his discharge by fraud and it could not for that reason subsequently be declared void (CSJAGA 1949/3685, 26 Aug 1949). A charge of fraud laid under the 94th Article of War with respect to the alleged overpayment of the accused was not in issue at the trial by reason of a nolle prosequi thereto having been entered by direction of the appointing authority.

Consequently, the Board of Review is of the opinion that Donahoo was effectively discharged from the service on 22 October 1947 pursuant to the provisions of his terminal leave orders, and it follows that court-martial jurisdiction over him, except for offenses in violation of Article of War 94, terminated at that time.

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.

J. R. Guinand, J.A.G.C.
 On Leave, J.A.G.C.
Carl R. Lauritsen, J.A.G.C.

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

CSJAGN-CM 337855

14 September 1949

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

v.)

Private JAMES H. WATSON
(RA 13164884), Head-
quarters Detachment, 6006
Area Service Unit (Post
Operating Company), Fort
Lewis, Washington.)

2d INFANTRY DIVISION

Trial by G.C.M., convened at
Fort Lewis, Washington, 8 June
1949. Dishonorable discharge,
total forfeitures after pro-
mulgation and confinement for
three (3) years. Disciplinary
Barracks.)

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private James H. Watson, Headquarters Detachment, 6006 Area Service Unit, (Post Operating Company), then Private in the 121st Quartermaster Service Company, did, at Great Falls, Montana, on or about 2 December 1948, by force and violence, and by putting him in fear, feloniously steal from the person of Corporal Hollon W. Gilbreath, 1929th AACCS Squadron, APO 980, about \$95.00, lawful money of the United States, property of the said Corporal Hollon W. Gilbreath.

He pleaded not guilty to the Specification and to the Charge and was found guilty of the Specification and the Charge. No evidence of previous

convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor, at such place as the reviewing authority might direct, for ten years. The reviewing authority approved the sentence, reduced the period of confinement to three years, 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, and withheld the order directing the execution of the sentence pursuant to Article of War 50e.

3. The only question which need be considered is whether the court had authority to try the accused because of the fact that, at the time of trial, the order appointing the court before which the accused was tried included no duly appointed defense counsel.

4. It appears from the record of trial that by paragraph 2 of Special Orders No. 99, dated 10 May 1949, the Commanding General, 2d Infantry Division, appointed a general court-martial to meet at Fort Lewis, Washington. By paragraph 5, Special Orders 119, dated 8 June 1949, the Commanding General appointed First Lieutenant Alvin Gordon as defense counsel of the general court-martial appointed by paragraph 2, Special Orders No. 99, above described, vice First Lieutenant Oliver C. Sard, relieved. For the trial of accused only, by paragraphs 6 and 7 respectively, Special Orders No. 146, dated 18 July 1949, the Commanding General, confirming his verbal order of 8 June 1949 (the date accused was tried), relieved First Lieutenant Alvin Gordon as defense counsel of the general court-martial appointed by paragraph 2, Special Orders No. 99, and detailed him as assistant trial judge advocate of the same general court-martial. The effect of the foregoing orders was to leave the general court-martial appointed by paragraph 2, Special Orders No. 99 without a duly appointed defense counsel for the trial of the accused.

The record of trial shows that the accused was tried on 8 June 1949 before the general court-martial appointed by paragraph 2, Special Orders No. 99 and that no defense counsel appears among the personnel of the court present or absent from the court-martial. The organization of the court reveals that Captain Bradford L. Webster was present as regularly appointed assistant defense counsel and that Major William W. O'Neill and Captain Douglas B. Martin, regularly appointed assistant defense counsel, were absent by reason of verbal orders of the convening authority. The accused stated that he desired to be defended by the regularly appointed assistant defense counsel, and introduced Captain Wilson Esterly and First Lieutenant Oliver C. Sard as special defense counsel. Although Captain Bradford L. Webster examined the record of trial before authentication and signed it as defense counsel, the organization of the court and

the statement of the record as pertaining to the selection of counsel by the accused indicates that at the trial he was not the defense counsel. The question is therefore presented whether or not the failure of the appointing authority to have appointed a defense counsel to this general court-martial had the effect of depriving the court of jurisdiction to try the case.

5. Article of War 11 provides in part as follows:

"For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and one or more assistant trial judge advocates and one or more assistant defense counsel when necessary * * *."

Article of War 17 provides in the second and third sentences thereof as follows:

"The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel, duly appointed for the court pursuant to Article 11. Should the accused have counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel."

The above quoted provisions of Articles 11 and 17 are, except for one minor change, exactly as written before the Articles of War were amended by Title II, Selective Service Act of 1948 (62 Stat. 627). Prior to the mentioned amendments, the Board of Review, in QM 313709, Velarde, 63 BR 237, 241; 5 Bull. JAG 332, considered a case somewhat similar to the one at hand and in so doing, concluded as follows:

"By providing that the accused who provides counsel of his own selection might if he desired have the defense counsel or assistant defense counsel act as his associate counsel the Congress must be held to have had the intent that such defense counsel or assistant defense counsel should be available, otherwise the provision is meaningless.

* * *

"The conclusion is inescapable that the provision of the 11th Article of War directing the appointment of defense counsel for a general or special court-martial is mandatory and that failure to appoint a defense counsel for the general court-martial which tried the accused

constituted fatal error, that the court was without jurisdiction and its action in trying the accused was void."

The Board of Review is of the opinion that the reasoning in the Velarde case, even though in the Velarde case neither defense counsel nor assistant defense counsel had been appointed to the court, is controlling in the case under consideration. Although the accused in the case at hand was ably defended by counsel of his own selection and aided by the regularly appointed assistant defense counsel, nevertheless the defect in the organization of the court-martial is not cured thereby. The court which tried the accused was without jurisdiction and all acts in connection therewith are void.

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

Signed _____, J.A.G.C.

Signed _____, J.A.G.C.

Signed _____, J.A.G.C.

30 September 1949

CSJAGN-CM 337855 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 Private James H. Watson (RA 13164884), 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 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. A rehearing is authorized.

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 337855).

1 Incl

THOMAS H. GREEN
Major General
The Judge Advocate General

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

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CSJAGH CM 337903

OCT 5 1949

UNITED STATES)

v.)

Private First Class JACK H.)
SHAFFER (RA 44119811), 7731)
Special Service Depot Company.)

UNITED STATES ARMY, EUROPE)

) Trial by G.C.M., convened at
) Wurzburg, Germany, 19-20 July
) 1949. Dishonorable discharge,
) total forfeitures after promulga-
) tion and confinement for forty
) (40) years. United States
) Penitentiary, Lewisburg,
) Pennsylvania.)

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

1. The Board of Review has examined the record of trial in the case of the soldier named above.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Jack H. Shaffer, 7731st Special Service Depot Company, did, at Aschaffenburg, Germany, on or about 16 April 1949, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Wilma Hartmann, a human being, by stabbing her with a knife.

The accused pleaded not guilty to the Charge and the Specification. He was found guilty of the Charge and guilty of the Specification except the words "and with premeditation." No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for forty years. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as

the Secretary of the Army may direct, as the place of confinement, and pursuant to Article of War 50e withheld the order directing execution of the sentence.

3. Evidence.

a. For the prosecution.

On the night of 16 April 1949, at approximately 2345 hours, accused and his girl friend, Wilma Hartmann, were seated at a table with some other couples in the enlisted men's club at Aschaffenburg, Germany. At this time Private First Class Mack J. Ray entered the club and was invited by accused to join their group (R 8). Ray accepted and during the next ensuing twenty-five minutes consumed three "double shots" of whiskey while accused consumed two. Ray could not say whether accused was drunk or sober but appeared to have "had a few drinks" (R 9). In Ray's presence accused criticized Miss Hartmann for giving away cigarettes to another girl causing Miss Hartmann to cry (R 11).

At approximately 0015 hours, 17 April 1949, accused, Miss Hartmann and Ray left the club and went to Miss Hartmann's home. They rode part of the way on the enlisted men's bus and walked the remaining distance. Miss Hartmann admitted them with her key and as all three entered, they were met by Miss Hartmann's father. Accused, Ray and Miss Hartmann went to Miss Hartmann's bedroom where they sat and talked. Soon after their arrival, Miss Hartmann went to the kitchen, prepared tuna fish and egg sandwiches and served them to accused and Ray in her bedroom. Accused and Ray ate the sandwiches and each had one "shot" of Golden Wedding Whiskey from a bottle which accused produced (R 9-11,57).

Following or during the refreshments, an unsuccessful attempt by accused to explain, in English, a murder reported in Stars and Stripes, made Miss Hartmann cry. Miss Hartmann told accused that it would be better if he returned to his depot and, still crying, removed some dishes from the bedroom to the kitchen. Accused followed her to the kitchen, grabbed her, and escorted her back into the bedroom. Although he did not force her neither was his manner gentle (R 11,12,58). Miss Hartmann's father followed them to the bedroom but could not gain entry because accused had locked the door and thrown the key through a closed window, thereby shattering the window pane (R 12,58). Accused stumbled against a lamp and it fell to the floor putting out the lights (R 12). In the meantime, Herr Hartmann was knocking at the door, demanding admittance to the bedroom and threatening to call the military police (R 58,59). The door was finally opened by Miss Hartmann with another key or by the accused with a pick. Miss Hartmann lighted two candles

in her bedroom and while Ray went to the street and recovered the key which accused had thrown out, she "fixed" the fuses which relit some of the lights but not those in her bedroom (R 12,59). When Ray returned to the bedroom with the key, accused told him to take Herr Hartmann, who "was nervous and upset, running all over the place," to the kitchen to pacify him. Ray complied with accused's request and as he and Herr Hartmann were sitting and conversing in the kitchen, they heard Miss Hartmann cry out or scream as if in pain. They both ran from the kitchen into the bedroom where, in the dim candlelight, accused was observed leaning over Miss Hartmann who was lying across the end of the couch with her legs "sticking straight up." Accused's hands were on Miss Hartmann's shoulders on either side of her neck with both his thumbs extending inward along her collar bone (R 13,59,60,62).

Private First Class Ray's account of what followed this incident is as follows:

Q. What did you do, and what did Mr. Hartmann do at that time?

A. Mr. Hartmann, he came in and was crying, 'Jack, Jack', and I told Jack, 'Leave this girl alone, Jack. She's too little and you will hurt her.' He says, 'All right'. He said to Mr. Hartmann, 'All is "schoen".' He told me to take the old man out and quiet him down.

Q. He told you again, then, to take the old man out and quiet him down?

A. Yes, sir.

Q. Then where did you go?

A. We started to the kitchen.

Q. Who do you mean by 'we'?

A. Me and Mr. Hartmann. I couldn't say how long, but we heard her scream.

Q. About how long had you been in the kitchen before you heard the next scream?

A. Maybe a minute. It could have been less or more.

Q. And when you heard the next scream, what did you do?

A. We both ran into the room and Pfc Shaffer was tearing Wilma's clothes from her breast, saying 'I've killed this poor girl.'

Q. Saying, 'I've killed this poor girl'?

A. Yes, sir. I grabbed my tie, coat, and cap and ran for the MP station.

Q. And you say he was tearing her clothes off?

A. Yes, sir. He was tearing the clothes from her breast." (R 14)

Herr Hartmann's testimonial version of what occurred thereafter is as follows:

"Q. What did you see when you entered the bedroom at that time?

A. In the dim light of the candles I could see that Shaffer was on the couch and holding my daughter by the throat.

Q. And what did you do at that time?

A. I had a flashlight in my hand and I crashed it on the back of Shaffer.

Q. How many times did you hit him?

A. One time. He didn't feel it.

Q. What happened then?

A. Then I went away to the hospital to place a call.

Q. Whom did you call?

A. I asked the doorkeeper to call for the MP.

Q. And then did you come back to your apartment?

A. Yes.

Q. How long were you gone? About how long?

A. Approximately ten minutes. It took a long time to explain to the doorkeeper.

Q. When you got back to your apartment, what did you find, if anything?

A. When I came upstairs again to my apartment, Jack was kneeling before the couch and calling, 'My darling, my darling'.

Q. Where was your daughter?

A. She was on the couch.

Q. Was there anybody else present in the room at that time?

A. No." (R 60)

Between 0230 and 0300 hours, 17 April 1949, in response to the calls made by Private Ray and Herr Hartmann, members of the Military Police, some German policemen and a medical aide and ambulance arrived at the Hartmann residence. (R 14,29,41,44,65,68). Wilma Hartmann, "naked

from the waist up" was lying on the couch in her bedroom with accused bending over her pressing a cloth to a wound in her chest. Accused was crying and was heard by military policemen to say, "Do something. I just stabbed my girl" and "I have killed my girl" (R 29,30,42,43,44, 45,46). The room was untidy. A table lamp had been upset and was lying on the floor. The rug had been "messed up" and some bloody under-clothing belonging to Miss Hartmann lay on the floor. The wall at the head of the davenport upon which Miss Hartmann was lying was blood-spattered and there were "clots of blood" where her head had been resting. On the floor between the davenport and the wall, a hunting knife, which was "covered with blood," was found, and on the bed across the room lay a knife sheath (R 30-34,48,49,50,51,69-70,72). The medical aide examined Miss Hartmann and found that she had a serious penetrating wound, approximately in the center of the chest about an inch long. He caused her immediate removal to the German City Hospital, Aschaffenburg, where she died eight days later on 25 April 1949. An autopsy performed by Dr. Johann Georg Becker established that Miss Hartmann's death was caused by a stab wound which "entirely punctured, not only the heart, but the heart sacs and the back side of the heart sac" (R 33,46,76,80, 83).

In the opinion of several prosecution witnesses, accused was drunk when they observed him at the Hartmann home and at the hospital after the fatal stabbing. His eyes were bloodshot, his face was flushed and his speech was thick. He was emotionally upset, was crying and did not seem to have control of his faculties (R 33,34,38,42,43,44,74,79).

At the Military Police Booking Station where accused was taken after Miss Hartmann was delivered to the hospital, accused was warned of his rights under the 24th Article of War by an agent of the Criminal Investigation Division. Accused then orally admitted that the knife found in Miss Hartmann's bedroom belonged to him, but when a receipt for the knife was prepared and tendered to him, he disclaimed that he had a knife (R 49,52,35,36). The agent desisted from further interrogation of the accused at this time because the answers accused gave were not rational or responsive and because accused smelled of liquor and was under great emotional stress (R 54). On the following day, 18 April 1949, the agent again interrogated accused and accused related that after he had fashioned the handle for the knife, he had brought the knife to Miss Hartmann's home and had left it in the drawer of the night table in her bedroom. Accused further stated to the agent that he could not furnish details or completely recall what had occurred in Miss Hartmann's room other than that he had argued with Miss Hartmann and also that he "had an argument with her previously as she felt he drank too much." (R 52,53)

b. For the defense.

Accused and his girl friend joined two other couples at a table at the Enlisted Men's Club at Aschaffenburg at between 2200 and 2230 hours on the evening of 16 April 1949. Private Ray joined the group at between 2315 and 2330 hours. Accused consumed about five "double shots of whiskey" during the course of the evening and in addition purchased three "shots" which he poured into a little bottle (R 86-88).

After 0100 hours, 17 April 1949, a waitress from the Enlisted Men's Club who had served accused some drinks previously that evening observed that accused was drunk when he was on the bus which went from the Enlisted Men's Club to Aschaffenburg (R 90,91). When he entered the bus "he was swaying back and forth and he was cussing" (R 93) and "He was fussing with his girl friend when they dismounted at Aschaffenburg" (R 92).

A member of the military police who had seen accused at the German City Hospital on the morning of 17 April 1949, and who had accompanied him to the Booking Station at Aschaffenburg, was of the opinion that accused "was pretty well under the influence of liquor". Accused's speech was slurred, he did not have proper control of his faculties, and there was a strong smell of liquor on his breath (R 97,99). The witness further testified that accused was sobbing, and in order to take him to the Booking Station from the hospital where he wanted to stay with his girl friend, he had to handcuff him (R 97).

On cross-examination, the witness stated that he overheard accused admit ownership of the knife but deny it when asked to sign a receipt therefor (R 99).

After his rights as a witness were fully explained to him by the law member, accused elected to remain silent (R 101).

4. Discussion.

The accused was arraigned under a specification laid under Article of War 92, which alleged that he "did at Aschaffenburg, Germany, on or about 16 April 1949, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Wilma Hartmann, a human being, by stabbing her with a knife." He was found guilty of the Specification except the words "and with premeditation" and guilty of the Charge.

Murder is defined by the Manual for Courts-Martial, 1949, as "the unlawful killing of a human being with malice aforethought." By "unlawful"

is meant "without legal justification or excuse" (MCM, 1949, Par 179a, p.230). A clear and concise definition of "malice aforethought," without which an unlawful homicide is not murder, is contained in the often quoted case of Commonwealth v. Webster, 5 Cush. 296, 52 Am. Dec. 711, as follows:

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

Another definition of "malice aforethought," authored by then Chief Justice Holmes of the Massachusetts Supreme Judicial Court and worthy of note, is found in Commonwealth v. Chance, 174 Mass. 245, 252 (cited in CM 319168, Poe, 68 BR 141, 164), as follows:

"Reduced to its lowest terms, malice in murder means knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act, coupled perhaps with an implied negation of any excuse or justification."

The proof necessary to establish that accused committed the offense of which he was found guilty, namely unpremeditated murder, are:

(a) That accused unlawfully killed Wilma Hartmann, a human being by stabbing her with a knife; and

(b) That such killing was with malice aforethought (MCM, 1949, Par 179a, p.232).

The indisputable evidence of record shows beyond reasonable doubt that Wilma Hartmann, the person named in the Specification of the Charge as the deceased, was admitted to the hospital on the morning of 17 April 1949 with a serious stab wound which penetrated the center of her chest, and punctured her heart and heart sacs, and that she died from such wound on 25 April 1949. Also shown with equal probative force is that in the early hours of the morning of 17 April 1949, accused, who had previously consumed a considerable amount of whiskey at the Enlisted Men's Club,

Private First Class Ray and Wilma Hartmann arrived at the latter's home in Aschaffenburg, Germany. Upon entering the home and being met by Miss Hartmann's father, the trio went to Miss Hartmann's bedroom on an upper floor. Here accused and Ray ate some sandwiches which Miss Hartmann prepared for them in the kitchen and each of the men had a "shot" of whiskey from a bottle which accused produced. Following a squabble between accused and Miss Hartmann arising out of the latter's inability to understand accused's English explanation of a murder, she suggested that accused return to his depot. She started to weep, left the bedroom and went to the kitchen. Accused followed Miss Hartmann to the kitchen and escorted her, not too gently, back to the bedroom. He locked the bedroom door and threw Miss Hartmann's keys through a closed window to the street and in doing so, shattered the window. He then stumbled against a table lamp, and knocked it to the floor which caused the lights to go out. During this incident, Miss Hartmann's father, who had followed accused and Miss Hartmann from the kitchen, was knocking at the locked bedroom door, demanding admission and threatening to call the military police. The door was eventually opened and while Ray went to the street and retrieved and returned with the keys which accused had thrown away, Miss Hartmann lit two candles in her bedroom and repaired the fuses. Accused, contriving to be left alone in the bedroom with Miss Hartmann, requested that Ray take Herr Hartmann to the kitchen and pacify him. Ray was in the kitchen conversing with Herr Hartmann for a short time when Miss Hartmann was heard to scream as if in pain. Ray and Herr Hartmann thereupon rushed back to the bedroom and there in the dim candlelight they saw accused leaning over Miss Hartmann with both his hands on her throat as she lay supine on a couch with her legs "sticking straight up". Herr Hartmann struck accused on the back with a flashlight and Ray remonstrated with accused to leave Miss Hartmann alone. When accused desisted from his attack upon Miss Hartmann and verbally indicated that all was well, Ray left him and Miss Hartmann alone in the bedroom and started to the kitchen. Herr Hartmann also left the bedroom and went to a nearby hospital to place a call to the military police. Approximately a minute after leaving accused and Miss Hartmann in the bedroom, Ray heard Miss Hartmann scream a second time. He again ran into the bedroom and there he observed accused tearing Miss Hartmann's clothes from the upper portion of her body and heard accused state, "I've killed this poor girl." Military and civilian police and a medical aide arrived at the Hartmann home a short time later in response to calls made by Ray and Herr Hartmann. Two military policemen who entered Miss Hartmann's room saw her lying on the davenport. Accused, who was beside her pressing a cloth to a penetrating wound on her naked chest, stated to them, "Do something. I just stabbed my girl." Later, when accused was accompanying Miss Hartmann to the hospital in an ambulance, he was heard to state, "I have killed my girl." A blood-stained hunting knife was found on the floor between the wall and the

davenport upon which Miss Hartmann was lying and on a bed across the room a leather knife sheath was found. Accused, prior to trial, admitted ownership of the knife and that he had fashioned the handle of the knife, had taken it to the Hartmann home and had left it in the drawer of a night table in Miss Hartmann's bedroom.

The foregoing competent evidence of record establishes beyond reasonable doubt that accused unlawfully and with malice aforethought killed Wilma Hartmann, a human being, by stabbing her with a knife. The probative showing that Wilma Hartmann, apparently sound of body, a few minutes after being left in a room with accused as its sole other occupant, screamed and that she was then found in the room with a stab wound which penetrated her chest and punctured her heart and heart sacs, thereby causing her death, when coupled with accused's several voluntary, unsolicited admissions that he had "just stabbed his girl" and had "killed his girl" and his extrajudicial admission of ownership of the bloodstained hunting knife found at the scene, is compelling proof that accused unlawfully killed Miss Hartmann. This conclusion is especially compelling in the absence of any claim by accused or suggestion in the record that accused's admitted stabbing of Wilma Hartmann was legally justified, provoked or excused. The element of "malice aforethought" necessary to render the offense murder, does not necessarily mean hatred or ill will toward the person killed, nor an actual intent to take his life and may exist when the act is unpremeditated (MCM, 1949, Par 179a, p. 231) and may be legally presumed from the fact that the death of Miss Hartmann was caused by the use of a deadly weapon, namely, a hunting knife, in a manner likely to cause death (MCM, 1949, Par 125a, p.151; CM 312584, Colley, 62 BR 227,231). Proof of the fact that accused possessed the requisite state of mind, namely, malice aforethought, presumed from his use of a deadly weapon in a manner likely to result in death, is strengthened and confirmed in no small degree by the evidential showing that immediately prior to his fatal stabbing of Miss Hartmann, he had committed a seemingly unwarranted assault and battery upon her which was only interrupted when force was exerted upon him in response to her summons for aid.

From the foregoing it is clear that the record of accused's trial contains adequate competent proof of all the elements of the offense of which he was found guilty. The finality of this conclusion, however, depends on the merits of accused's sole defense that his voluntary drunkenness at the time he fatally stabbed Wilma Hartmann was such that it rendered him without sufficient mental capacity to entertain malice aforethought.

While drunkenness resulting from the voluntary use of intoxicating liquor generally does not excuse crime committed while in that condition,

it is recognized at military law that when a specific intent or state of mind is a necessary element of proof of the offense alleged, the effect of voluntary drunkenness on an accused's mental capacity to entertain the particular intent or state of mind may be considered (MCM, 1949, par. 140a, p.188). In the instant case, the offense charged and found being murder, the presence in the record of evidence that accused had consumed a considerable quantity of whiskey before he stabbed Wilma Hartmann and the opinion evidence that, when observed before and after the stabbing, he was drunk, makes necessary a determination by us of the effect of his voluntary drunkenness on his mental capacity to entertain malice aforethought.

Our examination of the evidence of record with respect to accused's mental capacity and state of mind has led us to the identical conclusion arrived at by the court, namely, that accused's killing of Wilma Hartmann was committed with the requisite malice. Nowhere in the record is there evidence that accused's voluntary intoxication was such that he was unable by reason of it to entertain malice so as to mitigate the offense to a lesser degree of homicide. On the contrary, it appears that although probably drunk, and with mental and physical faculties somewhat impaired by his voluntary alcoholic potation, he knew what he was doing and possessed sufficient mental capacity to make him legally responsible for the consequences of his criminal act. It is shown that he possessed the muscular and mental coordination to enable him to proceed from the Enlisted Men's Club to Miss Hartmann's home and there to partake of food and additional alcoholic beverage and to engage in rational conversation; to follow Miss Hartmann to her kitchen when she left the bedroom and to escort her back; to contrive to be left alone with her in the bedroom on two separate occasions; and to verbally acknowledge after the stabbing of Miss Hartmann, although lachrymously and contritely, that he "stabbed" and "killed" her. Such a showing evidences mental awareness by accused of his acts and their probable result. It negatives any claim by accused that his intellect was so obliterated by excessive drinking as to disable him from entertaining malice aforethought and provides us with a sound factual basis to concur in the findings of the court that accused's killing of Miss Hartmann was done with malice aforethought.

In connection with our consideration of the effect of accused's voluntary drunkenness on his ability to entertain malice aforethought we have also considered the related question of the effect of his voluntary drunkenness on the admissibility in evidence of his extrajudicial admissions which were tantamount to a confession of the offense charged. The evidence shows that accused, who was described by several

witnesses as "drunk", prior to and after the stabbing of Miss Hartmann, made voluntary pretrial statements soon after the fatal stabbing to the effect that "I have stabbed my girl" and "I have killed my girl," and that later, at a time when he still smelled of liquor and his replies to interrogation were not responsive and he was obviously under great emotional stress, a Criminal Investigation Division agent elicited from him an admission of ownership of the murder weapon. We can perceive of no impropriety to the admission of this evidence since there was no showing that accused was totally insane when he made the admissions. The prevailing rule, military and civilian, is that the drunken condition of an accused, when making a confession, affects neither the voluntary character nor the admissibility in evidence of the confession unless the drunkenness has induced a condition equivalent to total insanity. The drunkenness of accused at the time of making the confession is a matter for consideration by the court in determining what weight and credibility should be given to the confession (CM 228891, Robnett, 16 BR 359,363,364; Bell v. United States, 47 F.2d 438; McAfee v. United States, 111 F.2d 199,204.)

A final question posed by the record arises from the apparent variance between the pleadings and the proof. The Specification of the Charge alleged that accused "did * * on or about 16 April 1949 * * kill Wilma Hartmann * * by stabbing her with a knife." The proof adduced at accused's trial showed that he stabbed Miss Hartmann as alleged on 17 April and that she died on 25 April 1949 as a result of the stab wound.

It is our opinion that the indicated variance was not material and that the Specification contained a satisfactory allegation of the time of the offense in view of the fact that time is not of the essence of the crime of murder (State v. Augusta, 199 La. 896 (1942), 7 SO 2 177). The Specification, alleging as it did, that accused killed a named human being in a specified manner, on or about 16 April 1949 clearly and sufficiently identified the offense with which accused was charged and adequately apprised him of it so that he would not be hampered or misled in his defense (CM 235011, Goodman, 21 BR 243,253). Accordingly, we hold that where, as in the instant case, an accused has been charged with murder "on or about" a day certain, and the proof shows that he inflicted the mortal wound upon the victim on the day following the date specified, and that the wound caused the victim's subsequent death, such a variance between pleading and proof is not material if the proof of record additionally shows that the charge was preferred against the accused subsequent to the date of his inflicting the mortal wound upon the deceased and that the deceased's death occurred within a year and a day after the wounding (MCM, 1949, par. 179a, p.232; State v. Augusta (supra); People v. Wells, 393 Ill. 626, 66 NE 2d 866).

5. Available records and information concerning accused show that he is unmarried and was 24 years and 4 months of age at the time of the offense. He quit school after completing the first semester of the 10th grade and was thereafter employed as a grocery store clerk and driver of light trucks for 4 years. He, thereafter, commenced his initial enlistment in the Regular Army on 30 October 1945 and reenlisted on 25 February 1949 to serve three years. He attained the grade of Private First Class. He has been overseas in the European Theater since 5 July 1946.

6. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to confinement at hard labor for forty years is authorized upon conviction of unpremeditated murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of unpremeditated murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 1111, act of 25 June 1948; 10 U.S.C. 1111.

Robert J. Clauer, 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
Washington 25, D. C.

OCT 24 1949

CSJAGV CM 337950

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

NEW YORK PORT OF EMBARKATION

v.)

Recruit BUDD F. DEYO)
(RA 12118848), 9213)
Technical Service Unit-)
Transportation Corps,)
Replacement Center,)
Detachment 3, Camp)
Kilmer, New Jersey.)

Trial by G.C.M., convened at
Camp Kilmer, New Jersey, 30 June
1949. Bad conduct discharge,
total forfeitures after promulga-
tion and confinement for six (6)
months. Post Guardhouse.

HOLDING by the BOARD OF REVIEW
GUIMOND, BISANT and LAURITSEN

Officers of the Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50e.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Recruit Budd F. Deyo, then of 9213 Technical Service Unit, Transportation Corps Replacement Center Detachment 2, Camp Kilmer, New Jersey, now of 9213 Technical Service Unit, Transportation Corps Replacement Center Detachment 3, Camp Kilmer, New Jersey, did, while enroute from Fort Dix, New Jersey to Camp Kilmer, New Jersey on or about 26 November 1948, desert the service of the United States, and did remain absent in desertion until he was apprehended at Syracuse, New York on or about 3 April 1949.

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be discharged 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 for one year. The reviewing authority approved only so much of the sentence as provided 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 six months, designated

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the Post Guardhouse, Fort Jay, Governor's Island, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 50e.

3. Prosecution's Exhibit No. 1, received in evidence without objection, was an extract copy of the morning report of Company I, 3rd Battalion, 39th Infantry Regiment, Fort Dix, New Jersey for 19 November 1948 showing "42 EM DS to Reld fr asgd and trfd to Repl Br Cpn Kilmer Pers Cen New Brunswick N J par 210 SO 230 Hq 9th Inf. Div Post (Cy SO atchd)." Prosecution's Exhibit No. 1-A received in evidence without objection was a copy of paragraph 210 of the mentioned Special Order, dated 9 November 1948, which, insofar as it pertained to the accused, showed his relief from assignment to Company I, 39th Infantry Regiment with an EDCMR of 18 November 1948, and his transfer to the Replacement Branch, Camp Kilmer/Personnel Center, New Brunswick, New Jersey, with a reporting date of "not later than 25 Nov 48." Prosecution's Exhibit No. 2 received in evidence purports to be a true extract copy of so much of paragraph 8, Special Orders Number 248, Headquarters, Camp Kilmer, dated 18 November 1948, as relates to the accused, showing him as having been transferred to that station, not yet joined, and assigned to the 9213 Technical Service Unit, Transportation Corps, Replacement Center Detachment #2, effective 18 November 1948. The prosecution offered in evidence as Exhibit No. 3 an extract copy of the morning report of Detachment #2, 9213 Technical Service Unit, Transportation Corps Replacement Center, Camp Kilmer, New Jersey for the dates 19 November 1948 and 28 March 1949. The defense did not object to the entry of 19 November 1948 reading, "628 EM asgd nt jd (enr to jn) par 8 SO 248 Hq Cp Kilmer N J eff dates indic list atchd (incl #1)," but did object to the entry of 28 March 1949 showing the accused from enroute to join to absent without leave as of 0001, 26 November 1948. The court admitted in evidence only the entry of 19 November 1948, sustaining the defense objection to the entry of 28 March 1949. It should be observed that no list or inclosure was offered or received in evidence with respect to the mentioned entry of 19 November 1948. There was subsequently introduced in evidence without objection a copy of paragraphs 43 and 44, Special Orders Number 77, Headquarters, Camp Kilmer, 6 April 1949, showing that the accused, having been dropped from the rolls 28 March 1949, was reassigned to the 9213 Technical Service Unit, Transportation Corps, Replacement Center Detachment #2 as of 3 April 1949 and transferred to Detachment #3 of the same organization on 6 April 1949. Prosecution's Exhibits Nos. 5, 6, 7 and 8, received in evidence without objection, are morning report entries of Detachments #2 and #3, 9213 Technical Service Unit, Transportation Corps, Camp Kilmer, New Jersey, dated 7 April, 15 June, 11 April, and 27 June 1949, respectively, tracing the accused's assignment, with corrections, to those organizations in an assigned not joined, confined in the post stockade status, as of 3 April and 6 April 1949. Prosecution's Exhibit No. 9 received in evidence without objection was a stipulation concurred in by the accused, the defense and the

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prosecution, to the effect that if the person named therein, a civilian police officer of East Syracuse, New York, was present in court and sworn as a witness, he would testify to the effect that he knew the accused and had apprehended him in civilian clothes in East Syracuse, New York, on or about 3 April 1949. Prosecution's Exhibit No. 10 received in evidence without objection was a stipulation concurred in by the accused, defense counsel and prosecution, to the effect that if the witness, a military policeman, was present in court he would testify that on or about 4 April 1949 he received the accused into his custody from the civilian police at Syracuse, New York.

1st Lieutenant Clarence Terry, the Executive Officer of Detachment 2, Replacement Division, Camp Kilmer, New Jersey, was called as witness and testified at some length both as a prosecution and defense witness. His testimony added nothing to the prosecution's case. As a consequence of the court sustaining the defense objection to the morning report entry of 28 March 1949 in Prosecution's Exhibit No. 3, a further effort was made to establish the date of the initial absence of the accused by calling as a prosecution's witness Sergeant Shirley N. Harrel, non-commissioned officer in charge of the receiving detachment, Building 1331, Camp Kilmer, New Jersey. After stating that such was his assignment on 6 April 1949, Sergeant Harrel testified in pertinent part as follows:

"Q. Did you receive all incoming personnel to Camp Kilmer for overseas assignment or station complement?"

A. Yes, sir.

Q. What do you do in that section when a man comes in?

A. He is requested to fill out a card which shows his name, rank, serial number, the station he came from, the date, and, if he knows, whether he is station complement, reassignment, or separation. One of the categories is circled. He brings the card and his orders to the desk with his name circled on the orders and the man initials the orders and a date and time stamp is placed on the order.

Q. Do all new arrivals report to your organization?

A. If they are for overseas assignment or station complement.

Q. I now hand you a document and ask if you can identify it.

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A. Yes, sir. It is a special order with my initials on it showing that the man was sent to Building 907 on 6 April at about 1340 hours.

Q. Can you say who the soldier was who presented that order to you?

A. The soldier represented himself to be Budd F Deyo.

Q. Is that your initial?

A. Yes, sir.

Q. Is that the stamp you put there?

A. Yes, sir.

Q. Have you ever searched the files of your organization regarding Recruit Deyo?

A. I have.

Q. What did your search disclose?

A. We have no record of the man's arrival prior to six April 1949, sir.

PROSECUTION: You may cross examine the witness.

CROSS EXAMINATION

QUESTIONS BY THE DEFENSE:

Q. Sergeant, directing your attention back to the orders again and to the name of Deyo. Is there anything unusual about his name...That is different from any other name?

A. No, sir.

Q. Look again.

A. The only thing different is that his name is circled.

Q. Who circled it? How do you know that paper was handed to you by a person representing himself as Deyo?

A. When a man comes into the receiving section he is asked to encircle his name on the orders.

Q. Do you know who encircled the name of Deyo?

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A. I do not.

Q. Could the trial judge advocate himself have encircled than name?

A. I couldn't answer that, sir.

DEFENSE: No further questions.

PROSECUTION: Are there any questions by members of the court?

EXAMINATION BY THE COURT

QUESTIONS BY THE MEMBERS:

Q. Maybe we can get it out of the record. I believe you testified that a soldier who represented himself as Budd Deyo presented that paper...this particular order to you on which you placed your initials on 6 April 1949.

A. That's right, sir.

RE CROSS EXAMINATION

QUESTIONS BY THE DEFENSE:

Q. Sergeant Harrel, does this accused here...Was he the same man who reported to you in the Regulating Section on 6 April?

A. I couldn't answer that, sir.

Q. Why not?

A. We have from a hundred to three hundred men a day reporting there, sir. I couldn't identify one.

Q. When a man reports to you do you particularly examine him. Do you even look up at him?

A. They all look alike, sir.

DEFENSE: No further questions.

RE DIRECT EXAMINATION

QUESTIONS BY THE PROSECUTION:

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- Q. I again hand you this paper marked Prosecution's Exhibit 1-A and ask you if you see any initials on that document.
- A. My initials, sir.
- Q. Are you sure that is your initial?
- A. Yes, sir. It is my initial.
- Q. By whom was that paper handed to you?
- A. By a soldier who represented himself to be Budd Deyo.
- Q. You stated in your testimony that you made a search of the records in your organization and you found that the accused had not reported prior to 6 April 1949.
- A. It does not appear on our records that he did.
- Q. In the search of the record, do you know when the accused should have reported?
- A. No, sir.
- Q. When they call for a search do they give you the date the man is due?
- A. Yes, sir.
- Q. What do you do?
- A. We start three days prior to the date and search up to date.
- Q. Do you remember what date was given in this case?
- A. No, sir. I couldn't truthfully say, sir.
- Q. What kind of records do you search?
- A. We have an individual arrival record of every man who comes into the regulating section in Kilmer in alphabetical order for three eight hour shifts.
- Q. And you made a search from some date you were given up to six April.
- A. That's right, sir.

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Q. What did your records disclose?

A. No record of his arrival at Kilmer prior to the date 6 April.

Q. Could the accused have reported to some section other than the Regulating Section?

A. That I couldn't answer truthfully, sir. If he had reported to any other detachment on the post they are instructed to return men to the Regulating Section. That is SOP for every detachment on the post, including Air Corps, Officer's Section, right on through. There are signs at each gate and MP's are instructed to send men to the Regulating Section.

Q. You have no personal knowledge as to whether or not that could not have been done in his case?

A. I haven't any personal knowledge that it wouldn't be done. If he reported to the regulating section once he would have no reason to come the second time.

DEFENSE: I object. That calls for a conclusion. He is stating his opinion, not facts. I ask that it be stricken.

LAW MEMBER: That portion of the witness's remarks as to an opinion will be stricken from the record.

Q. I again hand you Prosecution's Exhibit 1-A and ask you how you determine the date a man should be at Camp Kilmer.

A. Well, I receive no record, sir. The only thing we receive is when the individual arrives and hands in a copy of his orders.

Q. In this case...the case of Budd Deyo. You now hold his orders. What date should he have arrived?

DEFENSE: I object. That is only asking the witness to read from the order. The order is before the court. He only knows what he reads.

LAW MEMBER: The objection is overruled.

A. According to the order, sir. The man is authorized seven days delay en route and one day travel time. He should have reported on 25 November 1948.

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PROSECUTION: No further questions.

DEFENSE: I have some re-cross examination.

RE CROSS EXAMINATION

QUESTIONS BY THE DEFENSE:

Q. You testified before that you had made a search of the records in building 1731. When did you make that search?

A. I couldn't truthfully tell the date. It was after April 6th.

Q. After April 6th?

A. Yes, sir.

Q. For how many days back was the search made?

A. For the three days prior to his due date at Camp Kilmer and up to and including the date of his arrival.

Q. You say you found no record that he had reported.

A. Prior to 6 April.

Q. Did you find a record that he had not reported?

A. No, sir.

LAW MEMBER: If the record showed that the accused had reported prior to 6 April would you have found it?

A. Yes, sir." (R 43-48).

The prosecution then rested.

After a motion by the defense for a finding of not guilty was denied, the accused elected to remain silent and no evidence was introduced on behalf of the accused.

6. The question is therefore raised as to the competency of the evidence adduced by the prosecution to establish the initial date of the accused's alleged absence without leave. Absence without leave may be inferred from the circumstances as disclosed by the facts and testimony in a particular case. Direct proof, though desirable, is not in all cases requisite (CM 126112, Dig Ops JAG, 1912-1940, sec. 419(2)). From

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the prosecution's evidence, it may be said that a strong suspicion of guilt arises in this case. However, suspicion is not proof.

Conceding that it might be proper under some circumstances to show a negative fact by means of public records, the Circuit Court of Appeals for the Ninth Circuit said in part in Shreve v. United States 77 F (2d) 2, at pages 6 and 7:

"The next question is whether or not evidence of the fact that the books did not disclose the existence of an outstanding note, an affirmative fact, was proof or evidence of the fact that there was no such note, a negative fact. It was to prove this negative fact that the evidence was adduced. The decisions are not entirely in accord upon the question of whether or not the circumstance that books do not disclose a fact is evidence of the nonexistence of the fact. The divergence of view is perhaps partly due to the different situations in which the matter has been presented to the courts for decision. Jones on Evidence states the rule as follows: 'And it is said, generally, that books of account are admissible only as affirmative evidence in any event, and not for the purpose of establishing, from the circumstance that no entry appears, a negative proposition such as the nonexistence or nonoccurrence of a fact or event; though it may be doubted whether statement of such proposition as a rule of general application is warranted.' Jones Com. on Evid. (2d Ed.) vol. 4, p. 3288, § 1782.

"[5-7] On this subject we cite the following cases which hold that the nonexistence of a debt or obligation cannot be established by proof that the books contain no such entry: Boor v. Moschell, 55 Hun, 604, 8 N.Y.S. 583; Scott v. Bailey, 73 Vt. 49, 50 A. 557; Lawhorn v. Carter, 11 Bush (74 Ky.) 7; Riley v. Boehm, 167 Mass. 183, 45 N.E. 84; Kerns v. McKean, 76 Cal. 87, 18 P. 122; Lewis v. McNeal, 58 Cal. App. 70, 71, 207 P. 1021."

The Board of Review in CM 262042, Pepper, 5 B R (ETO) 125, 150, 151 made the following comment upon a motion to strike testimony:

The full thrust of the testimony establishes the fact that an examination of accused's accounts failed to reveal the existence of Pros. Exs. A, B, C, D. Evidence of this fact was negative in character. Accused was at liberty to test its credibility, weight and probative value upon cross-examination. The records in accused's office were prescribed and required by the Army regulations and said regulations had the force of law. They were therefore official public records."

Accused's contention is based upon the rule established in Shreve v. United States which has received particular consideration by the Board of Review. It is however, applicable

CSJAGV CM 337950

to private accounts and private records and has no proper place in the consideration of the records and accounts which, under the Army Regulations must be maintained by responsible and accountable officers of the Army. There was no error in the denial of accused's motion."

Again in CM 334270, Stricklin, 1 B R J C 141, 157 the Board of Review stated:

"***There was introduced into evidence a ledger of the depository showing the status of the government's account therein.***and that the ledger failed to show any entry which would reflect that the accused had made any deposit as reflected in the forged duplicate and triplicate. The ledger in and of itself would not be evidence that the deposit in question was not made unless it was shown that by law the ledger was required to be kept. (Shreve v. United States,***). There is evidence that the Bank of America, Lompoc Branch, was a Federal Depository and therefore, by law, it was required to keep an accurate entry of each sum of public monies received***. The ledger was, therefore, an official record. The testimony of the assistant cashier,*** that the ledger contained no entry showing the deposit, subject of the forged duplicate and triplicate of certificate of deposit, was competent evidence that such deposit was not made. (CM 262042, Pepper, 5 B R (ETO) 125 at 150)."

It is evident from Sergeant Harrel's testimony that he was not the person having "an official duty imposed upon him by law, regulation or custom to record the fact or event and to know, or to ascertain through customary and trustworthy channels of information, the truth of the matters recorded" in the so-called "arrival record" of individuals at Camp Kilmer, and that the records referred to do not fall within the classification of official records as defined in paragraph 130b, pages 166, 167, Manual for Courts-Martial, 1949.

While Sergeant Harrel's testimony might have been acceptable as evidence of a regular course of business employed in the operation of the receiving detachment, it is also evident that he was testifying, insofar as the accused was concerned, not to a "business entry" but to the absence of such an entry (par 130c and d pp 167, 168, MCM, 1949).

In view of the Sergeant's testimony and the failure of the prosecution to show that the records referred to were official public records required to be kept by law, regulation, or custom, it is clear that the rule enunciated in Shreve v United States, supra, and discussed in CM 262042, Pepper

CSJAGV CM 337950

and CM 334270, Stricklin is applicable herein.

It is not considered that proof of the initial absence of the accused can be established from the lack of an entry in the "individual arrival record" of the receiving detachment, Camp Kilmer, New Jersey. Without such proof of the initial date of the accused's alleged absence without proper leave, an essential element of the offense charged herein is lacking (CM 315687, Stanton, 65 B R 65, 69; par 146, pp 198, 199, and par 149, p 203, MCM, 1949).

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

Jeff. Guimond, J.A.G.C.
John M. Dwyer, J.A.G.C.
Carl B. Lauritzen, J.A.G.C.

5 NOV 1949

CSJAGV CM 337950

1st Ind.

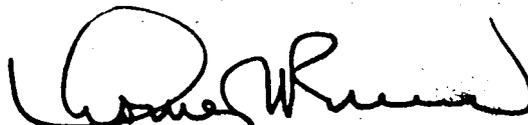
JAGO, Department of the Army, Washington 25, D. C.

To: Commanding General, New York Port of Embarkation, Brooklyn,
New York.

1. In the case of Recruit Budd F. Deyo (RA 12118848), 9213 Technical Service Unit - Transportation Corps, Replacement Center Detachment 3, 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) the holding and my concurrence therein vacate the findings of guilty and the sentence. You are authorized to direct a rehearing.

2. When copies of the published order in 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 337950).



THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of trial

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

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CSJAGK - CM 337961

6 OCT 1949

UNITED STATES)

v.)

Captain ROBERT EDWARD SYKORA
(O-1576720), 9206 Technical
Service Unit, Transportation
Corps)

SAN FRANCISCO PORT OF EMBARKATION

Trial by G.C.M., convened at Fort
Mason, California, 21 July 1949.
Dismissal.

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

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to the Judicial Council and The Judge Advocate General.
2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that Captain Robert E. Sykora, 9206 Technical Service Unit, Transportation Corps, San Francisco Port of Embarkation, Inspector General Department, Fort Mason, California, did, at Fort Mason, California, on or about 13 June 1949, with intent to deceive Colonel Robert L. Allen, Jr., Transportation Corps, Acting Port Inspector General, San Francisco Port of Embarkation, Fort Mason, California, officially state to the said Colonel Robert L. Allen, Jr., that his, Captain Sykora's absence from duty from 0800 hours to 1300 hours, 13 June 1949, was due to his having gone to Los Angeles, California; that he had spent Sunday night 12 June 1949 in Los Angeles, California; that he had caught a plane at Los Angeles, California about 0800 hours 13 June 1949, and had arrived in San Francisco, California about 1000 hours 13 June 1949, which statement was known by the said Captain Robert E. Sykora to be untrue in that Captain Robert E. Sykora was not in Los Angeles, California Sunday night 12 June 1949 and had not taken a plane from Los Angeles, California at about 0800 hours 13 June 1949 arriving at San Francisco, California at about 1000 hours 13 June 1949.

Inc/3

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

3. Evidence

For the Prosecution

On 13 June 1949 accused was assigned to duty in the office of the Inspector General, San Francisco Port of Embarkation, under the supervision of Colonel Robert L. Allen. On this date he was absent without leave from 0800 to 1300 hours. Upon reporting for duty the accused presented himself to Colonel Allen and voluntarily told him that his absence that morning was due to his having gone to Los Angeles over the weekend and his failure to get back in time. He stated that he spent Sunday night, 12 June 1949, in Los Angeles; that he intended to take a plane from Los Angeles to San Francisco at 0600 hours, Monday, 13 June 1949, but missed that plane and so took an 0800 plane which arrived at San Francisco about 1000 hours the same day (R 6). Colonel Allen then told the accused that he had information that he (accused) had been in an automobile accident on the Oakland Bay Bridge on the night of 12 June 1949. Accused denied this and repeated that he had spent that night in Los Angeles (R 6). Upon cross-examination of Colonel Allen by the defense, it was brought out that during a subsequent interrogation of the accused by Colonel Allen on 15 June 1949, accused admitted that he had told him (Colonel Allen) that he spent the night of 12 June 1949 in Los Angeles and apologized for making such statement (R 8).

First Lieutenant Charles W. Crump, Jr., testified that at about 1930, 12 June 1949, he called for accused at his quarters in Fort Mason, San Francisco, and they drove to the Oakland Army Base (R 10). After spending about forty-five minutes at the Base both left for San Francisco. En route Lieutenant Crump was involved in an automobile accident on the Oakland Bay Bridge and both he and the accused sustained minor injuries. Lieutenant Crump and the accused were together at all times from 1930 to 2330 hours on 12 June 1949 in the San Francisco-Oakland area (R 9-11).

For the Defense

As a witness for the defense Lieutenant Crump further testified that on the morning of 13 June 1949 he informed several persons in the office of the Inspector General that the accused had been in an automobile accident the night before and at about 0915 hours of the same date he visited the accused in his quarters and advised him that he had reported their automobile accident to persons in the Inspector General's Office (R 11,13,14). He further testified that accused's leg was badly hurt in the accident on the bridge.

First Lieutenant Walter A. Sullivan testified that he saw the accused and Lieutenant Crump together at the Oakland Army Base on the evening of 12 June 1949; that they stayed for about one and one-half hours; that accused had about two drinks at the club but was not drunk, and that accused departed from the club about 2130 hours accompanied by Lieutenant Crump (R 16-17).

Several witnesses testified concerning the accused's good reputation, character and excellent efficiency as an officer (R 14-24).

Accused was duly apprised of his rights as a witness and elected to testify in his own behalf. His testimony substantially corroborates the testimony of Lieutenant Crump and Lieutenant Sullivan pertaining to the events which transpired on the night of 12 June 1949. He further testified that the injury sustained in the accident caused him a "general overall shakeup," made him nervous and that he had to be assisted into his apartment. Before retiring for the evening accused instructed his wife to call his office in the morning if he did not get up and to report that he went to Los Angeles that evening. Accused's wife complied with his instructions on the following morning before he had awakened and she then informed accused of her action. Accused awoke at 0800 and reported for duty at 1300, 13 June 1949. He admitted making the alleged statement to Colonel Allen in order to protect his wife from being classed as a prevaricator (R 26-27).

4. Discussion

The accused was charged and found guilty of making a false official statement with intent to deceive his superior officer knowing such statement to be untrue in violation of Article of War 95. To support the conviction the record must show that the accused (a) made a certain official statement, (b) that the statement was false, (c) that the accused knew it to be false, and (d) that such false statement was made with intent to deceive the person to whom it was made (CM 318705, Jackson, 81 ER 433, and cases therein cited).

That the statement, as alleged, was made by the accused and that it was false is amply sustained by the uncontroverted evidence. Furthermore, the testimony of accused shows clearly that it was deliberately made by him with full knowledge of its falsity.

The only questions requiring consideration are (1) whether the alleged statement was of an official nature and (2) whether it was made with intent to deceive. As to the first question it is only reasonable to assume that the alleged statement was made and intended by accused as an excuse for his unauthorized absence from duty between 0800 and 1300 hours on 13 June 1949. Thus it pertained directly to his official duty status and was a matter of official concern to Colonel Allen, his

immediate superior, in the administration of his office. It follows, therefore, that an explanation given by an accused for an unauthorized absence from duty is necessarily of an official nature. With respect to the second question it has long been established that if an official statement is falsely made the intent to deceive may be inferred (CM 275353, Garris, 48 ER 42).

Thus it is manifest from the record that the evidence adduced clearly establishes every element of the offense found beyond a reasonable doubt and constitutes a violation of Article of War 95.

5. Accused is 32 years of age, married, and has two children. He completed high school in Los Angeles, California, in 1935. In civilian life he was employed as an office manager of a water purification firm and as a stenographer. His enlisted service began on 12 February 1940 and he attained the rank of technical sergeant. He completed the Quartermaster Officer Candidate School and was commissioned a second lieutenant, Army of the United States, on 15 July 1942. He was promoted to first lieutenant on 17 October 1942 and to captain on 25 February 1945. His efficiency ratings have been as follows: Five of "Very Satisfactory" from 27 July 1942 to 27 October 1943; five of "Excellent" from 28 October 1943 to 14 December 1944; five of "Superior" from 15 December 1944 to 30 June 1945. He received three "Excellent" from 3 October 1945 to 31 July 1946; three "Superior" from 8 October 1946 to 30 June 1947. He served overseas from 24 August 1942 to 21 August 1946 in Hawaii. He has been awarded the following decorations: Soldier's Medal, Asiatic-Pacific Theater Medal, American Defense Medal, American Theater Medal, and World War II Victory Medal.

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.

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

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

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

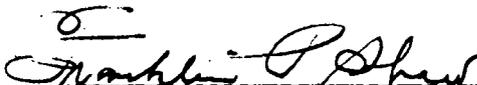
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

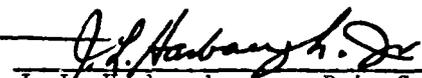
THE JUDICIAL COUNCIL

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

Case 337961

In the foregoing case of Captain Robert Edward Sykora
(O-1576720), 9206 Technical Service Unit, Transportation
Corps, upon the concurrence of The Judge Advocate General
the sentence is confirmed and will be carried into execution.


Franklin P. Shaw, Brig Gen, JAGC


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


E. M. Brannon, Brig Gen, JAGC
Chairman

14 November 1949

I concur in the foregoing action.



THOMAS H. GREEN
Major General
The Judge Advocate General

16 Nov 1949

del #2

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

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OCT 19 1949

CSJAGH CM 337978

| | | |
|------------------------------------|---|----------------------------------|
| UNITED STATES |) | THE GROUND GENERAL SCHOOL CENTER |
| v. |) | |
| First Lieutenant MARIO RAMON |) | Trial by G.C.M., convened at |
| GALLO, O-1030661, Student |) | Fort Riley, Kansas, 14, 15 |
| Officers Detachment, The Ground |) | July 1949. Dismissal, total |
| General School Center, Fort Riley, |) | forfeitures after promulgation, |
| Kansas. |) | and confinement for two (2) |
| |) | years. |

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

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General and the Judicial Council.
2. Accused was tried upon the following Charge and Specifications:
CHARGE: Violation of the 96th Article of War.

Specification 1: In that 1st Lieutenant Mario Ramon Gallo, Student Officers' Detachment, The Ground General School Center, did, at Fort Riley, Kansas, on or about 30 March 1949, with intent to defraud, wilfully, wrongfully and unlawfully make and utter to the Fort Riley Officers Mess a certain check in words and figures substantially as follows:

Meriden Conn
~~Junction City, Kansas~~, 30 Mar 1949 No. _____
The Puritan Bank & Trust Co
~~FIRST NATIONAL BANK~~ 83-130
Designated United States General Depository

Pay to the
Order of THE FORT RILEY OFFICERS MESS \$ 50 ⁰⁰/_{XX}
Fifty-----^{XX}-----_{xxx}DOLLARS

/s/ Mario R Gallo 1st Lt Cav.

and by means thereof, did fraudulently obtain from the Fort Riley Officers Mess Fifty Dollars (\$50.00) in lawful money of the United States, he, the said 1st Lieutenant Mario Ramon Gallo, then well knowing that he did not have and not intending that he should have sufficient funds in said Puritan Bank & Trust Company of Meriden, Connecticut, for the payment of said check.

Specification 2: (Same as Specification 1).

Specification 3: (Same as Specification 1, except that date of offense is 3 April 1949 and date of check is 3 April 1949).

Specification 4: (Same as Specification 1, except that date of offense is 16 April 1949, date of check is 16 April 1949, amount of check is \$25.00, and amount fraudulently obtained is \$25.00).

Specification 5: (Same as Specification 1, except that date of offense is 16 April 1949 and date of check is 16 April 1949).

Specification 6: (Same as Specification 1, except that date of offense is 16 April 1949, date of check is 16 April 1949, amount of check is \$25.00, and amount fraudulently obtained is \$25.00).

Specification 7: (Same as Specification 1, except that date of offense is 16 April 1949, date of check is 16 April 1949, amount of check is \$25.00, and amount fraudulently obtained is \$25.00).

Specification 8: (Same as Specification 1, except that date of offense is 16 April 1949, date of check is 16 April 1949, amount of check is \$25.00, and amount fraudulently obtained is \$25.00).

Specification 9: (Same as Specification 1, except that date of offense is 16 April 1949, and date of check is 16 April 1949).

Specification 10: (Same as Specification 1, except that date of offense is 16 April 1949, date of check is 16 April 1949, amount of check is \$60.00, and amount fraudulently obtained is \$60.00).

Specification 11: In that 1st Lieutenant Mario Ramon Gallo, Student Officers' Detachment, The Ground General School

Center, did at Fort Riley, Kansas, on or about 2 April 1949, wrongfully and unlawfully make and utter to the Fort Riley Officers Mess a certain check in words and figures substantially as follows:

Meriden Conn
~~Junction City, Kansas,~~ 2 Apr 1949 NO
 The Puritan Bank & Trust Co

~~FIRST-NATIONAL-BANK~~ 83-130
 Designated United States General Depository

Pay to the
 Order of THE FORT RILEY OFFICERS MESS \$ 325 ⁰⁰/_{xxx}

Three Hundred & Twenty Five ^{xx}/_{XXX}DOLLARS

/s/ Mario R Gallo 1st Lt Cav

he the said Mario Ramon Gallo then well knowing that he did not have and not intending that he should have sufficient funds in said Puritan Bank & Trust Company of Meriden, Connecticut, for the payment of said check.

Specification 12: (Same as Specification 11, except that date of offense is 13 April 1949, date of check is 13 April 1949, amount of check is \$540.00, and making and uttering is alleged to have been done "wilfully, wrongfully and unlawfully").

He pleaded not guilty to, and was found guilty of, the Charge and the Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor, at such place as proper authority may direct, for five (5) years. The reviewing authority approved the sentence but reduced the period of confinement to two (2) years, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

Accused is in the military service of the United States (R 11). During the months of March, April and May, 1949, he was a member of the Student Officers Detachment at Fort Riley, Kansas (R 10,11). The members of the Student Officers Detachment had their own club or mess. The mess was a branch of the Fort Riley Officers Mess (R 12,28,29,38,39,46).

All checks cashed at the branches were forwarded to the Fort Riley Officers Mess (R 13). The bookkeeper of the Mess then indorsed the name of the Mess on each check by rubber stamp and the checks were deposited in the First National Bank of Junction City, Kansas (R 13,14). Each of the checks hereinafter mentioned was made payable to the Fort Riley Officers Mess and bears the rubber stamped indorsement of the Mess on the reverse side. Based on the presence of this indorsement, the bookkeeper identified each check as having passed through the Fort Riley Officers Mess (R 15-20,22,23; Pros Exs 2-13).

On 30 March 1949, accused wrote and signed two checks, each in the amount of \$50.00, on The Puritan Bank and Trust Company of Meriden, Connecticut, and cashed them at the Student Officers Club, receiving the face amount of each check in currency (R 28,32,33,34,69; Pros Exs 2,3). The checks were received for payment by the drawee bank on 6 April 1949 and payment was refused by reason of "insufficient funds." On the date the checks were written, 30 March, the balance in accused's checking account was \$12.63 and, although in the period between 31 March and 4 April, there were sufficient funds in the account to pay the two checks in question, other checks of accused were presented to and paid by the bank thereby reducing the balance to an amount insufficient to pay the two checks when received on 6 April (Pros Ex 1, pp.3,4,5 and Ex A thereto).

Another check, dated 2 April 1949, drawn on The Puritan Bank and Trust Company, and bearing accused's name as drawer, in the amount of \$325.00, was presented by accused to the bartender at the Student Officers Club (R 44,69; Pros Ex 1, pp. 16,17; Pros Ex 12). In exchange for the check the bartender gave accused "a sealed envelope" (R 44). The check was received by the drawee bank on 12 April 1949, and payment was refused by reason of "insufficient funds." There was only \$97.63 in accused's account on 2 April and at no time between that date and 12 April were there sufficient funds in the account to pay the check (Pros Ex 1, pp.14,15, and Ex A thereto).

A check dated 3 April 1949, in the sum of \$50.00, drawn on The Puritan Bank and Trust Company, was made, signed and cashed by accused at the Student Officers Club (R 35,69; Pros Ex 4). The check was received by the drawee bank on 10 April 1949, and payment was refused because of insufficient funds in accused's account. On 3 April, when the check was drawn, accused had a balance of \$97.63 in his account. The account was overdrawn on 4 April and between that date and 10 April there were insufficient funds in the account to pay the check (Pros Ex 1, pp.5,6 and Ex A thereto).

On 10 April 1949, accused wrote and signed a check in the sum of \$60.00 on The Puritan Bank and Trust Company and cashed it at the Student Officers Club receiving currency for the face amount (R 42,43, 69; Pros Ex 11). The drawee bank received the check on 18 April 1949 but refused payment by reason of "insufficient funds." When the check was written, 10 April, accused had \$25.63 in his account. No deposits were made in the account between 10 and 18 April (Pros Ex 1, pp.13,14 and Ex A thereto).

On 13 April 1949, accused made and signed a check for \$540.00, on The Puritan Bank and Trust Company (R 35,36,69; Pros Ex 13). He gave the check to the bartender at the Student Officers Club, and the latter, acting in accordance with previous instructions from the noncommissioned officer in charge of the club, gave accused certain checks in exchange (R 35,36). The check for \$540.00 was received by the drawee bank on 22 April 1949 and payment was refused by reason of "insufficient funds." There were insufficient funds in accused's account to pay the check at the time it was written, 13 April, and during the period 13 April to 22 April (Pros Ex 1, pp.15,16 and Ex A thereto).

Accused cashed six checks totalling \$200.00, at the Student Officers' Club, on 16 April 1949. The amounts of the individual checks were: \$25.00 (Pros Ex 5); \$50.00 (Pros Ex 6); \$25.00 (Pros Ex 7); \$25.00 (Pros Ex 8); \$25.00 (Pros Ex 9); and \$50.00 (Pros Ex 10). The checks were dated 16 April 1949, were drawn on The Puritan Bank and Trust Company, and bore the name of accused as drawer (R 41,42,69; Pros Exs 5-10). They were received by the drawee bank on 26 April 1949, and payment was refused by reason of "insufficient funds." On 16 April, the date the checks were written, accused's bank balance was \$24.63. No deposits were made in the account between 16 April and 26 April (Pros Ex 1, pp. 6-13, and Ex A thereto).

The signature, "Mario R. Gallo," on each of the checks described herein, was identified as the signature of accused by Mr. A. E. Tomassetti, the assistant treasurer of the drawee bank (Pros Ex 1, pp. 16,17). Mr. Tomassetti further stated that during the period 24 December 1948 to 28 April 1949, fifty-two checks of accused were returned unpaid by reason of "insufficient funds" (Pros Ex 1, p.18). Of these checks, one was returned in December 1948, one in January 1949, thirty-three in March, 1949, and seventeen in April 1949.

All of the checks described in the specifications in the present case were returned unpaid to the Fort Riley Officers Club (R 20). At the time of trial the Club held accused's unpaid checks in the sum of \$1708.50 (R 65). About 6 May 1949, a board of officers was convened to determine the "extent of loss, manner and responsibility of approximately

seventeen-hundred dollars (\$1700.00) from the Fort Riley Officers' Club and Mess" (R 48). Accused appeared before the Board and at the commencement of the proceedings was warned of his rights under Article of War 24 (R 49). He was shown the checks introduced in the present case as Prosecution Exhibits 4 to 13 (Specs 3 to 12, incl), and acknowledged his signature thereon (R 50,52,55,56,60,61).

4. Evidence for the defense.

Accused, advised of his rights as a witness, elected to take the witness stand only for the purpose of identifying a letter written to him by Mr. A. E. Tomassetti (R 82,83). The letter reads in pertinent part as follows:

"It certainly was a surprise to hear that you are to be court-martialed with the charge of willful intent to defraud. I have known you for many years and for a good part of that time you have had an account with us and your deposits were mailed to us sometimes by check, money order, or cash. Each time you sent them they arrived, but when I heard that you had sent two deposits of large amounts and we did not get them, I suggested you notify the postal authorities.

"As for the charge of willful intent to defraud I can remember the time you wrote me that you had \$300. worth of checks outstanding and if they came to hold them for you as you were sending a deposit to cover them. I did just that and while holding them the examiners came and I certainly was put on a spot for doing so, but my confidence in you was rewarded when a day or two later your deposit arrived.

"In all the years I have known you I have never heard nor known the time you ever tried to defraud anyone. As for the allotments of \$100. a month, they have been coming to us regularly.

"Hoping the charge against you will be withdrawn I remain,"
(Def Ex A-d).

Lieutenant Colonel George L. Foy, Commanding Officer of the Student Detachment at Fort Riley, testified that he had known accused as a member of the detachment from 14 February to 20 April and that during that period accused had never given him any trouble (R 77,78). On 20 April, accused came to Colonel Foy and voluntarily told him that he, accused, was in financial difficulty to the amount of \$1300 arising out of his issuance of checks and that he had made several attempts to raise the amount

required to pay the indebtedness but had been unsuccessful. Colonel Foy advised accused to continue his efforts to raise the money. Colonel Foy reported the matter to the Commanding General and at the same time suspended accused's credit at the club and its branches (R 78).

Accused spent most of his evenings at the Student Officers Club playing the slot machines (R 73,76). He never bought any large quantities of merchandise (R 74,76). During the period 2 March 1949 to 16 April 1949, accused "hit" the jackpot 29 times for a total of \$685.00 (R 66,67, 68,73,75,76). The noncommissioned officer who serviced slot machines in the club testified that the machines were set "to take twenty percent of each dollar played on an average per one-thousand pulls." (R 79). He further testified that any person who collected \$700 in jackpots must have put in the machines "over a thousand dollars (\$1000.00), easily." (R 81)

5. Accused was convicted of twelve specifications involving the wrongful making and uttering of checks, in violation of Article of War 96. Ten of these specifications (Specs 1 to 10) allege that accused wrongfully made and uttered the described checks, totalling \$410.00, with intent to defraud, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for payment, and that by means of these checks he fraudulently obtained the face amount of the checks from the payee. The two remaining specifications (Specs 11 and 12) allege that accused wrongfully made and uttered the described checks, in the amounts of \$325.00 and \$540.00 respectively, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for payment. All checks were allegedly drawn on The Puritan Bank and Trust Company and uttered to the Fort Riley Officers Club at Fort Riley, Kansas, on various dates between 30 March 1949 and 16 April 1949.

The making and uttering of the twelve checks by accused was clearly established by the evidence adduced by the prosecution. It is shown that accused uttered all twelve checks to employees of the Student Officers Club, a branch of the Fort Riley Officers Club, at Fort Riley, Kansas. Several of the checks were written and signed by accused in the presence of the employees who cashed the checks. The remaining checks had been written out, except for the name of the payee, at the time they were uttered. Since the court had before it the proved signature and handwriting of accused on the checks written in the presence of the employees, the court could find that the remaining checks were in his handwriting and had his signature (CM 325112, Halbert, 74 BR 89). All of the checks bore the signature, "Mario R. Gallo," as maker and the testimony of the assistant treasurer of the drawee bank showed that this

was the accused's signature. In a pretrial investigation accused voluntarily admitted that he had written the checks set out in Specifications 3 to 12. All checks were shown to have been drawn on the Puritan Bank and Trust Company of Meriden, Connecticut.

The majority of the checks are shown to have been written on the dates they bear. As to the others we may rely on the presumption that they were written on the dates they bear (CM 332879, Boughman, 81 BR 223,232). Except as to the checks described in Specifications 3 and 11, it was shown that the checks were uttered on the dates they were written. In the case of the checks described in Specifications 3 and 11 it is established that they were received by the drawee bank at Meriden, Connecticut, 7 days, and 10 days, respectively, after the dates they were written. It is apparent, therefore, that they were uttered on or about the dates they were written.

The evidence further shows that as to the ten checks described in Specifications 1 to 10, in each instance accused received cash for the face amount of the check from the payee, the Fort Riley Officers Club. These checks were indorsed on behalf of the payee and deposited in a local bank from which they were forwarded for payment to the drawee bank. Since the time interval between the dates of cashing and the dates of presentation varied from 7 to 10 days it is clear that they were presented for payment within a reasonable period of time. Payment was refused as to each of the checks because of insufficient funds in accused's account. There was no showing or contention that such insufficiency was due to other than accused's own acts. There were insufficient funds in accused's account when he wrote seven of these ten checks and he made no deposits in the account thereafter. When three of the checks were written, or within a few days thereafter, he had sufficient funds in his account to pay the checks but not on the dates they were presented for payment. Under these circumstances fraudulent intent could be inferred. The Board of Review in CM 280789, Hughes, 53 BR 317,323 held:

"* * The facts that the accused issued checks against an insufficient bank account which was not made sufficient, that the condition of the account was the result of his own acts, he being the person active in using the account, and that the checks were returned on presentation for want of sufficient funds, creates an evidentiary situation where, in the absence of adequate explanation or countervailing proof, the inference of fact is fully justified, from common human experience, that the accused knew that his account was insufficient and did not intend that it should be sufficient. If there be evidence of extenuation or excuse, the accused is the person to furnish it.

This rule is well established, often stated in the language that the accused, under such circumstances is 'chargeable' with knowledge of the condition of his own account (CM 202601, Sperti, 6 BR 171,214; CM 236070, Warner, 22 BR 279; CM 257069, Bishop, 37 BR 7,13; CM 257417, Sims, 37 BR 111,117; CM 258314, Reeser, 37 BR 367,378; CM 259005, Poteet, 38 BR 197,206), and that the 'burden' (of going forward with proof in his defense to dispel the ordinary inferences from established facts) in such an evidentiary situation is on the accused (CM 249232, Norren, 32 BR 95,103; CM 249993, Yates, 32 BR 255,261; CM 250484, Hebb, 32 BR 397,402)."

Similarly, in CM 245507, Payne, 29 BR 189,192, the Board of Review said:

"* * * The act of delivering a check, presently payable, in exchange for cash is in itself a representation that the check will be honored when presented for payment at the bank upon which it is drawn. If the check is dishonored because of the lack of funds on deposit belonging to the maker of the check, fraud may be implied from those facts alone. This implication or presumption however may be overcome by an explanation of the circumstances which, if believed, may explain the otherwise fraudulent act. * * *." (Cf: CM 336515, Stewart (22 Sept 49)).

The fact that twelve of accused's checks were dishonored within a period of about 20 days strengthens the conclusion that accused wrote the checks, described in Specifications 1 to 10, with fraudulent intent. As stated in CM 219428, Williams, 12 BR 249,262:

"* * * but the course of conduct of accused in writing a large number of checks within a comparatively short period of time, and his failure to exercise ordinary care with respect to the condition of his bank account at the time these checks were negotiated, reflects more than inadvertence, indifference or carelessness. Such repeated wrongful and unlawful acts lead to but one conclusion, viz., that accused made and uttered the checks specified, with knowledge and intent to defraud as alleged. * * *." (Quoted in CM 315578, Bell, 65 BR 47,52).

Additional proof of fraudulent intent arises from the fact that prior and subsequent to the period during which the checks in the instant case were dishonored, numerous other checks of accused were returned unpaid. Evidence to this effect was properly admitted since intent to defraud and guilty knowledge were issues in the case (CM 260755, McCormick, 40 BR 1,4).

For the purpose of negating the inference of fraud, it was shown that as to the checks written on 30 March and 3 April (Specs 1,2,3), there were sufficient funds in accused's account to pay them either on the date they were written or during part of the period between the date they were written and the date they were presented for payment. A similar defense was rejected by the Board of Review in CM 332879, Boughman, 81 BR 223,233. The Board relied upon CM 307125, Keller, 60 BR 335, in which it was held as follows:

"* * His uttering of 50 worthless checks in the short period of less than two months and thus procuring \$650 was clearly fraud. The fact that until 19 September he had in his account funds equal in amount to some of the worthless checks uttered on and after 7 September does not absolve him in any way, since by issuing certain checks which cleared the bank prior to those issued on and after 7 September he created a condition in his account such that on the dates when he uttered the worthless checks there were not in fact funds sufficient for the payment thereof; such funds as he then had were, as it developed, sufficient only to pay checks which had cleared the bank before the worthless checks were presented for payment." (See also CM 275648, Creighton, 48 BR 122,123).

Another possible defense to the imputation of fraud is suggested in the letter from the assistant treasurer of the drawee bank to accused in which a vague reference is made to two deposits of accused which supposedly failed to reach the bank. No testimony was introduced by the defense to support this innuendo. Whether any deposits were in fact lost or delayed in transit would be wholly conjectural and further consideration of the matter is not warranted.

A final defense to the allegation that the checks in question were made and uttered with intent to defraud consists of evidence that accused was an inveterate player of slot machines in the Student Officers Club, coupled with the assertion that the entire proceeds of the checks were expended in the slot machines. It is argued that the Club was not defrauded since the proceeds of the checks were immediately returned to it. In answer it may be said that although the record shows accused's jackpot winnings during the period, it does not show the amount he deposited in the machines or his losses. Consequently, the evidence does not show that the proceeds of the checks were returned to the Club. But even if this circumstance had been proven, the defense is without merit. In cashing accused's checks the Club was not making a loan or gift to him so that he could play the slot machines. The cashing of the checks and the playing of the slot machines were unrelated transactions and the use that accused made of the proceeds of the checks was entirely

personal. It would not be contended that when accused received the cash for the checks he had the intent of returning the money to the Club. It may be assumed that accused played the machines with the intent, however fatuous, of winning. If he did pay the proceeds back to the Club it was contrary to his intent and involuntary on his part. We see nothing in evidence of this character which would disprove that accused made and uttered the checks with fraudulent intent and that he obtained the proceeds of the checks fraudulently. Any value which the evidence in question may possess is purely extenuatory (CM 284149, Brown, 55 BR 261,272).

Under all the evidence in the case we believe that accused's fraudulent intent is clearly established and we accordingly sustain the findings of guilty of Specifications 11 to 10 of the Charge.

As previously stated, Specifications 11 and 12 allege that accused wrongfully made and uttered the described checks then well knowing he did not have and not intending to have sufficient funds in the bank for payment. There is no allegation that accused made and uttered these checks with intent to defraud or that he fraudulently or otherwise obtained anything of value thereby. Similar specifications have been held by the Board of Review in numerous cases to state an offense in violation of Article of War 96. The following quotation from CM 277799, Dowd, 51 BR 207,215, illustrates these holdings:

"* * No fraud was charged in connection with the issuance and utterance of the checks, but it has been repeatedly held to be a violation of Article of War 96 for one in the military service to issue a check on a bank, knowing that there were not sufficient funds and not intending that there should be sufficient funds to meet such checks on presentation, even though an intention to defraud was absent. As stated in CM 249232, Norren, 3 Bull JAG 290, 32 BR 95:

'A member of the military establishment is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it. Such conduct is not only a reflection on the individual and a violation of a civil law if committed with wrongful intent, but service-discrediting as well. Frequently checks are cashed not because of the assurance derived from the implied representation attached to the check so much as the faith created by the uniform. The individual may be satisfied by the exculpation which flows from an explanation rooted in carelessness or negligence. The

hurt to the credit and reputation of the Army is not so easily removed.

* * *

'It is the opinion of the Board of Review that proof that a check given for value by a member of the military establishment is returned for insufficient funds imposes on the drawer of the check, when charged with service-discrediting conduct, the burden of showing that his action was the result of an honest mistake not caused by his own carelessness or neglect.'

Similarly in CM 294486, Gault, 57 BR 333,337, the Board of Review noted:

"Accused is here charged with wrongfully and unlawfully making and uttering a total of fourteen checks aggregating \$760 in amount, knowing that he did not have and not intending to have sufficient funds on deposit to pay them. There is no allegation that he intended to defraud or that he fraudulently obtained anything thereby. A Specification worded as are these has recently been held not to contain the element of fraud and the offense alleged thereby was described as 'something less than that of obtaining money or property by fraud and something more than mere careless failure to maintain a sufficient bank balance' (CM 280789, Hughes; CM 206548, Welch)."

The evidence in support of Specifications 11 and 12 shows that when accused made and uttered these checks to employees of the Student Officers Club he received, in one instance, some checks in exchange, and in the other instance, a sealed envelope in exchange. Both checks were deposited by the payee in a local bank, promptly forwarded to the drawee bank, and dishonored. Accused did not have sufficient funds in the bank for the payment of these checks either at the time they were written or subsequent thereto.

The evidence and principles of law previously discussed, under which it was concluded that accused knew he did not have and did not intend to have sufficient funds in the bank for payment of the checks described in Specifications 1 to 10, lead to a similar conclusion with respect to the checks described in Specifications 11 and 12. Since accused knew he did not have and did not intend to have funds in the bank for payment, his making and uttering of the checks was wrongful. Although the consideration for the two checks was neither alleged nor proved, it does not affect accused's guilt under the specifications as written. Convictions in similar cases in which the evidence failed

to disclose the consideration for accused's worthless checks, have been upheld in CM 249006, Vergara, 32 BR 5,14, and CM 256706, Siddon, 36 BR 335,342. It may be noted that in the instant case the evidence indicates that, at least as to one of the two checks in question, it was given to redeem accused's previous checks.

The evidence, therefore, sustains the allegations of Specifications 11 and 12.

It appears that in the course of presenting its case in chief, the prosecution introduced a witness whose name was not indorsed on the charge sheet or otherwise made known to the accused. Since the law member offered to entertain a motion by the defense for a continuance, which the defense asserted was unnecessary, no error is shown.

6. Department of the Army records show that accused is about 29 years and 9 months of age having been born at Calabria, Italy, on 31 January 1920, and is married. His American citizenship was derived through naturalization of his father in 1932. In 1938 he was graduated from Meriden High School, Meriden, Connecticut. Thereafter his civilian pursuits were: student actor, student director, and stock clerk for an electrical supply house. He was inducted in the Army on 25 January 1942, and following completion of the Officer Candidate Course at the Cavalry School, Fort Riley, Kansas, received a temporary commission as a second lieutenant in the Army of the United States on 3 October 1942. On 25 February 1945, he was promoted to the temporary grade of first lieutenant and on 1 June 1948 he was appointed to the same grade in the Officers' Reserve Corps, Army of the United States. In the course of his military service, on 6 July 1943, he suffered severe facial injuries in a jeep accident for which he received extended plastic surgery. From 22 September 1945 to 10 February 1946 he served in the Pacific Theater. His efficiency ratings are: Very Satisfactory (2) and Excellent (10). He was tried by general court-martial on 16 January 1943, for an absence without leave of four days, receiving a sentence to restriction and forfeiture of pay.

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. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, as modified by the reviewing authority, and to warrant confirmation of the modified sentence. A sentence to dismissal, total forfeitures after promulgation, and

confinement at hard labor for two years is authorized upon conviction of an officer of violations of Article of War 96.

Robert J. Connor, J.A.G.C.
Charles J. Berkowitz, J.A.G.C.
John Lynch, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

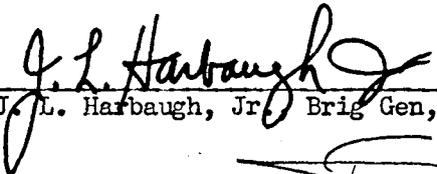
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CM 337978

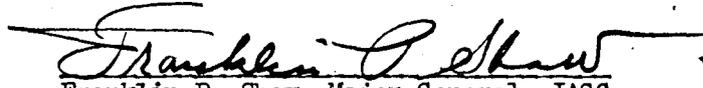
THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant Mario Ramon Gallo, O-1030661, Student Officers Detachment, The Ground General School Center, Fort Riley, Kansas, upon the concurrence of The Judge Advocate General the sentence as modified by the reviewing authority is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

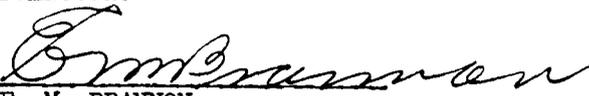

J. L. Harbaugh, Jr. Brig Gen, JAGC


Robert W. Brown, Brig Gen, JAGC


Franklin P. Shaw, Major General, JAGC
Chairman

30 January 1950

I concur in the foregoing action.
Under the direction of the Secretary
of the Army, the confinement adjudged
is remitted.


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

6 February, 1950

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

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CSJAGH CM 337997

OCT 19 1949

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

v.)

Recruit JOHN W. BEARD, RA)
39343951, Company A, 9th)
Infantry, Fort Lewis,)
Washington.)

2D INFANTRY DIVISION

Trial by G.C.M., convened at
Fort Lewis, Washington, 24 May
1949. Bad conduct discharge.

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

1. The Board of Review has examined the record of trial in the case of the 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: (Withdrawn by appointing authority prior to arraignment, R 3).

Specification 2: In that Recruit John W. Beard, Company A, 9th Infantry, then Private John W. Beard, Company L, 8th Infantry, did, at Monterey, California, on or about 7 September 1948, with intent to defraud, wrongfully and unlawfully make and utter to Cerrito's, Monterey, California a certain check, in words and figures as follows, to wit:

Phoenix, Arizona Sept 7 19 48 No. --

15th Street & McDowell Branch 91-176
FIRST NATIONAL BANK OF ARIZONA 1221

Pay to the
Order of Cerrito's \$ 12 49

Twelve and 40/100-----Dollars

Co L, 8th 39343951

John W. Beard

Specification 9, except the words "with intent to defraud" and "fraudulently," of the excepted words not guilty; guilty of Specification 10, with exceptions; and guilty of the Charge. Evidence was introduced of one previous conviction by Special Court-Martial for absence without leave of one month and twenty-four days. He was sentenced to be discharged the service with a bad conduct discharge. The reviewing authority disapproved the finding of guilty of Specification 10, approved the sentence, and, pursuant to Article of War 50e, withheld the order directing execution of the sentence.

3. The record of trial is legally sufficient to support the findings of guilty of Specification 9 of the Charge. The sole question presented is whether the finding of guilty, with exceptions, of Specification 2 of the Charge is a finding of an offense necessarily included in that originally alleged in Specification 2. In view of the conclusion reached it is unnecessary to set out the evidence applicable to Specification 2.

4. Specification 2 of the Charge alleged that accused, with intent to defraud, wrongfully and unlawfully made and uttered a certain check and by means thereof fraudulently obtained from the payee the face amount of the check in merchandise, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for payment. The court found accused guilty of the specification with the exception of the allegations, "with intent to defraud," "fraudulently," and "then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for payment of said check." The court found, therefore, that accused wrongfully and unlawfully made and uttered a certain check and by means thereof obtained the face amount of the check in merchandise. Does the court's finding state an offense which is lesser included in the offense alleged in the original specification?

In discussing the subject of lesser included offenses the Manual for Courts-Martial states:

"If the evidence fails to prove the offense charged but does prove the commission of a lesser offense necessarily included in that charged, the court may by its findings except appropriate words and figures of the specification, and, if necessary, substitute others, finding the accused not guilty of the excepted matter but guilty of the substituted matter. The test as to whether an offense found is necessarily included in that charged is that it is included only if it was necessary in proving the offense charged to prove all elements of the offense found. * * *." (MCM, 1949, par. 78d).

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In proving the offense charged, the prosecution, in addition to proving that accused made and uttered the check and obtained value thereby, had to prove that accused made and uttered the check wrongfully and unlawfully in that he intended to defraud, and knew that he did not have and did not intend to have funds in the bank for payment of the check. Since the court acquitted accused of any fraudulent knowledge and intent and at the same time found that his making and uttering of the check was wrongful and unlawful, it is apparent that the wrongfulness and unlawfulness found, was necessarily based upon an element of proof other than that alleged in the original specification, namely, fraudulent knowledge and intent. The finding, therefore, introduces a material element of proof not required in proving the original specification. It must be concluded, therefore, that the finding does not state an offense lesser included in that charged.

In view of this conclusion we overrule CM 294637, Silva, 57 BR 381, in which, under an identical specification and a substantially similar finding by the court, it was held that the finding involved "the military offense of careless failure to maintain a sufficient bank balance" and that such offense was lesser included in the offense charged. It should be noted that the holding in the Silva case is also inconsistent with the principle laid down in the recent case of CM 336515, Stewart (22 Sept 49), in which the Judicial Council held that the offense of wrongfully failing to maintain sufficient funds in the bank for payment of a check when presented for payment, is not lesser included in the offense of making and uttering a check with fraudulent knowledge and intent such as is alleged in the original specification in the instant case.

5. The finding of guilty of Specification 9 of the Charge, which is sustained by the record of trial, will support a maximum sentence of confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period (MCM, 1949, par. 117c, p.140). A bad conduct discharge, which was the only sentence adjudged, is not authorized for such offense.

6. For the reasons stated the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty of Specification 9 of the Charge and the Charge, and legally insufficient to support the finding of guilty of Specification 2 of the Charge and the sentence.

Robert J. Glavin, J.A.G.C.

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

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

OCT 28 1949

CSJAGH CM 337997

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 John W. Beard, RA 39343951, Company A, 9th Infantry, 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 Specification 9 of the Charge and the Charge and legally insufficient to support the finding of guilty of Specification 2 of the Charge and the sentence. Under Article of War 50e this holding and my concurrence vacate the finding of guilty of Specification 2 of the Charge and the sentence.

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

(CM 337997).

1 Incl
R/T

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.

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OCT 14 1949

CSJAGH CM 338030

UNITED STATES)

ZONE COMMAND AUSTRIA)

v.)

Recruit HIRAM R. RAINEY, RA)
14284555, and Private First)
Class ARTHUR L. TOLIN, RA)
15254157, both of Company B,)
4th Reconnaissance Battalion.)

Trial by G.C.M., convened at)
Salzburg, Austria, 2,3,4 August)
1949. Both: Dishonorable discharge,)
total forfeitures after promulgation,)
and confinement for twenty five (25))
years. United States Penitentiary,)
Lewisburg, Pennsylvania.)

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

1. The Board of Review has examined the record of trial in the case of the 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 Charges and Specifications:

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

Specification: In that Recruit Hiram R. Rainey, Company B, 4th Reconnaissance Battalion and Private First Class Arthur L. Tolin, Company B, 4th Reconnaissance Battalion, acting jointly and in pursuance of a common intent, did, at Salzburg, Austria, on or about 25 June 1949, with malice aforethought, wilfully, feloniously, and unlawfully kill Anton Poth, a human being by striking him on the head with a rock.

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

Specification: In that Recruit Hiram R. Rainey, Company B, 4th Reconnaissance Battalion and Private First Class Arthur L. Tolin, Company B, 4th Reconnaissance Battalion, acting jointly and in pursuance of a common intent, did, at Salzburg, Austria, on or about 25 June 1949, wrongfully strike Ernst Prekop on the body with their hands.

They pleaded not guilty to, and were found guilty of, the Charges and the Specifications thereunder. Evidence of one previous conviction by summary court-martial was introduced as to the accused Rainey. No evidence of previous convictions was introduced as to the accused Tolin. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct, for twenty-five years. In the case of each accused, the reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, or elsewhere as the Secretary of the Army may direct, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50e.

3. Evidence.

a. For the prosecution.

Some time between 7:30 and 8:15 on the night of 25 June 1949, in the city of Salzburg, Austria, the accused Rainey and Tolin joined Private First Class Gilbert DerWeduwe and another soldier, Private First Class McArthur, on a Special Service Bus, and accompanied them to their company. At the time, accused Rainey was drunk and appeared to fall asleep on the bus. Tolin "wasn't too bad" (R 28-29-32). Accused had a jug containing some sort of alcoholic beverage, which DerWeduwe, who sampled the beverage, was unable to identify although he found it had a "terrible kick" (R 32,33). After a short stay at DerWeduwe's company, the group of four visited "Mom's Gasthaus" arriving there at approximately eight-thirty. Neither accused drank "too much" in the Gasthaus but, according to DerWeduwe, Rainey was very drunk and more or less asleep (R 35). Private First Class Francis W. Chaput, another patron of the Gasthaus, observed that Tolin "passed out" under a table but he "woke back up" (R 44). The accused's group remained at the Gasthaus for approximately a half hour or hour and then decided to return to the company. It was about 9:30 (R 29,34). As they were leaving the Gasthaus, McArthur parted from the group, and the two accused, with DerWeduwe, started down the street. The accused had some sort of altercation with a civilian group consisting of two men and two women, and chased them down the street (R 20,29-30). Ernst Prekop at the time was walking in the direction from which the chase was proceeding. DerWeduwe bumped into Prekop and said, "What is los?" According to DerWeduwe, Prekop replied "Why don't you go home?" to which DerWeduwe responded "All right." DerWeduwe, in response to calls from accused, rejoined them, whereupon one of them said something about "did he give [you] a hard time." DerWeduwe answered in the negative. Subsequent events were described by DerWeduwe as follows:

"* * And we were continuing down the street. Then I figured it was the end of that. One of the fellows, Rainey, turned around, ran after this here fellow, this German, and I was kind of bewildered, I didn't know what was going on. Then the other fellow came out and Rainey started slugging this guy. He was ten yards from me. I was about ten yards from them and Tolin and the other guy started hitting him. They said something to me about joining them. I didn't want nothing to do with this here German civilian. They stopped, and chased him through this garage, a building there, and he ran into that; I think he fell down, I'm not sure. I think he fell down. Then he ran back again toward me, fell into a ditch like, a little creek running alongside the company. One of the fellows was going to kick him in the head, Rainey. I grabbed his foot, stopped him." (R 30)

Prekop in the course of his testimony identified, by indicating, the particular accused who initially assaulted him, but the record fails to reflect which of the two accused he indicated (R 21,23). Prekop was unable to state whether, after the initial onslaught, the assault was continued by one or more persons (R 25). He estimated the time of the incident as about 2130 or 2200 (R 23). DerWeduwe accompanied Prekop part of the way toward the "D.P." camp but subsequently rejoined the accused "over the bridge." One of the accused said "We really fixed that guy." DerWeduwe believed that accused were going to get into trouble, and so left them after they went into a gasthaus near the company (R 31,37).

Chaput also left Mom's Gasthaus at approximately the same time as the accused and DerWeduwe. He was accompanied by two other soldiers, Sanders and Christley (R 42). He had previously observed the accused in the Gasthaus and estimated that when he had first seen them it was about ten or ten-thirty (R 44). Chaput and his companions proceeded in the direction of the company. They were just behind the accused. A civilian came toward them on the opposite side of the road (R 42). Chaput observed "The two soldiers cross over." Chaput's group continued on and "passed them." Christley exclaimed, "Watch this," and Chaput turned and observed "somebody" hit the civilian who ran on to the "DP Camp." (R 43). With reference to the assault Chaput testified as follows on cross-examination:

- "Q. What happened immediately after he said, 'Watch this?'
- A. I turned around and saw the two soldiers crossing the road and strike the civilian.

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- Q. Looking in the direction where the first assault took place?
A. It happened right under the street light, about ten feet.
- Q. That is the assault that took place right after your companion said, 'Watch this?'
A. Right.
- Q. How many soldiers were in the vicinity of yourself and Tolin and Rainey that night?
A. Three of us and three of them.
- Q. Who were the three of us?
A. Corporal Sanders, PFC Christley and myself.
- Q. Who was the third with Tolin and Rainey?
A. The German with Tolin and Rainey.
- Q. Did you see any civilians with Tolin and Rainey?
A. One.
- Q. Who was that?
A. The one they hit.
- Q. Were you with, or in sight of Tolin and Rainey, between the time they left the gasthaus and the assault took place?
A. Yes.
- Q. Did you see any civilians other than Poth on that street?
A. No, sir.
- Q. What did Tolin and Rainey do between the time they left the gasthaus and the assault took place?
A. Just kept walking, sir.
- Q. That is all they did?
A. Before they hit the first civilian.
- Q. Do you know the name of the first civilian?
A. No, sir.
- Q. Have you seen him since that time?
A. Up at the CID.
- Q. Have you seen him today?
A. Yes, sir, he was in here." (R 45,46)

After witnessing the assault, Chaput, Christley and Sanders continued on in the direction of the bridge. When they were on the bridge they were overtaken by Tolin and Rainey. At the same time another civilian was coming up the road toward the enlisted men. Tolin said to Rainey, "Let me do it." Tolin went over to the civilian, swung at him, missed, and fell to the ground. Thereupon, Rainey went up to the civilian with a rock in his hand. Rainey hit the civilian, who fell to the ground (R 43,50). Chaput identified the victim of Rainey's assault as "Some civilian" (R 48).

While Chaput went for the "CQ" Sanders brought the civilian up to a sitting position. After returning with the "CQ", Chaput and Sanders took the civilian to the orderly room (R 43,51). There was blood coming from the left side of the civilian's face, but he walked "under his own power" to the orderly room one hundred yards away. He did not talk but "kept shaking his head, mumbling." After arriving at the orderly room Sanders washed the civilian's face (R 48,51). Chaput left at the time the civilian was taken to the "aid room" (R 51).

Pretrial written statements of accused were admitted in evidence to be considered only against their respective authors (R 83; Pros Ex 1,2). Issue was joined as to the voluntary character of the statements but in our view of the case it is not necessary to recount or discuss the evidence adduced on the issue. It is sufficient to say that the evidence offered by the prosecution supports a conclusion that the statements were voluntarily made. The two statements are in substantial accord and relate that the accused on the date of the homicide alleged went to Salzburg on pass and did considerable drinking. Their accounts of their movements from the time they met DerWeduwe are in substantial accord, with one exception, with that related by the prosecution's witnesses. The accused admitted that after leaving "Mom's Gasthaus" they joined in an assault upon a civilian, each striking the civilian with his fists. Subsequently, they were in an altercation with another civilian at the small bridge by the signal company area. Here their stories differ from the accounts given by the prosecution's witnesses. According to the accused's accounts of the incident Rainey swung at the civilian, missed, and fell to the ground, and Tolin struck the civilian on the head with a stone held in his right hand. The blow was delivered with such force that the man fell to the ground (Pros Exs 1,2).

At approximately 2200 hours, 25 June 1948, a man who identified himself as "Poth" was brought to the Landeskrankenhaus at Salzburg where he was treated by Doctor Herbert Goetziner. When Doctor Goetziner first saw the man there were present an Austrian policeman and an American "MP." Poth had "a heavily bleeding skull fracture." Detailed

examination by Doctor Goetziner revealed the following:

"* * not only the skin and the lower parts of the skin, but even the skull showed signs that it was broken by force. At the lower part of the described spot, you could see the brain. The bone was piercing into the brain. And the brain was destroyed in an extent of a couple of centimetres. All tissues were torn too. There was much bleeding from the blood vessels inside the brain skin. The brim of the whole spot was like a cut. The way as if you take a heavy tool and push it right through." (R 7,8).

The fracture was on the left hand side of the head (R 11). Doctor Goetziner described his treatment and the patient's course as follows:

"I administered first aid at once. I took away the destroyed-parts of the brain, stopped the bleeding, sewed the brain tissues and took the destroyed-parts of the skull away and used the remaining skin to close up the wound. The patient was dazed. After such a brain concussion, there is very high danger, so he was given a puncture the next day. There was a slight lameness on the right part of the brain. This lameness came from the bleeding. The lameness never disappeared altogether, however, it slowed down. That is a sign that the bleeding did not continue. More and more, we could not talk to the patient. The breathing became worse and worse. There was also an inflammation of the brain tissues which was lightened by a shot of penicilin. The concussion caused during the time a pneumonia and upon this pneumonia, the patient eventually died." (R 8)

Death occurred on or about 29 June 1949 (R 8).

b. Evidence for the defense.

Private First Class Allen C. Trombley testified that on the night of 25 June between 2330 and 2345 hours he and Private First Class Jackson "picked up" the accused Tolin who was carrying a rock (R 84,85). The rock was turned over to Corporal Harold A. Loyd who turned the rock over to the "CID" (R 86,87).

Private John R. McArthur testified that on the night of 25 June he was with accused from about eight o'clock until the time they left "Mom's Gasthaus." In his opinion both accused were drunk but Rainey was the "drunker" of the two (R 91-100).

Private First Class Douglas C. Sanders testified that on the night of 25 June he had seen accused in the gasthaus near the signal company and that both were drunk but that Rainey was a little drunker and "passed out." After leaving the gasthaus Sanders saw one of the accused swing at a civilian. Thereafter Sanders and Private First Class Chaput were standing on the bridge near the Signal Company. As the accused were approaching the bridge Rainey stooped and picked up an object. When the accused came abreast of Sanders and Chaput, Tolin secured a light from Chaput. Then one of the accused remarked, "I'll take care of this." Sanders observed that a civilian was approaching and Tolin walked over to the civilian, swung at the civilian, missed and fell to the ground. Rainey then "moved up, took a swing at the civilian. It looked to [Sanders] like [Rainey] threw a stone." Sanders was unable to state, however, that the object thrown was a stone, but he did hear "the blow." The accused fled from the scene. Sanders ran over to the civilian, helped him up and then told Chaput to go get somebody to take him to the hospital (R 101-107).

Other witnesses testified that accused had a reputation for fighting when they were drinking (R 108,109,110,111).

It was stipulated that while in confinement accused were not subject to any other than "the usual guard with confinement" (R 111).

John W. Campbell, a "CID" agent who was instrumental in securing the pretrial statements from accused, testified that on 29 or 30 June a stone was brought in by "John Lynn" who advised Mr. Campbell that one of the accused had been apprehended with the stone in his possession (R 112). The stone was examined but no evidence of blood was found on it (R 113).

Doctor Herbert Goetziner was recalled by the defense and testified in detail as to the treatment given by him to Anton Poth (R 114-120). In our view of the case it is not necessary to set forth his testimony.

The accused after being apprised of their rights thereto elected to testify in their own behalf. In substance they testified that they received passes at 1330, 25 June 1949, and went into Salzburg. They spent the afternoon drinking and did not recall any incidents in which they were involved after joining DerWeduwe (R 122-124).

4. The evidence conclusively shows that at the time and place alleged accused assaulted one Ernst Prekop with their hands, and warrants the findings of guilty of Charge II and the Specification thereunder.

The evidence further shows that a short time after the assault upon Prekop some time between 2130 and 2230 hours, the accused, without cause, attacked another civilian, and one of the accused, Tolin, according to his pretrial statement, or Rainey, as shown by the testimony, struck the civilian on the head with a rock, thereby knocking the civilian to the ground. Under the circumstances shown, had the victim of the second assault committed by the two accused died as a result of the attack, a prima facie case of murder would thereby have been established. Accused were charged with and found guilty of the unpremeditated murder of one Anton Poth. The record shows that "Poth" was admitted to a hospital, the Landeskrankenhaus in Salzburg, at approximately 2200 hours on 25 June 1949 with a severely fractured skull which, without any intervening cause, resulted in his death on 29 or 30 June 1949. As hereinbefore related, accused had on the night in question, at the approximate time of Poth's admission to the hospital, committed assaults on two civilians. The victim of the first assault was Ernst Prekop and the victim of the second assault was described merely as "some civilian." There is no direct testimony that the victim of the second assault was Poth. The fact that the victim of the second assault was Poth could be established by circumstantial evidence (CM 329968, Mowell, 78 BR 205). In order to sustain the finding of guilty of murder, it, however, must be established beyond a reasonable doubt that the victim of the second assault was Poth, otherwise, all that the record shows as to Poth is his demise, probably by virtue of violence.

We are of the opinion that the circumstances shown by the record of trial fail to establish beyond reasonable doubt that the victim of the second assault was the deceased, Poth. The record does show that "some civilian" was hit on the head with a rock with considerable force and knocked to the ground. One of the witnesses, Sanders, apparently believed that the civilian was in need of hospitalization inasmuch as he sent the other witness, Chaput, to find someone to take the victim to a hospital. In this connection, however, there is nothing to show that the victim was ever sent to a hospital. After being picked up by Sanders, the victim, unaided, walked one hundred yards to the orderly room. At the time, Chaput, who was walking alongside the victim, noticed blood on the left side of his face. After the victim's face was wiped off at the orderly room, he was taken to the aid room. Thereafter, there is no further mention of the victim. There are but two circumstances which point to possible similarity between the victim of the second assault and the deceased Poth. Making allowances for the differences with which various people estimate time, we may infer that the victim could have been assaulted in Salzburg at approximately 2130 to 2230 hours and be at the Landeskrankenhaus in Salzburg at approximately 2200 hours. The other circumstances of possible similarity is that the victim had blood on the left side of his face and Poth's skull fracture

was on the left hand side of the head. These two points of similarity are not sufficient to establish that the victim of the second assault and Poth are one and the same person. (CM 316930, Mitchell, 66 BR 117; CM 202359, Turner, 6 BR 87,122; CM 309701, Taylor, 32 BR (ETO) 336; CM 248113, Coe, 1 BR (CBI-IBT) 34; CM 309037, Dillon, 2 BR (CBI-IBT) 367). Since the record thus fails to show that Poth's death was caused by accused, it necessarily fails to support the findings of guilty of murder.

We have observed that the defense counsel in his cross-examination of Chaput concerning the first assault, asked the following question: "Did you see any civilians other than Poth on that street?", to which Chaput answered, "No, sir." We think it clear from the context of the cross-examination that the defense counsel's use of the name "Poth" was inadvertent, that he was, in reality, speaking of Prekop who was the victim of the first assault, and that Chaput's answer cannot be interpreted as implying that he saw Poth on the street. When, in the course of further cross-examination concerning the second assault, Chaput was asked, "Who was assaulted?", his answer was, "Some civilian, sir." Under these circumstances we fail to see any concession by the defense or testimony which establishes that Poth was in the vicinity where the assaults hereinbefore described took place.

5. The maximum sentence which may be imposed for assault and battery, the offense of which we find the accused has been legally found guilty, is confinement at hard labor for six months, and forfeiture of two thirds pay per month for six months (MCM, 1949, par. 117c). Penitentiary confinement is not authorized for the offense of assault and battery since the maximum sentence to confinement which may be adjudged therefor is only six months (MCM, 1949, par. 90).

6. The court was legally constituted and had jurisdiction of the persons and of the offenses. Except as hereinbefore noted, no errors injuriously affecting the substantial rights of the accused were committed during 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, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support only so much of the sentence as to each accused as involves confinement at hard labor for six months in a place other than a Federal penitentiary, reformatory or correctional institution, and forfeiture of \$50.00 pay per month for a like period.

Robert J. Clunier, J.A.G.C.

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

Herb Squach, J.A.G.C.

OCT 24 1949

CSJAGH CM 338030

1st Ind

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

TO: Commanding General, Zone Command Austria, APO 174, c/o Postmaster,
New York, New York.

1. In the case of Recruit Hiram R. Rainey, RA 14284555, and Private First Class Arthur L. Tolin, RA 15254157, both of Company B, 4th Reconnaissance Battalion, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support only so much of the sentence as to each accused as involves confinement at hard labor for six months in a place other than a Federal penitentiary, reformatory or correctional institution, and forfeiture of \$50.00 pay per month for a like period. Under Article of War 50e this holding and my concurrence vacate the findings of guilty of Charge I and its Specification, and so much of the sentence as to each accused as is in excess of confinement at hard labor for six months in a place other than a Federal penitentiary, reformatory or correctional institution and forfeiture of \$50.00 pay per month for a like period. Under the provisions of Article of War 50 you have authority to order the execution of the sentence as modified in accordance with the foregoing holding. You are authorized, alternatively, to direct a rehearing. In the event that you desire a rehearing, the findings and the sentence should be disapproved in entirety, and, simultaneously, a rehearing directed as to either charge and the specification thereunder or both charges and the specifications thereunder.

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 338030)

1 Incl
R/T



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.

225

CSJAGK - CM 338081

7 OCT 1949

UNITED STATES)

UNITED STATES CONSTABULARY

v.)

Trial by G.C.M., convened at Stuttgart,
Germany, 2 August 1949. Dismissal and
total forfeitures after promulgation.

First Lieutenant FLOYD M.
EVANSON (O-1031717), Head-
quarters and Headquarters
Company, 1st Battalion, 2nd
Armored Cavalry.)

OPINION of the BOARD OF REVIEW
McAFEE, BRACK and CURRIER .

Officers of The Judge Advocate General's Corps

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to the Judicial Council and The Judge Advocate General.
2. The accused was tried upon the following charges and specifications:

CHARGE: Violation of the 96th Article of War.

Specification: In that 1st Lieutenant Floyd M. Evanson, Headquarters and Headquarters Company, 1st Battalion, 2d Armored Cavalry (United States Constabulary) was, at Vilseck-Sub-Post, Vilseck, Germany, on or about 19 June 1949, drunk in camp.

ADDITIONAL CHARGE: Violation of the 85th Article of War.

Specification: In that 1st Lieutenant Floyd M. Evanson, Headquarters and Headquarters Company, 1st Battalion, 2d Armored Cavalry (United States Constabulary) was, at Vilseck Sub-Post, Vilseck, Germany, on or about 19 June 1949, found drunk while on duty as train commander.

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

A letter order from the accused's organization was identified and received in evidence without objection which showed that the accused was appointed train commander of a "pass" train which was to run from Vilseck to Augsburg, Germany, and return, over a three-day period commencing on or about 17 May 1949. The order was dated 16 June 1949. Major Lester J. Knepp, regimental adjutant, testified that the date 17 May 1949 in the body of the letter order was incorrect and that the correct date should be 17 June 1949. On 17 June 1949 the accused was instructed as to his duties as train commander by Major Knepp. Thereafter the accused entered upon and performed the duty of train commander (R 7-10; Pros Ex 1). Accused instructed the enlisted guards assigned to the train to confiscate and turn over to him all intoxicating beverages found in the possession of the men who were to board the train. Private First Class Richard K. Evett, one of the assigned guards, confiscated four bottles of liquor at the train station in Augsburg and turned them over to the accused. Private Evett saw the accused at a point about midway of the trip from Augsburg to Vilseck and at that time the accused talked coherently and sensibly. He next saw the accused just before arrival at Vilseck on a platform of one of the cars, talking to a small boy. He (accused) was then slightly intoxicated judging from his actions of swaying, having trouble keeping his eyes open, "hazy" voice, the smell of liquor on his breath, and the spacing of his words. On cross-examination Private Evett testified that he did not see accused take a drink at any time during the trip nor did he see him walk. He last saw the accused in the parking lot at regimental headquarters being assisted out of a three-quarter ton vehicle by several officers (R 10-15).

First Lieutenant Henry H. Burnett testified that he was officer of the day on 19 June 1949 and met the "pass" train on its arrival at Vilseck at approximately 2330 hours. There were some vehicles with their headlights turned on which furnished illumination. He saw the accused leaning against the rear end of a three-quarter ton truck, with his blouse unbuttoned, without a cap, and shouting unintelligibly. Accused and six other officers boarded the truck which took them to regimental headquarters, where Lieutenant Burnett assisted the accused in dismounting. In the opinion of Lieutenant Burnett the accused was drunk. Accused was then taken to the office of Captain Libby, the regimental provost marshal. The accused's jacket was unbuttoned, his tie was pulled down, and his trousers looked like he might have vomited on them. He was not wearing a hat. The accused could not talk coherently. Captain Libby told the accused to "button up his jacket, police himself up," and to go on out to the truck which would take him to his quarters. Captain Libby followed the accused outside and caught him as he was about to fall down the steps. In Captain Libby's opinion, the accused was drunk, however he was not belligerent or disrespectful and "he caused no trouble". Captain Thomas E. Hauss testified that he was regimental duty officer on 19 June 1949; that he saw the accused in Captain Libby's office at about 2330 hours; that the accused had difficulties in his speech; that his appearance and uniform were

deplorable, and that he had difficulty in walking. In his opinion the accused was drunk. Captain Hauss also testified that accused did not report to him, nor was he aware of any instructions which required the accused to report to him or anyone else (R 15,16,18,20-22).

For the Defense

First Lieutenant Ralph D. White testified that he was on the "pass" train, that he had had an automobile accident on the way to Augsburg and was bleeding from cuts he had received. He was in the same car with accused on the train and the accused tried to patch the lacerations on his (witness') hands and face and got himself (accused) and his clothing bloody and dirty. He saw the accused take two drinks, but did not think he was drunk, disorderly or out of uniform at any time. He thought that accused's appearance was the same as any other officer who would take the five-hour train ride from Augsburg to Vilseck on "these German trains." After riding in the truck from the train to regimental headquarters, Lieutenant White went to his colonel's room in the "BOQ" and then to his own room. While Lieutenant White was on his way to his quarters he saw the accused entering his (accused's) quarters unassisted. In his opinion the accused was sober (R 24, 26-29).

First Lieutenant Orville R. Hughes testified that he was on the "pass" train to Vilseck on 19 June 1949 and in charge of the men from the "2d Battalion." The accused was the train commander. He was present with the accused when the regimental adjutant briefed them as to their duties on the day prior to the trip to Augsburg. The briefing by Major Knepp included the instruction that he was to report any "AWOL's" to the accused. Upon their arrival at Augsburg, Germany, their duties would cease until 1700 hours, 19 June 1949, at which time they were to assemble the men, take a roll call, inspect their baggage for liquor, and keep order while on the train. He did not hear of any instructions which required the accused to make a report at the end of the return trip of the "pass" train. He saw the accused in the Augsburg station with a sack of five or six bottles. He did not see the accused thereafter during the trip nor after the train stopped (R 30,31,32).

Second Lieutenant Willoughby H. Nelson testified that he was on the "pass" train from Augsburg on 19 June 1949 and that he saw the accused several times with a cup in his hand with what appeared to be a "coke." He saw the accused several times walking about and performing his duties as a train commander. In his opinion the accused was "sober enough to know his duty and to perform it." During the trip Lieutenant White poured out drinks of whiskey for several officers including the witness. He did not see Lieutenant White give the accused any whiskey. On cross-examination he testified that when the accused got off the train he was in uniform. He could not recall whether the accused "had a cap or hat on," whether his jacket was buttoned up or if his tie was tied. The accused's trousers were dirty. In his opinion the accused was sober (R 33,37,38).

Second Lieutenant Glenn Leroy Heryford testified that he was on the pass train from Augsburg to Vilseck on 19 June 1949 and shared the same compartment with accused. He saw the accused walking several times but he was not staggering. He saw the accused take two drinks and in his opinion the accused was not drunk. Witness could not state that the drinks taken by the accused were in fact whiskey (R 38,39,40).

The accused was advised of his rights as a witness by the law member and elected to remain silent (R 42,43).

4. Discussion

The accused was charged with and found guilty of being found drunk on duty in violation of Article of War 85 and of being drunk in camp in violation of Article of War 96.

In order to sustain a conviction of being found drunk on duty in violation of Article of War 85, it is necessary to prove that the accused was on a certain duty as alleged and that he was found drunk while on such duty. The term "duty," as used in this Article means military duty. Every duty which an officer or soldier is legally required by superior military authority to execute, and for the proper execution of which he is answerable to such authority, is necessarily a military duty. Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of this Article (MCM, 1949, par 173, pp 225,226; CM 315761, Conway, 65 BR 99; CM 307018, Showalter, 60 BR 37).

In order to sustain a conviction of being drunk in camp it is only necessary to prove that the accused was drunk under the specified circumstances (MCM, 1949, par 183a, p 255; CM 280587, Swan, 53 BR 237).

The evidence in support of these charges establishes that the accused was assigned to duty of train commander of a train which was to travel from Vilseck, Germany, to Augsburg, Germany, on 17 June 1949 and to return therefrom 19 June 1949. During this trip the accused performed the duties of train commander. During the return trip to Vilseck on 19 June 1949 the accused was seen with a cup in his hand on several occasions. He was also observed taking two drinks. Private First Class Richard K. Evett, a guard on the train, saw the accused just before the train arrived at Vilseck. The accused's breath smelled of alcohol. He was having trouble in keeping his eyes open, his voice was "hazy" and he was "swaying." Private Evett concluded that the accused was intoxicated. After the train stopped at Vilseck the accused was seen leaning against a truck. His blouse was unbuttoned and he was shouting something unintelligibly. It was necessary to assist him into the truck and upon arrival at regimental headquarters located at the Sub-Post of Vilseck it was necessary to assist him in alighting from the truck. He

had difficulty in walking and when he left the regimental headquarters he almost fell down the steps. Three defense witnesses testified that the accused was sober while he was train commander. However, one of them admitted that he had given the accused two drinks of whiskey. The question of whether the accused was drunk on 19 June 1949 at the times alleged in the specification was squarely before the court. The court heard the evidence and found that the accused was drunk while on duty as train commander and drunk in camp. In the opinion of the Board of Review these findings are amply sustained by the evidence.

During the trial of the case the defense moved to dismiss the Additional Charge and its specification on the ground that it constituted a multiplicity of charges. The evidence established drunkenness involving two separate offenses. Under the evidence as shown in this case the motion was properly denied.

5. Department of the Army records show that the accused is 32 years of age, married, and has one child. He served as an enlisted man from 17 January 1941 to 17 February 1943, attaining the grade of corporal. He received a high school education. He completed the Cavalry Officer Candidate School and was commissioned a second lieutenant, Army of the United States, on 18 February 1943. He was promoted to first lieutenant on 20 May 1945. He was relieved from active duty on 6 April 1946. He enlisted as a master sergeant and was recalled to active duty as a first lieutenant on 12 September 1946. His adjectival efficiency ratings average "Excellent." His last available efficiency rating (Form WD AGO 67-1, dated 1 July 1947), covering the period 3 December 1948 to 24 January 1949, indicates that his service was unsatisfactory.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violations of Articles of War 85 and 96.

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

Joseph P. Bussell, J.A.G.C.

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

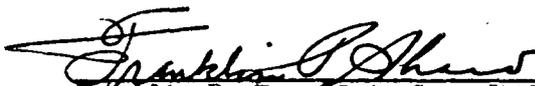
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Office of The Judge Advocate General

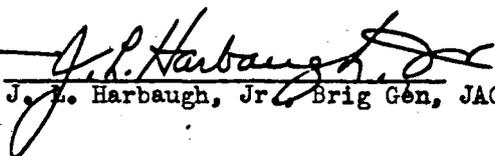
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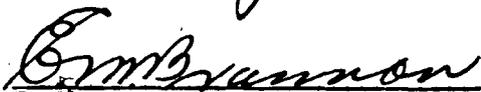
CM 338081

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

In the foregoing case of First Lieutenant Floyd M. Evanson (O-1031717), Headquarters and Headquarters Company, 1st Battalion, 2nd Armored Cavalry, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

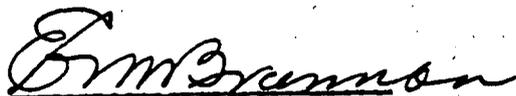

Franklin P. Shaw, Brig Gen, JAGC


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


E. M. Brannon, Brig Gen, JAGC
Chairman

17 October 1949

I have withheld my concurrence in the foregoing action because of my prior participation in the case as a member of the Judicial Council.


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

(GCMO 4, 14 Feb. 1950).

1 February 1950

was considered. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit all pay and allowances to become due after the date of the order directing execution of the approved sentence, and to be confined at hard labor at such place as proper authority may direct for one year. The reviewing authority approved "only so much of the finding of guilty of the Specification with respect to value as finds some value not in excess of \$30.00," approved the sentence and ordered it executed but suspended the execution of that portion thereof adjudging bad conduct discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, Milwaukee, Wisconsin, or elsewhere as the Secretary of the Army may direct, as the place of confinement. The proceedings were promulgated by General Court-Martial Orders No. 266, Headquarters Fifth Army, 15 August 1949.

3. Since the record of trial is legally sufficient to support the approved findings of guilty, it will not be necessary to set forth or discuss the evidence. The sole question presented by the record of trial is the sufficiency of the approved findings of guilty to sustain a sentence to confinement in excess of six months.

The degree of punishment that may be legally adjudged for larceny is determined by the value of the property which is the subject of the larceny. The period of confinement imposed in this case, one year, can be sustained only if the value of the property involved is more than \$20.00. If the value of the property involved is not greater than \$20.00, the maximum period of confinement which may be adjudged is six months (MCM, 1949, par. 117c). In the instant case the approved finding as to value, "some value not in excess of \$30.00," does not establish that the property involved was of a value in excess of \$20.00. It follows, therefore, that confinement for a period greater than six months is excessive.

4. The court was legally constituted and had jurisdiction of the person and the offense. Except as noted herein no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the modified findings of guilty 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 six months.

Robert J. Blanton, J.A.G.C.

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

W. Bruce, J.A.G.C.

18 OCT 1949

CSJAGH CM 338103

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 Arthur Perry, RA 19052315, 5612 Area Service Unit, Attached to Detachment 1, 9951 Technical Service Unit, Surgeon General's Office, Percy Jones General Hospital, Battle Creek, Michigan, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the modified findings of guilty 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 six months. Under Article of War 50e(3) this holding and my concurrence vacate so much of the sentence to confinement at hard labor as is in excess of confinement at hard labor for 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 that portion of the sentence so vacated. A draft of a general court-martial order designed to carry into effect the foregoing 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 338103)

2 Incls
1 Record of trial
2 Draft of 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.

235

SEP 3 0 1949

CSJAGQ - CM 338217

UNITED STATES

v.

Corporal JESSE TAYLOR
(RA 35155006), 43rd
Transportation Truck
Company, Oakland Army
Base, Oakland,
California.

SAN FRANCISCO PORT OF EMBARKATION

Trial by G.C.M., convened at
Fort Mason, California, 5
August 1949. Dishonorable
discharge (suspended), total
forfeitures after promulga-
tion and confinement for two
(2) years. Disciplinary Bar-
racks.

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

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

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

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Corporal Jesse Taylor, 43rd Transportation Truck Company, Oakland Army Base, Oakland, California, for the purpose of obtaining approval of a claim against the United States by presenting to First Lieutenant Samuel M. Pinckney, Personnel Officer of the 43rd Transportation Truck Company, in the field on operation "WD Snow", an officer of the United States, duly authorized to approve such claim, did at Headquarters, 43rd Transportation Truck Company, Ely, Nevada, on or about 28 February 1949, make and use a certain writing, to wit: War Department Form No. 366 "Payroll Enlisted Men," the regular monthly payroll for the month of February of the 43rd Transportation Truck Company, Ely, Nevada, which said document as he, the said Corporal Jesse Taylor, then knew contained a statement that Corporal Jesse Taylor was last paid to include 31 December 1948, which statement made such writing false, in that said Corporal Jesse Taylor had in fact received a regular payment on or about 31 January 1949 and was then known by the said Corporal Jesse Taylor to be false.

Specification 2: In that Corporal Jesse Taylor, 43rd Transportation Truck Company, Oakland Army Base, Oakland, California, did at Ely, Nevada, on or about 28 February 1949 make a claim against the Finance Officer at Oakland Army Base, Oakland, California, by presenting a War Department Form No. 366 "Payroll Enlisted Men," the regular monthly payroll for the month of February of the 43rd Transportation Truck Company, Ely, Nevada to First Lieutenant Samuel M. Pinckney, an officer of the United States, duly authorized to approve such claim, in the amount of One Hundred One Dollars and Fifty-five cents (\$101.55) for pay for the month of January 1949, which claim was false in that Corporal Jesse Taylor had in fact received payment of One Hundred One Dollars and Fifty-five cents (\$101.55) on or about 31 January 1949 and was then known by the said Corporal Jesse Taylor to be false.

Accused pleaded not guilty to the specifications of the charge and the charge. He was found guilty of both specifications and the charge. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for two years. The reviewing authority approved the sentence and ordered the same executed, but the execution of that portion of the sentence adjudging dishonorable discharge was suspended 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. The result of trial was promulgated in General Court-Martial Orders No. 54, Headquarters San Francisco Port of Embarkation, Fort Mason, California, 1 September 1949.

3. Inasmuch as the Board holds that there was prejudicial error in the trial, the evidence need not be summarized.

4. The first witness for the prosecution, Captain Robert L. Tarver, was the accuser and the accused's commanding officer. He also testified as a defense witness. At the completion of his redirect examination by the prosecution there being no further questions he was excused at which time the following took place:

"PROSECUTION: I will ask Capt Tarver just to sit over here, as he is the accuser in the case, and may catch some points.

"DEFENSE: Will the record show that? I would like to enter that the record shows that Capt Tarver is sitting on the Prosecution's side, and being requested to remain.

"PROSECUTION: That is on the record, my statement." (R. 16).

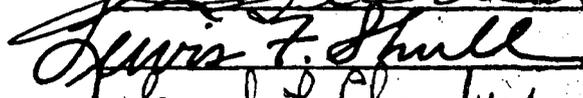
In addition to Captain Tarver, six other witnesses testified during the trial. The record does not otherwise show the full extent of Captain Tarver's participation in the trial of the case. It is quite apparent from the foregoing, however, that during the major portion of the trial an officer other than the regularly appointed trial judge advocate and assistant trial judge advocate sat at the prosecution's table at the invitation of the trial judge advocate and for the latter's assistance. Captain Tarver was not on orders as a member of the prosecution and had not been sworn. Such participation by an unauthorized officer constitutes fatal error.

In CM 318089, Knothe, 67 BR 129, 130, 4 Bull. JAG 58, the Board of Review in a similar situation held that the record of trial was legally insufficient to support the findings of guilty and sentence, stating:

"Only the convening authority can relieve or detail a member, judge advocate, or assistant judge advocate of a general court-martial (A.W. 11; par. 368(1), Dig. Op. JAG, 1912-1940), and it has been held that activity in a trial by an assistant trial judge advocate otherwise appointed constituted fatal jurisdictional error (CM 113341 (1918), par. 368(1), Dig. Op. JAG, 1912-1940). It appears obvious that the same fatality must accompany activity on behalf of the prosecution, in a trial, by a volunteer assistant who has not even the color of an official appointment. Such activity is an invasion of the right of accused to be protected during his trial from the intrusion by one who is not properly a part of the court-martial duly convened to try him (CM 125676 (1919), par. 1417, Dig. Op. JAG, 1912-1930; CM 200734, Burns, 5 BR 5, par. 368(1), Dig. Op. JAG, 1912-1940)."

The above-quoted case has been cited recently with approval in CM 324853, Pollard, 73 BR 379, at 381.

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

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

CSJAGQ - CM 338217

1st Ind.

1 OCT 1949

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

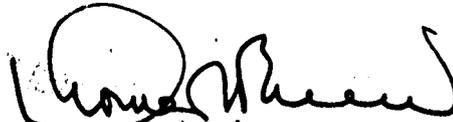
TO: Commanding General, San Francisco Port of Embarkation,
Fort Mason, California

1. In the case of Corporal Jesse Taylor (RA 35155006), 43rd Transportation Truck Company, Oakland Army Base, Oakland, California, 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 50a(3), this holding and my concurrence vacate the findings of guilty and the sentence. A rehearing is authorized.

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 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 338217).



THOMAS H. GREEN

Major General

The Judge Advocate General

2 Incls

1. Record of Trial
2. Dft GCMO

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

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CSJAGK CM 338314

6 OCT 1949

UNITED STATES

1ST CAVALRY DIVISION

v.

Recruit JAMES W. SCHANKS
(RA 18276576), Heavy Mortar
Company, 8th Cavalry Regi-
ment (Infantry).

Trial by G.C.M., convened at Headquarters,
7th Cavalry Regiment, 21, 22, 23 and 24
June 1949. Dishonorable discharge, total
forfeitures after promulgation, and con-
finement for life.

OPINION of the BOARD OF REVIEW

McAFEE, BRACK and CURRIER

Officers of The Judge Advocate General's Corps

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Recruit James W. Schanks, Heavy Mortar Company, 8th Cavalry, acting in conjunction with Private Edward G. Stang, Company F, 7th Cavalry Regiment, did, at Tokyo, Japan, on or about 2400 hours, 25 April 1949, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill Fumio Arakawa, a human being, by hitting him about the head with a blunt instrument, to wit, a wrench, and stabbing him with a dangerous instrument, to wit, a knife, and throwing him into a well containing several feet of water.

He pleaded not guilty to and was found guilty of the charge and specification. Evidence of two previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing the execution of the sentence, and to be confined at hard labor at such place as the proper authority might direct for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

About 6:30 p.m. on 25 April 1949, Private Edward G. Stang and the

accused were in a restaurant in Shibuya, Tokyo, Japan. Hiroshi Sumi, a male Japanese of their acquaintance, was also in this restaurant. Sumi was drunk. The accused and Private Stang invited Sumi to go with them (R 35). The three proceeded to the Shibuya station where, by prearrangement, they met Fujiko Takeiri and Reiko Umetani, two Japanese females. The five had some drinks at a restaurant and then proceeded by street car to Oi Machi, arriving there about 8 p.m. The two girls went to a hotel. The three men proceeded to several drinking houses where they consumed beer and sake. During the evening the accused had in his possession a knife. Several witnesses saw the accused use this knife to open his watch. One of the places visited by the accused and his two companions was a restaurant operated by Yajima Togoro. They were served beer and when asked to pay the accused threatened Togoro with a knife. They left Togoro's restaurant about 11:30 p.m. (R 10,11,13,14,16,17,20, 23-25,36,40,41,50,55,58). After leaving Togoro's restaurant they proceeded along some railroad tracks until they came to a railroad crossing where Sumi inquired of Tokuiichi Nakahara, the crossing attendant, the direction to the Oi Machi station. The crossing attendant observed two soldiers outside his "shack" at the time Sumi was making his inquiry. Sumi and the two soldiers left the crossing and proceeded west. They turned right at the first street and crossed a bridge over a river which was about fifty meters from the railroad crossing. It was dark but the railroad crossing and the bridge were each lighted with two small lights. The two soldiers with Sumi were the only soldiers that Tokuiichi Nakahara observed while on duty that night. Within two minutes after Sumi and the soldiers crossed the bridge Tokuiichi Nakahara heard a scream (R 25-28,36, 221,222,223; Pros Exs 5,6).

Fumio Arakawa, a Japanese policeman, visited Takeyo Okubo at her home on 25 April 1949. Takeyo Okubo lived about four hundred and fifty meters northwest of the railroad crossing where Tokuiichi Nakahara worked as a watchman. Fumio Arakawa left Takeyo Okubo's house about 11:50 p.m., 25 April 1949, to go home. Fumio Arakawa had visited Takeyo Okubo many times. Takeyo Okubo also testified that it was Fumio Arakawa's usual custom in going home from her house to go in the most direct route to the railroad crossing where Tokuiichi Nakahara worked. She did not know what route he took after crossing the railroad. In traversing this route he necessarily crossed the bridge located about fifty meters northwest of the railroad crossing. On the night of 25 April 1949 Fumio Arakawa was wearing black trousers, a white or gray shirt, and a brown jacket. Fumio Arakawa was a "third class" Judo expert (R 28,29,216-218; Pros Ex 6).

Hiroshi Sumi testified that after leaving the "drinking houses" they (Stang, Schanks and Sumi) walked along some railroad tracks. He was drunk. There were some things that he remembered but he could not remember everything that occurred that night. "I know where I come from and I know the routes where we walked." He also remembered that "when

the three of us were walking on the street we met a man in a white shirt coming towards us and Schanks started quarreling with him." Schanks and the man in the white shirt began fighting. Stang hit this man over the head with a monkey wrench. Sumi grabbed Stang in an attempt to stop the fight. Stang and Sumi fell to the ground. Sumi got up and "saw the man in the white shirt on the ground and Schanks was on top of him swinging his arms." The accused was striking the man in the white shirt with his fist. The accused's hand was clenched and the bottom of his fist was towards the ground. He did not notice anything in accused's hand. The man in the white shirt stood up and appeared to run away. This man disappeared, after which Sumi observed the accused bending over and looking into a well. Sumi also looked into the well (R 36-39,45,47-49,221-229; Pros Exs 5,6).

Prosecution Exhibits 5 and 6 were shown to be maps or sketches of the areas wherein the above events occurred and accepted in evidence by the court. Sumi pointed out on these maps the place where the fight occurred and the well into which the accused was looking. The fight occurred in the street about one hundred meters northwest of the railroad crossing where Sumi had talked to the attendant. The well was about one meter from the side of the street (R 221-229; Pros Exs 5,6).

After the fight Private Stang, Sumi and the accused went to the Shibuya station. Sumi then went home (R 39).

Between 2:00 and 3:00 a.m. on the morning of 26 April 1949 the accused and Private Stang went to the hotel room occupied by Fujiko Takeiri and Reiko Umetani. The accused and Stang were both drunk. Schanks stated that "he got in a fight and he had a sore arm." They spent the rest of the night in this hotel room. The following morning the accused told Fujiko Takeiri that he had been in a fight and had some blood stains on his trousers and "requested me to wash it off, so I wiped it off for him." About 1000 a.m., 26 April 1949, she took the accused's trousers to a laundry and had them pressed. When Reiko Umetani awakened on the morning of 26 April 1949 she saw a monkey wrench under the bed occupied by Stang (R 51,55,59). That afternoon Reiko Umetani, Sumi and Fujiko read a newspaper account of a Japanese policeman being "killed with a knife" (R 40-52,59). The accused was present and asked that the article be translated for him. Sumi testified that on this occasion the following occurred:

"Q Did he then ask you anything, if so, what?

A At that time he requested me to translate a newspaper article.

Q What did you do?

A So I translated for him.

Q What was this newspaper article?

A A policeman, called Arakawa, of Judo Kendo, 3-dan Kendo 5 dan, was found murdered, in the vicinity of Oi.

Q Did Schanks ask you any further questions, if so, what?

A Then he told me that the judge of the trial will be an American soldier so if you fail to testify as a witness you will be sentenced to death. There's another thing Schanks told me while we were going to Tengenji on a street car.

Q What did he ask or tell you while you were on the way to Tengenji?

A First he asked me how many times the man was stabbed, so I said to him it said in the newspaper three times. Then I said to him the victim is a judo expert. Then Schanks agreed with me and he showed me his hand which was twisted by the victim and I saw his hand was swollen up.

Q You say Schanks asked you how many times the man was stabbed. Was this before or after you had translated the newspaper to him?

A Before I translated the newspaper article for him.

Q Who was in the coffee house at Tengenji when you and Schanks arrived there?

A Stang, Reiko and Fujiko.

Q Now, you said something awhile ago about an American judge. Would you explain in detail what was said and who said it about the American judge?

A Schanks told me that the judge of the trial is American, so if you double cross me you will be sentenced to death.

* * *

Q What did Schanks then do?

A Then Schanks gave his watch and knife to Fujiko and left for his camp at about 9:30 PM to see the situation.

* * *

Q You say that Schanks gave Fujiko his knife and watch. To the best of your knowledge and belief, is the knife which you now have similar to the one which he gave her?

A Yes, this is very similar.

* * *

Q Did Schanks ever tell you what the fight started about?

A The fight started because when Schanks asked the man about the direction the man laughed at him.

Q When did Schanks tell you that?

A On the following day, on 26 April, on the way to Tengenji, from the Shibuya station." (R 40,41)

The accused told Fujiko that if he did not come back to throw the knife away (R 53,54). Reiko Umetani and Fujiko Takeiri each testified that on the evening of 26 April 1949 they wanted to go home but the accused would not let them leave him because they might report the matter to the police and that he did not trust them. They were with the accused and Private Steng from the 25th of April 1949 until 2 May 1949, at which time the accused was arrested (R 54,55,61,62).

Nambu Naoko of 3304 Banchi, Oi, Kurato-Cho, Shingawa-Ku, lives about 15 meters from the well where a body was discovered on the morning of 26 April 1949. About midnight on 25 April 1949 she heard the sound of footsteps, a scuffle, a scream for help, and someone talking in English (R 32-35, 219,220).

About 6 o'clock on the morning of 26 April 1949 Masao Takamura was on his way to work when he observed what appeared to him to be bloodstains on the road. He also observed "many foot marks in a cultivated field by the road." He looked into a nearby well and discovered a dead body, whereupon he made a report to the Japanese police. Masao Takamura used the maps introduced as Prosecution Exhibits 5 and 6 to point out where he saw the stains and the body in the well (R 64-70). (Note: He indicated that the bloodstains were about the same place where Sumi had testified that the fight occurred during the previous night. The well wherein he found the body was the same well which Sumi identified as being the one which the accused was looking into after the man in the white shirt disappeared.)

The Japanese police called Aole C. Carr, investigator for the Tokyo CID, reported the finding of a dead body, and requested assistance. Mr. Carr and various members of the Japanese police went to investigate the matter reported by Masato Takamura. They found a body in the well. Photographs of the body while it was in the well and after it had been removed from the well were received in evidence as Prosecution Exhibits 2,3 and 4. The body was face down in the well, almost submerged with the back and part of the head above the water level. The Japanese police removed the body from the well and discovered it to be the body of Fumio Arakawa. The well was about 13 feet deep and contained about 2-1/2 feet of water (R 72-79,81,82,95-99,118-123; Pros Exs 2,3,4).

Masato Okada was Chief of the Investigation Section of the Oi Machi Police Station. All reports pertaining to fights, assaults or other occurrences of violence within the Oi-Machi area are required to be made to his section. On 26 April 1949 his section received a report of a fight on the night of 25 April 1949 and a report that a body had been found in a well. This was the only report pertaining to an act of violence occurring on 25 April 1949 in that area (R 236,237).

During the afternoon of 26 April 1946, Mamoru Minagawa, a Japanese doctor, made an autopsy upon the body of Fumio Arakawa. The autopsy was completed in about an hour and a half. The body had three wounds in the chest which had been made by a "single bladed instrument." Two of the wounds penetrated the heart and the other one was in the left lung. On the left rear of the head there appeared about eight bruises which apparently had been made by some instrument which was "heavy, hard and square." The doctor was of the opinion that Fumio Arakawa suffered a brain concussion from the blows which caused the bruises. There was considerable water in Fumio's lungs. Death occurred by reason of drowning. From his examination, Dr. Minagawa concluded that Fumio Arakawa would have died from concussion of the brain within about thirty minutes after the blows on his head. The wounds which penetrated the heart caused considerable bleeding. These wounds would have caused Fumio's death as soon as the blood "gathered at the pericardium and stopped the movement of the heart." Death would have occurred about fifteen minutes after the wounds were inflicted in the heart. A person will drown in about two or three minutes (R 100-117).

The accused was arrested on 2 May 1949 by Sergeant Hayase and Corporal Gobeli and turned over to the Tokyo CID. At the time of the arrest the accused was carrying a "dagger" in a leather scabbard. This dagger had a wooden handle and a blade which was about six inches long (R 141-148; Pros Ex 7).

4. Evidence for the Defense

Captain Robert W. Ogilvie, a tissue pathologist at the 406th Medical Laboratory, testified that he had been performing and assisting in performing autopsies for about ten years. An autopsy performed in an hour and a half could only incorporate the gross finding. The term "gross finding" means "those findings which are apparent to the naked eye without the benefit of chemical, bacteriological or microscopic examination at the time of the autopsy." He further testified:

"Q What procedure is normally necessary to determine if a person died from drowning?

A Well, there are a number of procedures necessary for absolute evidence. First, you would need gross findings showing at least marked congestion of the lungs with or without the presence of froth in the trachea; in the air passages. Second, microscopic confirmation of these gross findings, with additional evidence of foreign body or plant life which is to be found; the type of water the individual was supposedly drowned in; and thirdly, the confirmatory test, which is always helpful, is the presence of an unequal blood chloride level in the blood of the right and left chambers of the heart.

Q Is it, in most instances, necessary to complete this entire procedure in order to definitely diagnose the cause of death as that of drowning?

A It is not possible sometimes, but optimally all 3 procedures should be undertaken. For example, if the body has been under water or drowned at a considerable time prior to the examination, the blood chloride level is valueless.

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*

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Q Basing your answer upon your knowledge of medical science, would it be possible to perform the autopsy on a man who had heart stabs, who had a brain concussion, but was supposedly drowned, and determine, actually, which of those three possible causes actually caused this man's death?

A I doubt that one could state for sure which was the immediate cause of death, however, drowning would be suggested if the three former prerequisites I mentioned before were fulfilled.

*

*

*

Q Based on the findings of medical science, if a man received a brain concussion, and stab wounds in the heart and placed in water, would those wounds hasten the drowning?

*

*

*

A If you insist in using the word brain concussion, then the man would have to be placed in the water, because with a brain concussion a man is most likely unconscious.

*

*

*

A (cont'd) Assuming that he was still alive, it would probably hasten his demise.

*

*

*

Q In the event that a deceased was unconscious, when he was submerged in water, how could you, as a medical man, determine that?

A If he was unconscious but alive he would still be breathing and he would aspirate, force any water into his mouth, and possibly, I might even say probably, into the air passageway into the lung. Occasionally cases of drowning are found in which a spasm of the vocal cords are produced, and, in that event I should say a spasm of the vocal cord, as a result of drowning, was the shock of submersion in water and as a result of that no water in such a case would enter the lungs." (R 241,242,243)

The law member explained to the accused his rights as a witness and the accused elected to have his defense counsel make an unsworn statement in his behalf. This statement was as follows:

"*** The accused wishes to inform the court that he had nothing to do with, nor took any part in the alleged incident, and was not near the scene of the accident." (R 245)

5. Discussion

Accused stands convicted of a charge and specification alleging premeditated murder.

The evidence clearly establishes that the accused and Private Edward G. Stang acting together did at the time and place and in the manner alleged in the specification kill Fumio Arakawa.

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

The evidence shows that neither the accused nor Private Stang was acquainted with their victim, Fumio Arakawa. They met Fumio by chance about midnight and assaulted him without provocation. The victim was struck on the head with a monkey wrench and stabbed in the heart and chest with a knife. The injuries inflicted by each instrument were of such a nature that death would have resulted therefrom within a few minutes. Fumio Arakawa was apparently unarmed at the time of the assault. Mortally wounded and unable to help himself, he was left in a well to drown. Such actions by the accused reflect malice aforethought and premeditation to kill.

The evidence also establishes that during the evening prior to the attack upon Fumio Arakawa the accused and his companions had been drinking. Two witnesses testified that the accused and Private Stang came to their room between 2:00 a.m. and 3:00 a.m. on 26 July 1949 and at this time they were both drunk.

"Drunkemess. - It is a general rule of law that voluntary

drunkenness, whether caused by liquor or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent or state of mind, when a particular intent or state of mind is a necessary element of the offense." (MCM, 1949, par 140a.)

In CM 314876, Rollinson, 64 ER 233,241, the Board of Review said:

"Evidence of intoxication falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime charged, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his act. It was for the court in the present case to determine the degree of accused's intoxication on the basis of all the evidence before it. There was substantial evidence to support a finding that accused at the time of the offense was capable of forming the purpose and intent to kill and that finding should not be disturbed on review (CM 294675, Minnick, CM ETO 12855)."

The Board of Review concludes that the acts and statements of the accused following the slaying constitute substantial evidence upon which the court properly could determine that at the time of the offense the accused was capable of forming the purpose and intent to kill and that such finding should not be disturbed on review.

6. The accused is 20 years of age. He has a Class F Allotment of \$22.00 per month to his dependents. He enlisted 7 May 1948 at Alexandria, Louisiana.

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

Carl E. McAlister

, J.A.G.C.

Joseph L. Brack

, J.A.G.C.

Roger W. Currier

, J.A.G.C.

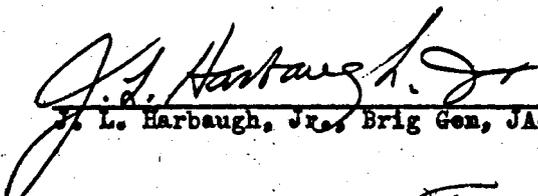
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

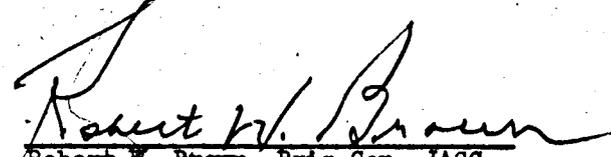
CM 338314

THE JUDICIAL COUNCIL

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

In the foregoing case of Recruit James W. Schanks, Jr.,
RA 18276576, Heavy Mortar Company, 8th Cavalry Regiment
(Infantry) 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.

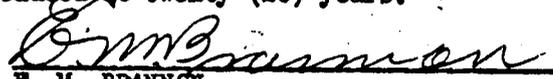

J. L. Harbaugh, Jr., Brig Gen, JAGC


Robert W. Brown, Brig Gen, JAGC


Franklin P. Shaw, Major General, JAGC
Chairman

30 January 1950

I concur in the foregoing action.
Under the direction of the Secretary
of the Army, the term of confinement
is reduced to twenty (20) years.


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

6 February 1950

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

249

CSJAGN-CM 338349

28 SEP 1949

UNITED STATES)

82D AIRBORNE DIVISION

v.)

) Trial by G.C.M., convened at
) Fort Bragg, North Carolina, 23
) August 1949. Dishonorable dis-
) charge, total forfeitures after
) promulgation and confinement for
) two (2) years. Disciplinary
) Barracks.

)
)
) Recruit EARL L. HARRIS
) (RA 16265241), Headquarters
) and Headquarters Battery,
) 319th Airborne Field
) Artillery Battalion.)

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

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

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

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

Specification: In that Recruit Earl L. Harris, Headquarters and Headquarters Battery, 319th Airborne Field Artillery Battalion, Fort Bragg, North Carolina, did, without proper leave, with intent to avoid service during maneuvers with his Battery, absent himself from his station at Fort Bragg, North Carolina, on or about 0600 hours, 15 April 1949, and did remain absent without leave until 3 May 1949.

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

Specification 1: In that Recruit Earl L. Harris, Headquarters and Headquarters Battery, 319th Airborne

Field Artillery Battalion, Fort Bragg, North Carolina, did, at Detroit, Michigan, on or about 29 April 1949, with intent to deceive, wrongfully and unlawfully make and utter to The Detroit Bank, Detroit, Michigan, a certain check, in words and figures as follows, to-wit: First Citizens Bank and Trust Company, Fayetteville, North Carolina, 29 April 1949, Pay to the Order of: Earl L. Harris, thirty dollars, \$30.00 /s/ Earl L. Harris, by means thereof did fraudulently obtain from the Detroit Bank, Detroit, Michigan, thirty dollars (\$30.00), he, the said Recruit Earl L. Harris, then well knowing that he did not have and not intending that he should have any account with the First Citizens Bank and Trust Company, Fayetteville, North Carolina for payment of said check.

Specification 2: In that Recruit Earl L. Harris, Headquarters and Headquarters Battery, 319th Airborne Field Artillery Battalion, Fort Bragg, North Carolina, did, at Detroit, Michigan, on or about 23 April 1949, with intent to deceive, wrongfully and unlawfully make and utter to Mr. Bernard Harris, a certain check, in words and figures as follows, to-wit: First Citizens Bank and Trust Company, Fayetteville, North Carolina, April 23, 1949, Pay to the Order of: Cash, Fifteen dollars, \$15.00, /s/ Cpl Earl L. Harris, and by means thereof did fraudulently obtain from Mr. Bernard Harris fifteen dollars (\$15.00) he, the said Recruit Earl L. Harris, then well knowing that he did not have and not intending that he should have any account with the First Citizens Bank and Trust Company, Fayetteville, North Carolina for payment of said check.

Specification 3: In that Recruit Earl L. Harris, Headquarters and Headquarters Battery, 319th Airborne Field Artillery Battalion, Fort Bragg, North Carolina, did, at Detroit, Michigan, on or about 25 April 1949, with intent to deceive, wrongfully and unlawfully make and utter to Mr. Bernard Harris, a certain check, in words and figures as follows, to-wit: First Citizens Bank and Trust Company, Fayetteville, North Carolina, April 25, 1949, Pay to the Order of: Cash, fifteen dollars, \$15.00, /s/ Earl L. Harris,

and by means thereof did fraudulently obtain from Mr. Bernard Harris fifteen dollars (\$15.00) he, the said Recruit Earl L. Harris, then well knowing that he did not have and not intending that he should have any account with the First Citizens Bank and Trust Company, Fayetteville, North Carolina for payment of said check.

Specification 4: (Withdrawn upon direction of appointing authority).

The accused pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence of one previous conviction was properly 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 proper authority might direct for two years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement, and withheld execution of the sentence pursuant to Article of War 50g.

3. The only question which need be considered concerns the legality of the sentence adjudged by the court and approved by the reviewing authority. In this respect, the case is governed by CM 335786, Welsh (1949), wherein the Board of Review determined the maximum punishment permissible upon conviction of offenses charged in the same phraseology employed in Specifications 1, 2 and 3 of Charge II herein. The Board said:

"The specifications * * * 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 lists 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, 1949, 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."

In the instant case, there being three offenses of making and uttering a bad check, twelve months confinement is permissible in addition to the six months authorized for the offense of absence without proper leave with intent to avoid service during maneuvers (MCM, 1949, par. 117c, p. 134).

Although the total period of confinement which may properly be sustained is eighteen months, none of the offenses of which accused was found guilty authorizes a dishonorable or bad conduct discharge (MCM, 1949, par. 117c, pp 134 and 140). Under these circumstances, however, the Manual provides 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, par. 117c, 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 eighteen months.

4. 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 eighteen months.

Chas. E. Young, J. A. G. C.
 _____, J. A. G. C.
 DISSENT
 _____, J. A. G. C.
John F. Taylor, J. A. G. C.

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

CSJAGN-CM 338349

28 SEP 1949

UNITED STATES)

82D AIRBORNE DIVISION)

v.)

Recruit EARL L. HARRIS)
(RA 16265241), Headquarters)
and Headquarters Battery,)
319th Airborne Field)
Artillery Battalion.)

Trial by G.C.M., convened at)
Fort Bragg, North Carolina, 23)
August 1949. Dishonorable dis-)
charge, total forfeitures after)
promulgation, and confinement)
for two (2) years. Disciplinary)
Barracks.)

DISSENTING OPINION by CORDES, Judge Advocate

1. With due respect for the holding of the majority of the Board of Review I find myself unable to concur therein.

2. Prior to 1 February 1949, the date the 1949 Manual for Courts-Martial was put into effect by Executive Order 10020, 7 December 1948, it was well settled that to make and utter a check, when chargeable with notice that the funds drawn upon were not sufficient, was "conduct of a nature to bring discredit upon the military service" cognizable as an offense under Article of War 96, even though there was no inherent intent to defraud (CM 220760, Fanning, 13 BR 61; CM 232592, Law, 19 BR 117, 2 Bull JAG 269; CM 236070, Wanner, 22 BR 279, 2 Bull JAG 384). The burden was on the accused to show that the check was bad because of an "honest mistake not caused by his own carelessness or neglect" (CM 280789, Hughes, 53 BR 317, 323).

Under Article of War 96, the table of maximum punishments now establishes four months confinement and partial forfeiture as the maximum penalty for making and uttering such checks "without intent to defraud" (MCM, 1949, par. 117c, p. 140). That this provision should be construed to cover only the careless or indifferent check negotiations mentioned above and not those corrupted with an intent to cheat seems obvious from a study of the aforementioned cases.

Admittedly the word "deceive" is not strictly synonymous with "defraud." However, the "intention to deceive * * * is the characteristic of fraud * * *" (Bouvier's Law Dictionary, 8th Ed), and the gist of the offense involved here is fraud. The legal sufficiency of the Specification is manifest. It sufficiently apprises the accused of all the ultimate facts of fraud: The "misrepresentation known to be such * * * by any person intending * * * thereby to cause a mistake * * * in order to induce [reliance]" (Restatement, Contracts, (1932), Sec. 474).

Under these circumstances, I see no basis in law or reason, for holding in effect that although a fraud with its intentional deception has been properly alleged, an intent to defraud has not. The sentence, imposed on the theory that an intent to defraud was alleged and proved, should be sustained.

W. B. Jones, Jr.

Judge Advocate.

CSJAGN-CM 338349 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 Earl L. Harris (RA 16265241), Headquarters and Headquarters Battery, 319th 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 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 eighteen months. Under Article of War 50a(3) 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 eighteen months. Under Article of War 50 you now have authority to order the execution of the sentence as modified in accordance with this holding.

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

(CM 338349).



THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of trial

CSJAGI CM 338398

OCT 6 1949

UNITED STATES

v.

Private LEALON L. HARRELSON
(38572111), Fourth Detachment,
4050th Area Service Unit,
The Artillery Center,
Fort Sill, Oklahoma.

THE ARTILLERY CENTER

Trial by G.C.M., convened at
Fort Sill, Oklahoma, 31 August
1949. Dishonorable discharge
(suspended), forfeiture of all
pay and allowances due or to become
due after promulgation, and confine-
ment for two (2) years. Disciplinary
Barracks.

HOLDING by the BOARD OF REVIEW
JONES, ARN 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: In that Private Lealon L. Harrelson, Fourth Detachment, 4050th Area Service Unit, The Artillery Center, Fort Sill, Oklahoma, did, at Camp Howze, Texas, on or about 11 June 1945, desert the service of the United States, and did remain absent in desertion until he was apprehended at Shawnee, Oklahoma, on or about 30 June 1949.

He 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 after the date of the order directing execution of the sentence and to be confined at hard labor, at such place as proper authority may direct, for two years. Evidence of one previous conviction was introduced. The reviewing authority approved the sentence and ordered it executed but suspended the execution of the dishonorable discharge until the soldier's release from confinement and designated the United States Disciplinary Barracks, Fort Leavenworth,

Kansas, as the place of confinement. The results of trial were promulgated in General Court-Martial Orders No. 183, Headquarters The Artillery Center, Fort Sill, Oklahoma, dated 13 September 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 31 August 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 9, Manual for Courts-Martial, 1949, at Item 9b, provides that the sentence to total forfeitures should read:

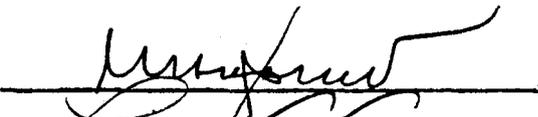
"* * * to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, * * *." (Underscoring supplied).

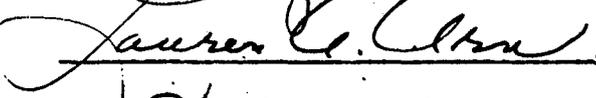
Executive Order Number 10020 prescribes that the Manual for Courts-Martial, 1949, "shall be in full force and effect * * * on and after February 1, 1949, with respect to all court-martial processes taken on or after February 1, 1949 * * *."

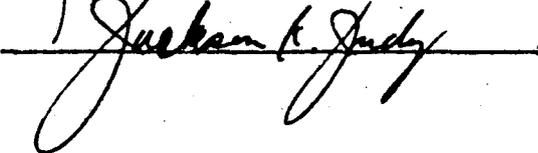
In view of Article of War 16 and the provisions of the Executive Order and Manual for Courts-Martial cited above, even though the offense was committed prior to 1 February 1949, the court was authorized to impose a sentence with respect to forfeitures of only pay

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.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for 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.


_____, J.A.G.C.


_____, J.A.G.C.


_____, J.A.G.C.

CSJAGI CM 338398

1st Ind

OCT 27 1949

JAGC, Dept of the Army, Washington 25, D. C. 1-17-49

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

1. In the case of Private Lealon L. Harrelson (38572111), Fourth Detachment, 4050th Area Service Unit, The Artillery Center, 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 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 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.

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 338398).

2 Incls

1. Record of trial
2. Draft of GCMO



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

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

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CSJAGK - CM 338479

12 DEC 1949

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

SEATTLE PORT OF EMBARKATION

v.

Captain WILLIAM C. MAROONEY
(O-1324036), Transportation
Corps, now of 9207 Technical Service
Unit-Transportation Corps (Seattle
Port of Embarkation), Seattle,
Washington.

Trial by G.C.M., convened at Fort
Lawton, Washington, 11-19 August
1949. Dismissal, total forfeitures
after promulgation, and confine-
ment for three (3) years.

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

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to the Judicial Council and The Judge Advocate General.
2. The accused was tried upon the following charges and specifications:

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

Specification: In that Captain William C. Marooney, TC, 9207 Technical Service Unit - Transportation Corps, Headquarters Detachment (Seattle Port of Embarkation) Fort Lawton, in his capacity as Special Services Officer, Fort Lawton, Washington, with intent to deceive the Official Custodian of the Central Post Fund and other officials of the Department of the Army concerned with the administration of the said Central Post Fund, and with intent to defraud the said Central Post Fund, did, at Fort Lawton, Washington, on or about the dates hereinafter mentioned, falsely and fraudulently submit to the said Custodian of the said Central Post Fund the receiving reports hereinafter mentioned, signed by him, the said Captain William C. Marooney, acknowledging receipt of articles, goods, merchandise, services, supplies, and/or property of the total monetary value mentioned as to each, as follows:

Item One: 24 March 1949, Receiving Report, on Purchase Order 1071, \$10,253.40;

- Item Two: (Nolle Prosequi).
 Item Three: (Nolle Prosequi).
 Item Four: 26 April 1949, Receiving Report, on Purchase Order 277, \$474.00;
 Item Five: 28 April 1949, Receiving Report, on Purchase Order 328, \$1,989.50;
 Item Six: 10 May 1949, Receiving Report, on Purchase Order 351, \$955.50;
 Item Seven: 16 May 1949, Receiving Report, on Purchase Order 361, \$511.65;

well knowing that each and all of said receiving reports were false and fraudulent in the following particulars, respectively: Item One was increased and padded \$1,600.00 over the true amount; Item Two (nolle prosequi); Item Three (nolle prosequi); Item Four was increased and padded \$106.00 over the true amount; Item Five was increased and padded \$476.50 over the true amount; Item Six was increased and padded \$247.50 over the true amount; and Item Seven was increased and padded \$282.20 over the true amount; and, by means of said receiving reports, obtained payments in each case from said Central Post Fund to the vendors concerned of the full amount and value acknowledged received in each case on or about the dates mentioned in each case; and pursuant to a separate agreement and arrangement with each vendor, did, receive from the vendors payment to him, Captain William C. Marooney, of amounts in the form of a kick-back on each item respectively as follows: Item One, payment of \$1,600.00 by check; Item Two (nolle prosequi); Item Three (nolle prosequi); Item Four, payment of \$106.00 by cash; Item Five, payment of \$476.50 by check; Item Six, payment of \$247.50 by check; and Item Seven, payment of \$282.20 by check; and did apply said checks and cash to his own use and purpose; whereby the Central Post Fund was defrauded of the total amount of \$2,712.20 on said five items; each and all of which acts constituted conduct unbecoming an officer and a gentleman.

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

Specification 1: In that Captain William C. Marooney, ***, in his capacity as Special Services Officer, Fort Lawton, Washington, with intent to defraud the Central Post Fund, Fort Lawton, Washington, wrongfully, unlawfully, wilfully and feloniously, at Fort Lawton, Washington, on or about 24 March 1949, caused to be submitted to the Custodian of the said Central Post Fund a bid from George M. Davis, of Seattle, Washington, for articles, goods, merchandise and property therein described, in the total amount of \$10,253.40, to be supplied and sold to the Special Services Division,

Fort Lawton, Washington, falsely pretended that said bid was for a true and correct amount, caused a purchase order to be issued by the Custodian of said Central Post Fund, verified and initialed by him, the said Captain William C. Marooney, for the purchase from said Central Post Fund of the said articles, goods, merchandise and property from said George M. Davis, for said sum of \$10,253.40, submitted to the said Custodian of said Central Post Fund a receiving report, signed by him, the said Captain William C. Marooney, as said Special Services Officer, acknowledging receipt of the said articles, goods, merchandise and property described in said bid and in said purchase order, as of the value of \$10,253.40, falsely pretended that said receiving report and said value were true and correct, and thereby caused payment to be made by said Custodian to said George M. Davis of said \$10,253.40 from said Central Post Fund, well knowing that said bid was false and fraudulent in that the actual and true value of the articles, goods, merchandise and property bid on and to be supplied and sold was only \$8,653.40 and that said bid was falsely and fraudulently increased and padded by \$1,600.00 up to the sum of \$10,253.40, and well knowing that the said receiving report was false and fraudulent in that the actual and true value of the articles, goods, merchandise and property received was only \$8,653.40, and by means thereof obtained from said George M. Davis payment of a sum of \$1,600.00 to him, the said Captain William C. Marooney, which said sum of \$1,600.00 he, the said Captain William C. Marooney, wrongfully, unlawfully, wilfully and feloniously applied to his own use and purpose, and, by means of each and all of the foregoing acts, defrauded the said Central Post Fund of the said sum of \$1,600.00.

Specifications 2 and 3: (Nolle Prosequi).

NOTE: Specifications 4 through 7 differ from Specification 1 only as to date, name of contractor, amount of bid by the contractor, amount claimed, and amount received by accused as follows:

| <u>Spec.</u> | <u>Date</u> | <u>Name of Contractor</u> | <u>Amount bid by contractor</u> | <u>Amount claimed</u> | <u>Amount Rec'd by acc'd</u> |
|--------------|-------------|---------------------------|-------------------------------------|---------------------------|----------------------------------|
| 4 | 21 Apr 49 | Van's Upholstery Shop | \$368.00 | \$474.00 | \$106.00 |
| 5 | 28 Apr 49 | Washburn Upholstery Co. | 1513.00 | 1989.50 | 476.50 |
| 6 | 19 May 49 | " " | 708.00 | 955.50 | 247.50 |
| 7 | 16 May 49 | " " | 229.45 | 511.65 | 282.20 |

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

Specification: In that Captain William C. Marooney, ***, did,

at Fort Lawton, Washington, on or about 5 June 1947, feloniously take, steal and carry away one soda fountain, value about \$1100.00, the property of the Fort Lawton Officers Club, now known as the Seattle Port of Embarkation Officers 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, 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. Evidence for the Prosecution

Charge I and its Specification

The proof adduced as to the specifications of Charge II and Charge I applies also to the Specification of Charge I and Charge I. To avoid repetition, the evidence summarized below is considered as applying to both charges.

Specification 1, Charge II

During and prior to the year 1949 Fort Lawton, Washington, maintained a nonappropriated fund known as the "Central Post Fund." This fund was used to maintain service clubs, libraries, recreation rooms, and to furnish equipment for athletic teams, soldier entertainment and various other types of recreation. The fund was administered by a council appointed by the post commander. All monies in the fund were in the custody of an officer commonly referred to as "the custodian of the Central Post Fund." The Central Post Fund of Fort Lawton received money from the "Post Trust Fund or from special allocations from the Sixth Army Welfare Fund." Funds were disbursed by the Central Post Fund in the following manner. Once each month the council considered requests from the various installations on the post for funds, and after considering these requests they would authorize certain installations to spend a definite amount of money during that month. The installation would submit a purchase order, initialed by the officer instituting the purchase, to the custodian of the fund who would check the items listed on the purchase order to see that they were proper purchases. When the items purchased were delivered a "receiving report" was signed by an officer representing the agency receiving the purchased items and this report was submitted to the custodian of the Central Post Fund together with a statement of amount due. The receiving report was checked against the purchase order and if they coincided a check was drawn by the custodian of the fund for the payment of the items purchased (R 27,28,33-37). From 12 October 1948 to 28 February

1949 Major William A. C. Gavin was custodian of the Central Post Fund at Fort Lawton, Washington. In the fall of 1948 the Sixth Army Welfare Fund donated "about \$15,300 - some odd dollars for furnishings and fixtures for the service clubs" to the Central Post Fund. A short time after this donation Captain Marooney, the special services officer, submitted a "purchase order of furniture for the service clubs in excess of ten thousand dollars." This purchase order was approved and the funds were obligated to pay for these purchases upon receipt of the items purchased (R 35-38).

Major Lawrence E. Heyenga, Transportation Corps, became the custodian of the Central Post Fund on 1 March 1949. He identified various purchase orders, receiving reports, cancelled checks, and supporting vouchers as part of the records of the Central Post Fund. These records were received in evidence as Prosecution Exhibits 7A through 7F. Prosecution Exhibit 7B is a Central Post Fund purchase order of furniture dated 29 November 1948 to George L. Davis in the sum of \$10,253.40. This purchase order shows that the items purchased were to be shipped to the Special Services Division. It was initialed "OK WCM" and by Major Gavin. Prosecution Exhibit 7C is an estimate by George L. Davis showing the cost of the items of furniture which appears on the purchase order. Prosecution Exhibit 7D is a receiving report by the Special Services Division to the Central Post Fund for the items and at the prices indicated on the purchase order. This receiving report is dated 24 March 1949 and is signed by "William C. Marooney" as the receiving officer. Prosecution Exhibit 7E is George L. Davis' invoice dated 21 March 1949 for the items listed on the receiving report. Prosecution Exhibit 7F is a check drawn by the Fort Lawton, Washington, Central Post Fund, dated 24 March 1949, payable to George L. Davis, in the sum of \$10,253.40. This check was paid in the usual course of business (R 40-45).

George M. Davis, an interior decorator of Seattle, Washington, does business under the firm name of George L. Davis Company. He has transacted business with various departments of the Army at Fort Lawton, Washington, for several years. He has known Captain Marooney since 1941. Sometime in November 1948 Captain Marooney called him (Davis) at his office and requested him to survey a "job" at the service club. The following day he went to Fort Lawton and contacted Mrs. Lightfoot, the manager of the service club. He made a survey of the club furnishings and submitted to the accused an estimate in writing as to the cost of refurnishing the club. This estimate was for upholstered furniture. It was decided that chrome furniture was more practical and Mr. Davis then submitted a bid in the sum of \$8653.40 for refurnishing the club with chrome furniture. At this time the accused stated that the Sixth Army had only appropriated him \$600 for baseball equipment and that they needed about \$3,000 for baseball equipment. The accused also stated that the estimate was about \$1600.00 lower than the nearest competitor's bid and suggested certain items be changed "to conform to his wishes in

getting the extra money for the baseball equipment." Mr. Davis agreed with this suggestion. He left some of his stationery with the accused and a short time thereafter he saw the bid for \$10,253.40 which was introduced as Prosecution Exhibit 7C. He signed and submitted this bid and thereafter received a purchase order by mail for the items listed thereon. The only differences in the initial bid and Prosecution Exhibit 7C were in the total amount and one item of 100 arm chairs which were initially priced at \$2600. In Prosecution Exhibit 7C the 100 arm chairs were priced at \$4200.00. After the items were delivered Mr. Davis called the accused to see if a check for the payment of the items delivered could be issued immediately. The check was issued and Mr. Davis went to the accused's office to pick up the check. The accused was not in his office but Sergeant Jewett delivered to him (Davis) a check drawn by the Central Post Fund and signed by Major Heyenga in the sum of \$10,253.40. Thereafter Mr. Davis called the accused on the telephone "to complete our transaction to find out who I should make the check for this \$1600 out to." The accused replied, "You better make it out to me and I'll take care of it." Thereupon Mr. Davis drew a firm check in the sum of \$1600.00 payable to "Capt Maroonney" and mailed it to the accused. Mr. Davis identified the check which he gave the accused and it was received in evidence without objection as Prosecution Exhibit 8. This check is numbered 1143 and dated 25 March 1949. It was drawn on the Fourth and Union Branch of the Seattle Trust and Savings Bank, Seattle, Washington, and bears the American Bankers Association Number 19-90 over 1250 and was indorsed "Capt Maroonney" (R 57,72).

Mr. George Cleveland Marshall, manager of the Queen Anne Branch of the National Bank of Commerce of Seattle, Washington, identified the records of his bank which pertain to a checking account and savings account of the accused. On 31 March 1949 the \$1600 check from Davis to the accused was deposited in the Queen Anne Branch of the National Bank of Commerce. \$700.00 was deposited in the accused's checking account and the deposit slip shows that the amount was derived from Check No. 1143 with an American Bankers Association Number 19-90 over 1250 identified as Prosecution Exhibit 8. \$900.00 was placed in the accused's savings account. The deposit slip shows that this amount was by "check," however, there is no check number on the deposit slip (R 94-99, Pros Exs. 9A, 9B).

Sometime after this transaction Mr. Davis discussed with the accused the disposition of the money, at which time the accused "mentioned certain amounts that he had spent on baseball equipment and I think it was a number of baseballs he bought with a part of that money." On cross-examination Mr. Davis stated that his bid of \$8653.40 was so low that he lost \$400.00 on the transaction (R 86).

A certificate which contained the signature of the accused was introduced into evidence as Prosecution Exhibit 10 for "signature identification" without objection by the defense (R 101).

It was stipulated that the indorsement on the check for \$1600

introduced as Prosecution Exhibit 8, and on the receiving report, Prosecution Exhibit 7D, are the signatures of the accused and that the initials "WCM" on the purchase order, Prosecution Exhibit 7B, and on the invoice, Prosecution Exhibit 7E, are the initials of the accused (R 111).

Specification 4, Charge II

Mr. P. J. Vanderveen operates "Van's Upholstery Shop" in Seattle, Washington. On or about 17 March 1949 Mr. Vanderveen received a call relative to some repair work to be done for the "Special Services" at Fort Lawton, Washington. Mr. Vanderveen went to Fort Lawton and met the accused who took him to a warehouse and showed him some furniture which was to be repaired. Mr. Vanderveen offered to repair this furniture for \$368.00. The accused told him to "go ahead with it." They started to the Special Services offices but before they arrived there the accused stated "he would probably add something on to that bill -- that I would get a bill for more than that, and the difference was to be -- he was going to use for some other things that he needed -- for baseball equipment, and for one thing and another, and that I was to give that back to him." He repaired the furniture and then went to the Special Services office to report to the accused that the work was finished. The accused was not present so he left and returned the following Monday. Again the accused was not in the office so he left a statement of the amount due in the sum of \$368.00 together with a "blank bill" with "one of the fellows in the office." The blank statement was left in order that the accused "could fix that out the way that he wanted to." Thereafter he received a check in the sum of \$474.00. Mr. Vanderveen then placed \$106.00 in a sealed envelope and gave it to the girl in the Special Services offices and directed her to give it to the accused (R 174-181).

Florence Hatsukano was employed as a clerk in the office of the Special Services at Fort Lawton. Sometime in April 1949 an elderly man representing himself to be from the Van's Upholstery Company came to the office and gave her a bulky envelope to give to the accused. The envelope had the accused's name on it. She placed this envelope on Sergeant Jewett's desk. She did not know the contents of the envelope (R 193-197).

Master Sergeant William C. Jewett, Chief Clerk, Special Services Division, Fort Lawton, Washington, testified that on or about 23 April 1949 Mr. Vanderveen came to the Special Services Office with an invoice or statement of account for repair work in the sum of \$368.00. He left this statement and a blank invoice of "Van's Upholstery." Sergeant Jewett placed these papers on the accused's desk. Later that day he called the accused's attention to the invoices and pointed out that the invoice of \$368.00 was less than that called for by the purchase order. The accused stated "that there was still some work to be done on that

purchase order." On 27 April 1949 Florence Hatsuano gave him a bulky envelope to deliver to the accused. He placed this envelope on the accused's desk (R 182-186). First Lieutenant Richard O. Ball, Assistant Special Service Officer, Fort Lawton, Washington, was in the office on 27 April 1949, at which time Sergeant Jewett exhibited to him a bulky envelope. The envelope was addressed to the accused and had "the heading Van's Furniture Company" on its front. The accused came into the office and began opening his mail and

"*** Captain Marooney took some sheets of paper and envelopes out of his office or out of his desk, rather, and proceeded to go through them, and he picked up an envelope that was quite bulky, and I was standing in front of his desk when he tore it open. Right after he tore it open and I looked at it, I had turned and started to look out of the window, and when I turned back to the desk, the envelope was empty."

To the best of his knowledge the envelope contained money (R 199-204).

Prosecution Exhibits 14A through 14E were identified as being a purchase order, receiving report, cancelled check and supporting vouchers from the records of the Central Post Fund pertaining to the transaction with "Van's Upholstery Shop" and received in evidence over the objection of the defense that they had not been "connected up with any allegations of the specifications with which the accused was charged." Prosecution Exhibit 14B is a purchase order of the Central Post Fund to Van's Upholstery Shop dated 24 March 1949 in the sum of \$474.00 and initialed "OK WCM." Prosecution Exhibit 14C is a Receiving Report dated 26 April 1949 for the repair of the furniture listed on the purchase order and signed "William C. Marooney" as receiving officer. Prosecution Exhibit 14D is Van's Upholstery Shop's statement of accused dated 23 April 1949 to the Special Services in the sum of \$474.00. Prosecution Exhibit 14E is a cancelled check by the Central Post Fund dated 27 April 1949 payable to Van's Upholstery Shop in the sum of \$474.00 (R 116,171,173).

Specification 5, Charge II

Mr. James O. Washburn of Seattle, Washington, does business under the name of Washburn Upholstering and Furniture Company. Mr. Washburn became acquainted with the accused about the middle of April 1949 when he went to Fort Lawton with George L. Davis to inspect some furniture which was to be upholstered and repaired. The accused showed him some davenport, chairs, and settees at Service Club Number 3 and requested an estimate as to the cost of repairing and recovering them. Mr. Washburn stated that he would "go back to my office and figure up what the bid would come to." He called the accused on the telephone and told him that the cost of repairing the furniture would be approximately \$1500.00.

Thereupon the following occurred:

"Q Was there any other conversation?

A Well, then he says, 'The purchase order will come through like this.' Just for instance, like say there six davenports, he says, 'Make it read ten davenports. Where there are approximately seven chairs, make it read eleven chairs,' and if it had approximately two hundred yards of material, he said, 'Make it read two hundred and fifty yards of material,' and that was the purchase order that I received." (R 209)

Upon receiving the purchase order Mr. Washburn picked up the furniture, recovered and repaired it, and returned it to the pest. He then submitted to the accused a statement of account in the sum of \$1989.50. Prosecution Exhibits 15A through 15F were identified as purchase orders, receiving report, statement of account, and cancelled check from the records of the Central Post Fund pertaining to the foregoing transaction and received into evidence over the objection by the defense that the exhibits had not been sufficiently connected with the accused and the specification involved in the case (R 207-213).

Prosecution Exhibit 15C is a Central Post Fund Purchase Order Number 328, dated 15 April 1949, to Washburn Upholstering Company "in the amount of \$1989.05 and initialed 'OK WCM'." Prosecution Exhibit 15D is a statement of account dated 26 April 1949 showing the sum of \$1989.50 due the Washburn Upholstering and Furniture Company and initialed "OK WCM." Prosecution Exhibit 15E is a supplementary purchase order dated 4 May 1949 to Washburn Upholstering Company in the sum of 45 cents. This purchase order was issued to cover the difference between the original purchase order and the statement of account by Washburn. Prosecution Exhibit 15F is a receiving report showing the repair of furniture in the sum of \$1989.50 and is signed "William C. Marooney" as the receiving officer. Prosecution Exhibit 15A is a check by the Fort Lawton, Washington, Central Post Fund dated 4 May 1949 payable to "Washburn Upholstering Co." in the sum of \$1989.50.

When Mr. Washburn received the Central Post Fund's check for \$1989.50 he called the accused and asked him what was to be done with the excess money. The accused told Mr. Washburn to mail him a check. Mr. Washburn drew a check on the Broadway Branch of the Seattle-First National Bank, Seattle, Washington, dated 5 May 1949, payable to the accused in the sum of \$476.50, and mailed it to the accused. He identified the check, which had been paid by the drawee bank, and it was received in evidence as Prosecution Exhibit 15G without objection by the defense. This check was numbered 2799 and contains American Bankers Association Number 19-88 over 1251. It was indorsed "Captain Marooney." This check was cashed at the Queen Anne Branch of the National Bank of Commerce on 10 May 1949

and deposited in the accused's accounts as follows: \$176.50 in his checking account, and \$300.00 in his savings account (R 240-242, Pros Exs 9C, 9D).

Specification 6, Charge II

At the request of the accused, Mr. Washburn made an estimate in the sum of \$708.20 for the repair of some other furniture. He received a purchase order from the Central Post Fund in the sum of \$955.50. After the work was completed he received a check from the Central Post Fund dated 11 May 1949 in the sum of \$955.50. The court received in evidence the records of the Central Post Fund pertaining to this transaction as Prosecution Exhibits 16A through D. These records are various purchase orders, receiving reports, statements of account, and checks signed and/or initialed substantially as the other records previously received in evidence and pertaining to the other transactions. Upon receipt of payment by the Central Post Fund Mr. Washburn drew a check dated 13 May 1949 payable to "Captain Maroonney" in the sum of \$247.50 and mailed it to the accused; This check was introduced into evidence as Prosecution Exhibit 16G without objection. This check was indorsed "Captain Maroonney" and paid by the drawee bank (R 206-228, 246, Pros Exs 16A through C).

Specification 7, Charge II

About 13 May 1949 Mr. Washburn made an estimate for the repair of certain other furniture for the Special Services at the request of the accused. His estimate was for the sum of \$229.45. Thereafter he received a purchase order from the Central Post Fund in the sum of \$511.65 for this work. Upon completion of the work he received a check dated 18 May 1949 from the Central Post Fund in the sum of \$511.65. The court received in evidence the records of the Central Post Fund pertaining to this transaction as Prosecution Exhibits 17A through E. These records are various purchase orders, receiving reports, statements of account and checks, all signed or initialed substantially as the other records previously received in evidence and pertaining to the other specifications. Upon receiving payment of the \$511.65 from the Central Post Fund Mr. Washburn drew a check on the Broadway Branch of the Seattle-First National Bank dated 20 May 1949, payable to "Captain Maroonney" in the sum of \$282.20 and mailed it to the accused. This check was received in evidence as Prosecution Exhibit 17G without objection. The check numbered 2844 with the American Bankers Association Number 19-88 over 1251 was indorsed "Captain Maroonney," and deposited to the accused's checking account in the Queen Anne Branch of the National City Bank of Commerce, Seattle, Washington (R 206, 220-230, 246; Pros Exs 17A through C and 9E). At the time of these transactions the accused indicated to Mr. Washburn that the extra money was for baseball equipment (R 210,214-220).

Additional Charge and Specification

It was stipulated that the accused was secretary of the Fort Lawton

Officers Club, now known as the Seattle Port of Embarkation Officers Club, from 20 February 1947 to 30 June 1947 (R 258-259).

About 5 January 1946 the Officers Club obtained a soda fountain from Navy surplus stock without cost to the club. This transaction was effected pursuant to appropriate Naval regulations. The fountain was carried on the Navy records at a value of \$1468.80 (R 288, 309-317,321,324; Pros Exs 21A and B).

The soda fountain was installed in the snack bar at the Fort Lawton Officers Club in January 1946 and remained there until sometime in the early part of 1947, at which time the area used for the snack bar was converted into a barber shop and game room. The soda fountain was then stored in the basement outside the game room (R 313,249,250).

Mr. Harry Oyer was steward of the Fort Lawton Officers Club from the latter part of 1945 until April 15, 1947. Sometime in March 1947 Mr. "Les" Arnold talked to Mr. Oyer about purchasing the soda fountain. Mr. Oyer told the accused that Mr. Arnold wanted to buy the soda fountain and the accused stated that he would take it up with the Board of Governors. On 5 January 1949, Mr. Oyer again became steward of the Officers Club at Fort Lawton. The soda fountain was not at the club at this time (R 248-255).

Mr. Lester Arnold of Seattle, Washington, testified that he asked Mr. Oyer about buying the soda fountain which had been in operation in the snack bar of the Fort Lawton Officers Club. Sometime thereafter either in March or April 1947 the accused mentioned to him that the soda fountain could be purchased for \$1100.00 in cash. In June of 1947 he paid the accused \$1100.00 in cash for the soda fountain and the fountain was delivered to him at his residence by the accused in July of 1947. In early August 1947 he installed the fountain in the Snow White Dairy in Seattle, which he owned at that time. Sometime in 1948 he sold the Snow White Dairy together with the soda fountain. The accused did not give him a receipt for the \$1100.00, although he requested a receipt several times (R 270-275).

Sometime about the first of July 1947 the accused ordered two janitors employed by the club to load the soda fountain on the club truck and follow Mr. Arnold to his home and unload the soda fountain there. This order was carried out and the soda fountain was placed in Mr. Arnold's garage (R 272, 276-281).

The minutes of the Board of Governors of the Officers Club did not show that they ever authorized the sale or other disposition of the soda fountain (R 329,330).

Mr. Ferong, the bookkeeper at the Fort Lawton Officers Club, testified that \$1100 was never turned in to the club by the accused or by anyone else (R 285-288).

4. Evidence for the Defense

First Lieutenant Samuel E. Kelly was the post athletic officer at Fort Lawton in the spring of 1949. A request was made to the Sixth Army Welfare Fund to allocate approximately \$4,000.00 for athletic equipment at Fort Lawton, Washington. On 24 March 1949 a conference was held by the Sixth Army relative to athletics, at which time it was stated that it was not the responsibility of the Sixth Army Welfare Fund to equip post-level teams and that the responsibility for such equipment rested with the custodian of the Central Post Fund. However, Fort Lawton was given \$1000.00 to equip both the softball and baseball teams. The Central Post Fund at Fort Lawton furnished \$350.00 for athletics. This \$1350.00 was spent for baseball equipment. The athletic equipment at Fort Lawton, with the exception of basket ball, was in deplorable condition. The athletic teams did not "receive any athletic equipment as donations from any other source." The only equipment which he did not purchase and which was purchased without his knowledge was eight or nine gloves valued at about \$145.00 and a lining machine valued at \$75.00. These items were purchased by his superior officer, Captain Marooney (R 336-342).

Mr. Ed Vervynck, salesman for an athletic supply company, received a call from the Special Services Officer at Fort Lawton, Washington, with a request that he survey their athletic equipment. He made a survey of the football equipment and found it in fair shape. He discussed with the accused the equipment needed during the baseball season. The accused purchased ten dozen baseballs and a liner at a cost of about \$275.00. Following this transaction his firm sold other baseball equipment to Fort Lawton. Such sales amounted to about six hundred dollars. Payment for all sales were billed to the Special Services Officer and paid by the Central Post Fund (R 342-347).

Lieutenant Colonel Arthur K. Amos testified that he has known the accused since the fall of 1945. The accused worked for him until he (Amos) was transferred from the post. The accused is loyal, industrious, honest, and a fine officer in every respect. He gave the accused a superior rating on his efficiency report (R 307,308).

Captain Dale C. Hotchkiss, post police officer at Fort Lawton, testified that the accused had been assigned to his organization for the past two months, that he has known the accused since 1946 and that he had had some dealing with the accused "along supply channels" when he (Hotchkiss) was the Post Quartermaster. He knew of no instance when the accused's dealing with property was "out of line." The accused has always been well liked around the post and was favorably commended about his work (R 349).

By the accused

The accused was advised of his rights as a witness and elected to

make an unsworn statement. He stated that he is 50 years of age; that he joined the Connecticut National Guard in February 1925 and was a master sergeant at the time his division was called into service late in 1940. He participated in the Central Pacific, Northern and Central Solomons Campaigns, earning two battle stars. He returned to Fort Benning in 1943 to attend officer candidate school. He was commissioned a second lieutenant, Infantry, in August of 1943, and promoted to first lieutenant about six months thereafter. He was promoted to captain in May of 1945. From Fort Benning he went to Fort Robinson, Arkansas, and then to the Philippines and Japan. Concerning the offenses charged herein he stated:

"I desire to state that I was never in Seattle prior to 11 April 1946 and had never met George L. Davis until the winter of 1948 and '9, approximately the first of the year of 1949, somewhere around January. Any money that I received while Special Services Officer was for the purpose of applying the same towards the purchase and maintenance of athletic equipment for Fort Lawton teams, there being insufficient funds from regular allocations. All of this money was in my possession for this purpose at the time of my arrest. I had already contacted a sporting goods firm on estimates and was awaiting the return of Captain Wicke from West Point football coaches school to advise me on the proper purchases, such as blocking dummies and like that, he having been placed in charge of the Fort Lawton football team being a former Alabama star. The money was never obtained in this manner until after Lieutenant Kelly returned from Sixth Army with the information that the fund would no longer be furnished by the Sixth Army for post teams. My arrest naturally precluded me from making any of the contemplated purchases. A return of all funds has been tendered to the proper authorities and is available and full restitution of the same will be made. On advice of counsel, based upon legal objections already in the record, I have no statement to make as to the additional charge and the additional specification."

The defense then stated that it desired that two newspaper articles be marked for identification as Defense Exhibits A and B and appended to the record to show possible bias against the accused by the appointing authority. Exhibit A is an article which appeared in the Seattle Times on 17 August 1949 and is captioned, "Lawton Captain Court Martialed Over Post Funds." Exhibit B is a picture of the accused and defense counsel Lieutenant Potter and captioned, "Fort Lawton Captain Accused of Fraud." It was stated that if the information contained in these articles came from the office of the appointing authority then the defense was of the opinion that the reviewing authority had a preconceived opinion of the accused's guilt which would preclude him from reviewing the case (R 354).

5. Discussion

Challenges

At the beginning of the case the defense challenged each member of the court for cause upon the grounds that each member of the court was a member of the Seattle Port of Embarkation Officers Club and was therefore disqualified to act as a member of the court inasmuch as the Additional Charge involved club property. Each member of the court was examined on voir dire and admitted that he was a member of the Seattle Port of Embarkation Officers Club. Except in the case of Colonel Perry as herein-after set forth, there is nothing in the record to show when any member of the court became a member of the officers club. Lieutenant Colonel John W. Perry stated that he became a member of the Board of Governors of the club about the first of November 1948 but that he did not know anything about the facts concerning the allegations set forth in the specification of the Additional Charge; that he had not discussed the case and that after it was discovered that the fountain was missing the Board of Governors had their insurance policy checked to see that their insurance covered the loss. He did not have any pecuniary interest in a loss from the club and would not receive any portion of the assets of the club in the event the club was closed. No other member of the court was a member of the Board of Governors of the club. The fact that Colonel Perry was a member of the Board of Governors of the club was stated as an additional ground for challenge as to him. The challenges were not sustained (R 3-15).

Army Regulations 210-60, dated 3 April 1947, provide in part:

"SECTION II

" * * *

"4. Establishment. - a. - Under the authority contained in these regulations post, camp, station, or installation commanders, with the approval of the commanding general of the appropriate major command, may authorize the establishment of a post officers' or noncommissioned officers' club when such action is in the interest of the service.

"b. Such clubs will be governed under a constitution or charter and bylaws which will provide for their operation and dissolution in accordance with the provisions of these regulations. Any provision of existing constitutions, charters, or bylaws which is in conflict with these regulations will be amended to conform herewith.

"5. Designation. - a. The designation of a club will identify it with the post or installation it serves and all of its business will be transacted in the name of the club only. Example:

Fort Benning Officers' Club

By -----

Col., AUS, Secretary

"6. Funds for establishment. - When the post or installation commander determines that the establishment of such a club is in the interest of the service, he will fix the amount of necessary capital, including funds necessary for the purchase of equipment and for initial operations. Such capital may be obtained, with the approval of the commanding general of the appropriate command, from the Army Club and Mess Fund (for class I and II installations) or the Air Force Club and Mess Fund (for Air Force installations), by borrowing from any other appropriate source approved by the commanding general of the appropriate command, or by deposits, or by contributions; provided that arrangements are made for the prompt repayment of loans from the revenues of the club; all contributions are accepted only as gifts to the club; and that deposits and contributions are accepted with the express condition that no person making a deposit or contribution shall thereby acquire or own any funds or property of the club or possess any enforceable right or interest in any fund or property of the club; provided that, so long as the financial condition of the club warrants, the post commander may provide by general regulation for the refund of any deposit in whole or in part, without any accretion whatever, at the termination of such member's participation. [Change No. 2, 6 Dec 1948.]

"7. Dissolution. - a. Upon the dissolution of a club, the surplus property thereof will be disposed of in the following manner:

- (1) By sale or gift to other officers' or noncommissioned officers' clubs designated by the commanding general of the appropriate command.
- (2) By sale in accordance with procedures established for the disposal of surplus Army exchange property.
- (3) According to the wishes of the donor, if reasonably ascertainable and feasible, in cases where property has been donated to a club.

"b. All residual assets, including proceeds from the sale of property, will be held until such time as complete liquidation has been effected. They will then be forwarded promptly by check through ^{command} channels to the Custodian, Army Club and Mess Fund, Department of the Army, Washington 25, D.C., for class I and II installations, or to the Custodian, Air Force Club and Mess Fund, Headquarters, United States Air Force, Washington 25, D.C., for Air Force installations. Check will be accompanied by a certified copy of the terminal audit of the fund. At the same time the terminal audit report and check are forwarded through command channels, a certified copy of such audit report, together with a copy of the latest financial statement, will be transmitted direct to the Custodian, Army Club and Mess Fund or Air Force Club and Mess Fund. [Changes No. 2, 6 Dec 1948]

"8. Legal status. - Clubs governed by these regulations are integral parts of the Military Establishment, are wholly owned Government instrumentalities, and are entitled to the immunities and privileges of such instrumentalities except as otherwise directed by the War Department.

"9. Membership.-a. Membership in a post officers' or non-commissioned officers' club will be on a voluntary basis.

"SECTION III

"12. Commanding general of appropriate command. - a. The commanding general of the appropriate command will supervise the establishment, operation, and dissolution of all post officers' and noncommissioned officers' clubs at installations within his command.

"14. Board of governors. - a. The affairs of a post officers' or noncommissioned officers' club will be conducted by a board of governors consisting of from 3 to 11 officers or noncommissioned officers elected annually from and by the active membership of the club.

"e. The duties of the Board are to - ***

(5) Appoint the secretary and supervise his functions.

"15. Secretary. - a. The secretary will be an officer or noncommissioned officer appointed from the active membership of the club, and will hold office as prescribed by the board of governors with the approval of the post commander.

"b. The secretary is in executive control of the club. He is responsible for this management, the performance of duty of assistants and employees, and is the custodian of its property and funds.

"c. He will receive, disburse, and account for funds in accordance with the regulations, and the policies and procedures prescribed by the board of governors.

"i. He will act as recorder, without vote, to the board of governors.

"j. He will be financially liable for losses of club funds and property, only where dishonesty, fraud, or obvious negligence on his part is established. He will be bonded, in accordance with paragraph 16, AR 210-50, the cost thereof will be borne by the fund.

"o. Club funds are entrusted to personnel of the Army in their official capacity and their misapplication is punishable

under the Articles of War. The lending of club funds is prohibited."

Officer clubs are established, operated, and dissolved pursuant to the Army Regulations. They are integral parts of the military establishment and are Government owned instrumentalities. An officer may join a particular officers club and be entitled to use the facilities of such club. His membership therein does not give him any right or title to any of the physical assets of the club and upon dissolution of the club all assets are disposed of in accordance with Army Regulations. It is impossible for the individual members of an officers club to share in the assets of the club upon dissolution of the club.

The defense did not claim or attempt to establish that any member was actually biased or prejudiced for or against the accused.

The Board of Review concludes that the members of an officers club do not have such an interest in the assets of the club so as to prohibit them from performing their duties as members of courts-martial when the offenses charged in the specifications involve crimes relating to club property. Neither does the fact that Lieutenant Colonel Perry became a member of the Board of Governors in November of 1948 disqualify him as a member of this court. The offense set out in the specification of the Additional Charge was alleged to have occurred on 5 June 1947, long before Colonel Perry was shown to have any duties or special obligations in regards to club property. The Board of Review concludes that the challenges for cause were properly denied.

The Newspaper Articles

At the close of the trial the defense caused to be appended to the record two newspaper articles. They blandly state, without offering any proof of the fact, that the newspaper report emanated from the Office of the Commanding Officer at Fort Lawton, and that such actions create a doubt as to his qualifications to review the case. Defense counsel in his brief contends that the reviewing authority was disqualified to act in this case. The defense did not contend that the newspaper articles influenced any member of the court and did not make any challenges for cause based thereon. During the trial spectators were not excluded from the court and all sessions of the court were open to the public. It does not appear from the record that the reviewing authority was disqualified under the provisions of Article of War 8 as being either the accuser or the prosecutor or that his interest in the case was other than official. The contention of the defense merits no further discussion (CM 323089, Gale, 72 BR 41,76).

Specification and Charge I; Specifications 1,4,5,6, and 7 of Charge II and Charge II

The evidence establishes that during the early months of 1949 the accused was the Special Services Officer at Fort Lawton, Washington. In carrying out his duties it became necessary for him to purchase certain furnishings and to cause other furnishings to be repaired for the various service clubs located on the post. The cost of the purchases and repair of furnishings was to be borne by the Central Post Fund. In so far as the evidence relates to Specification 1 of Charge II it shows that accused secured from George M. Davis, doing business under the name of George L. Davis Company, a bid in the sum of \$8653.40 for certain furnishings. Upon receipt of this bid the accused informed Mr. Davis that it was \$1600 below his nearest competitor and suggested that the bid be raised in the sum of \$1600, which sum was to be returned to the accused by Mr. Davis upon payment by the Central Post Fund. The accused also stated that by handling the transaction in this manner he could get extra money for baseball equipment. Mr. Davis agreed to the raising of the bid in the sum of \$1600.00 and left some of his stationery with the accused. Thereafter he received a bid, prepared on his stationery, in the sum of \$10,253.40 which he signed and forwarded to the accused. The accused submitted the necessary purchase orders, bids and receipts to the custodian of the Central Post Fund showing that he had purchased certain furnishings for the sum of \$10,253.40, and that such furnishings had been received by him. Relying upon the various purchase orders, bids and receipts, the custodian of the Central Post Fund issued to "George L. Davis" a check in the sum of \$10,253.40, which check was duly paid by the drawee bank. Upon receipt of the check Mr. George M. Davis drew a firm check payable to the accused in the sum of \$1600 and mailed it to the accused. This check was deposited in the accused's bank account, \$700.00 being deposited in his checking account and \$900.00 in his savings account.

The evidence also shows that the accused conducted a similar transaction with Van Upholstery Shop as alleged in Specification 4, Charge II, and three other similar transactions with the Washburn Upholstery Company as alleged in Specifications 5, 6 and 7 of Charge II. The only substantial difference in these transactions are the amounts which were returned to the accused by the persons submitting the successful bids. Van's Upholstery Shop "kicked back" to the accused the sum of \$106.00 in cash, while Washburn Upholstery "kicked back" to the accused the sums of \$476.50, \$247.50 and \$282.20, all by check.

The accused made an unsworn statement wherein he tacitly admitted securing the sums of money set forth in the specifications of Charge I and Charge II. He also claimed that all money obtained by him was for the purchase of athletic equipment and that all of this money was in his possession at the time of his arrest. He never obtained any money in this manner until Lieutenant Kelly returned from the Sixth Army with the information that funds would no longer be furnished by the Sixth Army for

the support of the post athletic teams.

The supplying of false purchase orders, bids, and receiving reports to support fraudulent claims against the Central Post Fund of Fort Lawton, a non-appropriated fund under the control of the Army, and the securing of money in excess of the amounts actually due as alleged in the specifications under Charges I and II constitutes fraud and is conduct unbecoming an officer and a gentleman and a violation of Articles of War 95 and 96 (CM 270454, Kreie, 45 ER 289; CM 319531, Gibbs, 68 ER 365; CM 302964, Strickland, 59 ER 247,256). In his unsworn statement the accused attempted to exculpate himself by stating that he intended to use the money so obtained for the purchase of athletic equipment for Fort Lawton athletic teams and that at the time of his arrest he possessed all of the money obtained by him from the Central Post Fund. While these facts might be considered in mitigation of the offenses they do not constitute a defense thereto. While it may be contended that the specification of Charge I sets forth the same acts and transactions as alleged separately in Specifications 1,4,5,6 and 7 of Charge II, nevertheless these offenses are alleged to be in violation of Articles of War 95 and 96, respectively. This manner of pleading finds sanction in military law and is not an illegal multiplication of charges even though the separate offenses stem from the same set of facts (CM 281663, Hindmarch, 22 ER (ETO) 223,229; *McRae v. Henkes* (CCA 8th 1921), 273 Fed 108, Cert. denied, 258 U.S. 624, 66 L. Ed. 797 (1922), CM 319531, Gibbs, supra).

Additional Charge and Specification

The evidence shows that the accused was the Secretary of the Fort Lawton Officers Club, now known as the Seattle Port of Embarkation Officers Club, between 20 February 1947 and 30 June 1947. At this time the club possessed a soda fountain which had been obtained from the Navy. In June of 1947 the accused sold this soda fountain to Mr. Lester Arnold for the sum of \$1100.00, and in the early part of July 1947 caused the fountain to be delivered to the purchaser. Mr. Arnold paid the accused the \$1100.00 in cash, and the accused never turned this money into the club. The accused did not have authority to sell the soda fountain.

The defense contended that under this state of facts the accused could not be guilty of larceny and if he was guilty of anything it was embezzlement.

In CM 318293, Mayer, 67 ER 211,217, the Board of Review said:

"It is contended that inasmuch as accused was the motor officer in charge of the pool for which the gasoline and brake fluid in question were issued, he should have been charged with

embezzlement rather than larceny. But accused did not have possession of such property in contemplation of the law, he had only a custody limited to the care and lawful operation of the pool. His custody or control of the property in the pool was subject to the orders and control of his superior officers. It follows that the taking and selling by accused and his confederates of this property constituted larceny thereof (CM 220398, Yeager, 12 BR 397; CM 252103, Selevitz, 33 BR 394; CM 268478, Brown, 44 BR 294; CM 275547, Garrett, 48 BR 104; CM 317327, Durant)."

The secretary of an officers club has custody of club property and funds, but this custody is subject to the orders and control of his superior officers. It follows that the taking and selling by the accused of the soda fountain constitutes larceny thereof. The defense also contended that the transfer of the soda fountain from the Navy to the officers club was illegal and that the club never obtained title thereto and therefore an allegation of ownership of the fountain in the club was improper, and for this reason a conviction could not be sustained. The Board of Review does not consider it necessary to determine the legality of the transfer of the fountain from the Navy to the club. The club had assumed responsibility for and had possession of the fountain. The club, therefore, acquired at least a special property interest therein. In a prosecution for larceny under Article of War 93, ownership may be alleged in either the special or general owner (CM 317327, Durant, 66 BR 277,307).

When determining the value of property shown to have been stolen the general rule to be applied is the local legitimate market value on the date of the theft. Value may also be established by proof of very recent purchase price paid for the article upon the market (par 180g, MCM 1949, p 241). In the instant case the evidence shows that Mr. Arnold sought to purchase the soda fountain through what he had a right to assume was legitimate channels and paid \$1100.00 for the fountain. This transaction occurred within the continental limits of the United States wherein such items are usually for sale. The sale of the fountain for \$1100.00 occurring contemporaneously with the larceny of the fountain is sufficient to establish a value of at least the sale price. The court was therefore justified in finding the value of the soda fountain to be \$1100.00.

6. John J. O'Brien and John A. Burns, civilian attorneys of Seattle, Washington, acted as special defense counsel at the time of trial. They also forwarded to the Board of Review a brief in support of the contentions advanced by the defense during the trial. They also set forth in their brief that since the trial "it has come to the attention of the defense that Colonel Perry was a member of the Fund Council for the Fort Lawton Central Post Fund from at least February 4, 1948, to the date of trial." In support of this statement counsel attached to their brief certain orders which designate Colonel Perry as a member of the aforementioned council. Orders dated 28 September 1948 and 2 March 1949 not

only designate Colonel Perry as a member of the council but also designate the accused a member of the same council. From these orders it appears that at the time of the offenses charged in the specifications under Charges I and II the accused was a member of the Fund Council of the Fort Lawton Central Post Fund. Being a member of the council he necessarily knew the other members of the council and when he proceeded to trial without challenging Colonel Perry using this fact as the cause of challenge he waived his right to challenge the member upon this ground (CM 333087, Sheets, 81 ER 305, and cases therein cited). This information being within the knowledge of the accused at the time of trial, it cannot now be advanced as newly discovered evidence.

7. Department of the Army records show that the accused is fifty years of age and married. He completed high school at New Haven, Connecticut, in 1918. In civilian life he was employed as a railroad repair foreman and a postal clerk. As a master sergeant in the National Guard, he entered Federal service on 24 February 1941. After enlisted service in the Pacific Theater, he was returned to the Zone of Interior for the purpose of attending Officer Candidate School. He was commissioned a second lieutenant, Infantry (AUS) on 21 August 1943, and promoted to first lieutenant and captain (AUS) on 3 May 1944 and 9 May 1945, respectively. He has been awarded the Combat Infantryman's Badge, Asiatic Pacific Theater Medal with two battle stars, the Good Conduct Medal and the American Defense Medal. His efficiency ratings average "superior" from August 1943 to February 1947. His "overall" efficiency ratings are 134 for the period 7 April 1948 to 20 July 1948 and 111 for the period 1 October 1948 to 31 March 1949.

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

Carlton E. McAlister, J.A.G.C.

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

Roger La. Quisenberry, J.A.G.C.

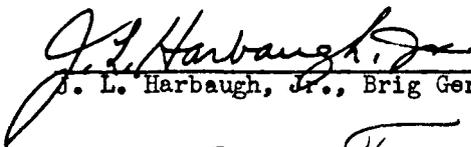
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THE JUDICIAL COUNCIL

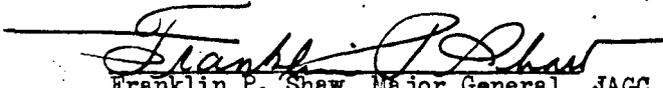
CM 338479

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

In the foregoing case of Captain William C. Maroney,
O-1324036, Transportation Corps, now of 9207 Technical
Service Unit-Transportation Corps (Seattle Port of Embarkation),
Seattle, Washington, 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.


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


Robert W. Brown, Brig Gen, JAGC


Franklin P. Shaw, Major General, JAGC
Chairman

30 January 1950

I concur in the foregoing action.


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

30 Jan. 1950

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

283

CSJAGH CM 338480

OCT 25 1949

UNITED STATES)

FORT ORD)

v.)

Trial by G.C.M., convened at
Fort Ord, California, 19
September 1949. Dismissal.

Captain MICHAEL LOUIS
BORACZEK, 0383529, Company
A, Army Language School,
Presidio of Monterey,
California.)

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

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

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

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

Specification: In that Captain Michael L. Boraczek, Company "A", Army Language School, Presidio of Monterey, California, then attached 6003 ASU, Fort Ord, California, was, at Marina, California, on or about 7 September 1949, in a public place, to wit: Mortimer's Inn, drunk and disorderly while in uniform, to the disgrace of the military service.

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

Specification: In that Captain Michael L. Boraczek, Company "A", Army Language School, Presidio of Monterey, California, then attached 6003 ASU, Fort Ord, California, did, at Mortimer's Inn, Marina, California, on or about 7 September 1949, wrongfully strike Henry F. Leyenberger in the face with his fists.

He pleaded not guilty to and was found guilty of the Charges and the Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

Accused is in the military service of the United States (R 8,9,10, 31). At the time of trial he was assigned to Company A, Army Language School, Presidio of Monterey, California. On the date of the commission of the alleged offenses, he was a member of the 6003d Area Service Unit, Fort Ord, California, awaiting separation (R 8,9).

At approximately 2100 hours on the evening of 7 September 1949, Sergeant First Class Herbert H. Goral, Corporal James Sincere, Private First Class Leo C. Smith and Private Pruett went to "Mortimer's Inn" in Marina, California, to have some drinks. Sincere, Smith and Pruett were wearing civilian sport clothes while Goral was attired in military uniform (R 11-12). As they entered and seated themselves on stools at that part of the bar nearest the entrance, Smith and Sincere immediately became aware of accused's presence. Accused, dressed in military uniform, was at the far end of the bar "hanging on G.I.'s," "talking very loud," "walking up and down the bar" and asking the bartender, "where his bottle of scotch went" (R 15,19,20,27,28). The barroom was crowded (R 16). Its occupants, in addition to the bartender and waitress, consisted of 18 or 20 persons, civilian and military, some of whom were women (R 17,25,26).

The quartet of enlisted men had finished their first drink and were having their second, when accused shoved his way to the bar between Goral and Smith stating in a loud tone of voice, "Let a Captain come up and have a drink," or words to that effect (R 11,20,23). As the result of the unsolicited intrusion of accused among the enlisted men, Sergeant Goral was forced from the stool upon which he was seated (R 12,23,28).

Accused remained at the bar among the enlisted men for approximately fifteen minutes (R 13). His speech was loud and profane and his manner was offensive (R 14,17,26). He informed Sergeant Goral that he was a "CID" agent and directed Goral not to talk to or bother him (R 12-13). Under the pretense of shaking hands, accused grasped Sergeant Goral's hand in handshake fashion, pulled him off balance and jerked him around the floor (R 13,15). Accused then invited Sergeant Goral to "step outside" stating that he would "go to work" on him. Sergeant Goral accepted the invitation and they left the room. An encounter was averted, however, when Goral advised accused that he did not desire to have trouble with him. Evidently appeased, accused returned with Goral to the bar and Goral bought accused a drink as a peace offering (R 14,15). Accused then asked Smith what his rank was and upon being informed that Smith was a private first class, made a disparaging remark about privates and privates first class (R 13,14,17,19,28). Following this, accused jerked an unlighted cigarette from the mouth of Private Pruett. Upon

being told by Sergeant Goral "not to do that anymore," accused took off his uniform jacket, placed it on a nearby stool and stated to Goral, "Don't let these bars worry you, you son of a bitch." Goral told accused that he resented the appellative by which accused had referred to him. They commenced to scuffle but the bartender ordered them to go outside and they complied (R 14,15,16,21,28).

A short time thereafter, Sergeant Goral returned alone to the bar-room and asked Henry F. Leyenberger, the bartender, to take a towel out to accused and help clean him up. Leyenberger went outside with a towel and found accused sitting on the curb in front of the Inn (R 24). What then transpired is described in Leyenberger's testimony of record as follows:

Q. What did you do when you got there?

A. Outside, I wiped the Captain's hands and face off and straightened up his tie.

Q. Did the Captain make any statement to you while you were out there with the towel?

A. No, he asked me this, 'Would you wipe the blood off my face, if there is any,' which I did.

Q. Did he say anything about his hands?

A. Yes, sir, he asked me if his hands were clean. I said they were.

Q. What occurred then?

A. Before I knew what it was all about, he drew back and hit me on the side of the face with his fist, his right hand, the one that I had just cleaned while I was wiping the left hand off.

Q. Had you done anything to provoke that striking?

A. No, sir, I didn't say a word.

Q. And were there any marks on you as a result of that striking, either inside or on the face?

A. Just on the inside of my mouth. I have a lower plate, it kind of bruised my gums up pretty badly, that's all." (R 24-25)

After he was assaulted by accused, Leyenberger returned inside the Inn and had someone call the military police (R 29). In the meantime quite a number of persons gathered around the scene of the assault (R 30).

Goral and Sincere testified that in their opinion accused was "drunk" at the time of the incidents related (R 16,29). Smith testified similarly and added that his opinion was based on the fact that accused "was staggering, his speech was sluggish, and he had quite a time controlling himself." (R 20,21). Major Ward B. Waits, the Provost Marshal at Fort Ord, testified that he saw accused at the Station Hospital about 2130 hours on 7 September and that accused was drunk at that time (R 31).

4. For the defense.

After being fully apprised of his rights as a witness, accused elected to be sworn as a witness in his own behalf (R 32,33). After admitting that he was in the military service of the United States, he made the following testimonial response to his counsel's request that he relate his story:

"A. On the night in question the only thing I can state, after hearing the other witnesses is that I must have been drunk, due to the fact that after entering the bar in question I don't remember a thing that happened in so far as the enlisted man, the sergeant, or the civilian are concerned." (R 34)

Upon further questioning accused stated that after he had had his supper, he and four other officers had gone to his room on the post (Fort Ord) where they consumed a partially full bottle of scotch each having two drinks (R 37). As this depleted the supply of liquor, accused offered to pay for another bottle if it was obtainable. A major then drove accused to a liquor store located next door to "Mortimer's Inn" and accused bought a bottle of scotch. Although they originally intended to go back to accused's room, where the other officers were waiting for their return with the bottle, instead, at the major's suggestion, they went into "Mortimer's Inn" to get a drink (R 35,38,39). Accused consumed one drink of scotch at "Mortimer's Inn" and was served a second drink which he only partially drank because it was bitter (R 37, 39,40). He had no recollection of anything that occurred thereafter (R 34).

Accused further testified that he had sixteen years of military service as an enlisted man and officer; that he was married and had two children one of whom was 8 years of age and the other 4 years of age; and that between December 1941 and April 1949 he had approximately 54 months overseas service in the European Theater and in the Aleutians (R 35).

Captain Alexander Levine, Company A, Army Language School, testified as a character witness on behalf of accused. Captain Levine stated that he had known accused for over a year; that he and accused had met

at Fort Riley where they attended the Intelligence Course together and until recently were both students at the Army Language School, Presidio of Monterey, California; that accused was an able and conscientious student who would often work until midnight or 1:00 a.m. in order to keep up with his study of the Russian language; that accused's behavior was mannerly, "like that of any other officer;" and that accused was one of the "best fellows" he knew (R 40-42).

5. Discussion.

The accused was found guilty of being drunk and disorderly in a public place while in uniform, to the disgrace of the military service, in violation of Article of War 95; and of wrongfully striking Henry F. Leyenberger in the face with his fists, in violation of Article of War 96. The proof adduced at the trial abundantly supports these findings.

It was shown that "Mortimer's Inn," the situs of the alleged disorderly conduct, contained a barroom where beverages were dispensed and to and from which patrons came and went freely, and that approximately twenty men and women, civilian and military, were present at the time of the offenses alleged. (Whether the "Inn" was anything more than a barroom is not disclosed by the record). Since the evidence clearly establishes that "Mortimer's Inn" was a place frequented by the public or some of the public, or a place open to public view, the court was justified in concluding that "Mortimer's Inn" was a "public place" within the accepted meaning of the term in civilian and military law (CM 315105, Rochon, 64 BR 355,360).

It was also shown by uncontroverted and undisputed evidence that while accused was at "Mortimer's Inn" on the evening of 7 September 1949, he was dressed in military uniform; that he was "hanging on G.I.'s," "talking very loud," and "walking up and down the bar;" that he unceremoniously shoved his way to the bar between Private First Class Smith and Sergeant Goral, and as a consequence thereof pushed Goral from the stool on which he was seated; that he grasped Goral's hand as if to shake it and jerked and pulled Goral off balance and around the floor; that he invited Goral to step outside, promising, by using a vernacular term, to exert physical force on Goral; that without cause, he decried Private First Class Smith and all privates and privates first class by referring to them in a derogatory and degrading manner; that without excuse, he molested and harassed Private Pruett by jerking an unlit cigarette from Pruett's mouth; that when asked by Sergeant Goral to desist in the future from such action, he resorted to the use of an opprobrious and defamatory appellative by calling Goral a "son of a bitch" and then impliedly offered to brawl with Goral; that he did in

.fact scuffle with Goral in the barroom until ordered to go outside by the bartender Leyenberger and that he and Goral then went outside; that the above-described incidents occurred in the barroom within the view and hearing of those others there assembled; and that accused's speech was loud and profane and his manner was offensive; and that when Leyenberger, at Goral's request, went outside to assist accused and was in fact in the act of so doing, accused, without reason or provocation, struck Leyenberger on the jaw with his fist.

The foregoing undisputed evidence of the commission by the accused, an officer in uniform, in a public place and in the presence of others, of violent peace-breaching conduct, consisting of baselessly insulting, harassing and defaming enlisted men and finally engaging in brawling and altercation with them, is of such character as to amount to conspicuously disorderly conduct. Proof that accused was drunk at the time and place alleged is supplied by the testimony of the witness who categorically stated that accused was drunk and described him as "staggering," "sluggish of speech," and "having difficulty controlling himself;" by the testimonial opinion of others to the effect that accused was drunk; and by the evidence of record that he had imbibed of several drinks of straight Scotch whiskey. By his own admission to the effect that he had no recollection of events that transpired after commencing his second drink at the Inn, and by the uncontradicted evidence of the reprehensible manner in which he disported himself while there, is established that accused's drunkenness was of such a degree as to be properly classified as gross (CM 240799, Shapiro, 26 BR 131,134). Thus the record establishes by compelling, competent proof that accused was drunk and disorderly in the manner and at the time and place alleged in violation of Article of War 95 (CM 285128, Hodges, 56 BR 27,33; CM 315575, Heilman, 65 BR 39,42; CM 324590, Downs, 73 BR 275,281; MCM, 1949, par. 182).

With reference to the specification alleging that accused struck Herbert F. Leyenberger with his fist, in violation of Article of War 96, the record of trial contains unassailed proof to this effect, adduced from the victim and Corporal Sincere. Accused's voluntary drunkenness or his judicial assertion that he did not recollect his commission of the battery upon Leyenberger does not exculpate him of criminal responsibility therefor since the offense of simple battery does not require proof of a specific intent or state of mind to sustain a conviction (MCM, 1949, par. 140a).

6. The records of the Department of the Army show that accused is 41 years of age, married, and the father of two minor children. He was graduated from high school in 1926 and attended college during 1927. He appears to have been steadily employed in civilian life as a drug clerk,

assistant manager of a retail drug store, fuel oil and oil burner salesman, buyer of construction material, and railroad tower and bridge maintenance inspector.

He enlisted in the New York National Guard on 19 February 1934 and attained the grade of Staff Sergeant. On 27 July 1939 he was appointed Second Lieutenant, Coast Artillery Corps, National Guard of the United States, Army of the United States. He entered on active duty on 16 September 1940 and was promoted to First Lieutenant and Captain on 2 January 1942 and 5 June 1943, respectively. After overseas tours of duty in the Alaskan Department (3 Jan 42 - 19 Apr 44) and the European Theater (16 May 45 - 23 Oct 45), he was separated from the service on 2 February 1946. Pursuant to his own application, he was subsequently recalled to active duty on 31 July 1946 and served in Germany between September 1946 and April 1948. His efficiency ratings between 1 October 1940 and 30 June 1947 (WD AGO Form 66-1) include one (1) rating of Superior, twelve (12) ratings of Excellent, and two (2) ratings of Very Satisfactory. During the period 1 July 1947 - 14 August 1948 his efficiency report (WD AGO Form 67-1) over-all ratings CA were 077, 058, 058 and 118.

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 and the sentence and to warrant confirmation of the sentence. A sentence of 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.

Robert R. Glavin, J.A.G.C.
Charles J. Berkeault, J.A.G.C.
J. W. Lynch, J.A.G.C.

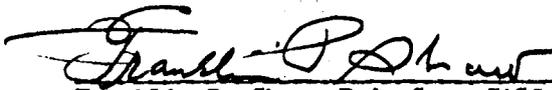
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Office of The Judge Advocate General

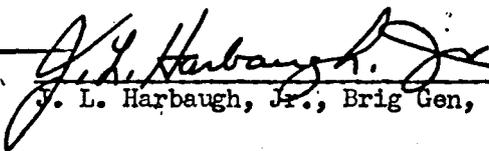
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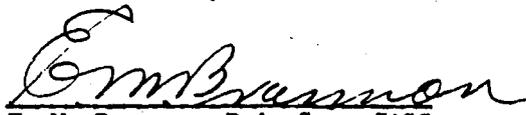
THE JUDICIAL COUNCIL

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

In the foregoing case of Captain Michael L.
Boraczek (O-383529), Company A, Army Language School,
Presidio of Monterey, California, upon 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,


E. M. Brannon, Brig Gen, JAGC
Chairman

9 November 1949

(GCMO 64, 23 Nov 1949).

I concur in the foregoing action.


THOMAS H. GREEN
Major General
The Judge Advocate General

14 November 1949.

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

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CSJAGK - CM 338522

19 OCT 1949

UNITED STATES)

FORT EUSTIS, VIRGINIA

v.)

Trial by G.C.M., convened at Fort
Eustis, Virginia, 9 September 1949.
Dismissal.

Major JACK W. HOWARD)
(O-1576152), 9224th Techni-)
cal Service Unit, Transporta-)
tion Corps.)

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Major Jack W. Howard, 9224 Technical Service Unit-Transportation Corps, Headquarters, Transportation School, did, at Fort Eustis, Virginia, on or about 25 May 1948, with intent to deceive The Adjutant General, Department of the Army, officially certify to the said The Adjutant General, Department of the Army, that his, the said Major Jack W. Howard's, civilian education included attendance at University of Texas, Austin, Texas from 1935 to 1938, which certificate was known by the said Major Jack W. Howard to be untrue in that he, the said Major Jack W. Howard, did not attend the University of Texas.

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

3. Evidence

For the Prosecution

A photostatic copy of a document titled "Application For Appointment

Incl # 3

as Warrant Officer In the Regular Service" (DA AGO Form 61, 1 Dec 47), dated 25 May 1948, bearing the signature "Jack W. Howard" and duly authenticated by the seal of the Office of the Adjutant General, U.S. Army, marking it "Official Copy" was received in evidence without objection as Prosecution Exhibit No. 1 (R 6). The form of this exhibit calls for specific statistical data to be stated in numbered spaces prescribed therein and the data contained therein purports to relate to one Major Jack W. Howard, ASN O-1576152, as applicant. In Space 5 the date of applicant's birth is shown to be "29 July 1918"; in Space 6, his place of birth, as "Gonzales, Texas"; and in Space 14, pertaining to his civilian education, there appears the following data:

| <u>COLLEGE</u> <u>Name and Location</u> | <u>Years</u> | | <u>Degree and</u> <u>Date</u> | <u>Honors and</u> <u>Scholarships</u> | <u>Principal</u> <u>Subjects</u> |
|--|--------------|-----------|----------------------------------|--|-------------------------------------|
| | <u>From</u> | <u>To</u> | | | |
| University of Texas Austin, Texas | 1935 | 1938 | No | None | Business Administration |

On page four of this exhibit, immediately above the signature of the applicant "Jack W. Howard" there appears the following certificate:

"I certify that the foregoing answers are true, correct and complete to the best of my knowledge and belief; and in signing this application I do so with the understanding that the veracity of all statements made may be investigated and if found incorrect I may be subject to such disciplinary action as appropriate."

Several time-stamp markings appearing on the face of this exhibit indicate that the above application was received at the "AG Integration 2nd Army" at 1000 hours, 31 May 1948; at the "100 AGO" at 1300 hours, 10 June 1948, and at the "Military Personnel Procurement Service AGO 9" at 1000 hours, 11 June 1948.

With the consent of the accused an oral stipulation was entered into between the prosecution and defense stipulating that the signature of Jack W. Howard, appearing on page four of Prosecution Exhibit No. 1, was the true and genuine signature of Jack W. Howard, Major, TC, O1576152, the accused (R 6).

Circular 38, Air Force Letter 35-13, Departments of the Army and the Air Force, Washington, D. C., dated 12 February 1948, was admitted without objection as Prosecution Exhibit No. 2 (R 6). This exhibit, titled "Career Guidance - Appointment of Warrant Officers to the Regular Army and United States Air Force," provides that applications for appointment as warrant officer will be submitted on DA AGO Form 61, through channels, to The Adjutant General, Washington 25, D. C., "until 2400 hours, 31 May 1948."

The deposition of E. J. Mathews, Registrar and Dean of Admissions, University of Texas, Austin, Texas, dated 29 July 1949, was admitted, without objection, as Prosecution Exhibit No. 3 (R-7). This deponent testified, in pertinent part, that the official records of admissions to the University of Texas for the period 1935 through 1938 disclosed that there was no record of enrollment of a student by the name of Jack W. Howard who was born on 29 July 1918 at Gonzales, Texas, in the University of Texas, during the period of 1935 through 1938.

For the Defense

Accused was duly apprised of his rights as a witness and elected to testify in his own behalf. He testified that his full name was Jack Wesley Howard and that he was born at Gonzales, Texas, on 29 July 1918. He testified that the signature on Prosecution Exhibit 1 was his; that the application had been filled out by a clerk in his office; that he had never attended the University of Texas as a student; and that before signing the application he was aware of the entry thereon which indicated attendance by him at the University of Texas (R 10,11,12).

Accused attended Officer Candidate School at Camp Lee, Virginia, in 1942 and while there learned that two other Howards were in attendance as students. He knew this because he had received mail that was not his. About six months after graduation from Officer Candidate School he was sent overseas, and after being there about a year he had occasion to check his 66-1 card. At that time he noticed that the card showed him as having attended the University of Texas for three years. He did not "attach much importance to it and thought that it was just one of those things that happened and it would be corrected." He was separated from the Army in January 1946 and came back on duty in April of 1947, reporting to Fort Eustis, Virginia. While on duty at Fort Eustis he decided to submit an application for a warrant officer appointment in the Regular Army. He had in his possession a copy of his 66-1 card which he had extracted from the one he had seen overseas. He gave this copy of his 66-1 card to one of the clerks in his office together with the warrant officer application form and instructed him to complete the form and return it to him. He was quite busy at that time and did not check the application thoroughly, however, he did note that the application showed attendance by him at the University of Texas for three years. He did not correct or do anything about it "because I thought perhaps I wouldn't meet the deadline date for submitting the application and I just let it ride." He did not attach much importance to the erroneous entry and sent it in as prepared by his clerk (R 9).

Major Temple W. Hilliard, Jr., testified that as Secretary of the Transportation School he was the immediate superior officer of the accused; that in such capacity he was in daily contact with and observation of the accused; that the accused performed his duties in a most efficient

manner; that, as his superior officer, he would make no changes in the duties of accused unless directed to do so by higher authorities (R 21,22).

There was admitted into evidence Defense Exhibit A, the statement of W. P. Midkiff, County Judge, Gonzales County, Texas, who stated that he had known the accused and his family intimately for many years and that they were honest, intelligent and dependable. A statement by Lieutenant Colonel Rush B. Lincoln, Jr., Assistant Commandant, Transportation School, was admitted into evidence as Defense Exhibit B. Lieutenant Colonel Lincoln stated that the accused had performed his duties in a superior manner and that he would be pleased to have accused serve under him as a supply officer (R 21).

4. Discussion

The accused was charged and found guilty of making a false official statement with intent to deceive The Adjutant General, Washington, D.C., knowing such statement to be untrue, in violation of Article of War 96. To support the conviction the record must show that the accused (a) made a certain official statement, (b) that the statement was false, (c) that the accused knew it to be false, and (d) that such false statement was made with intent to deceive the person to whom it was made (CM 318705, Jackson, 81 ER 433, and cases therein cited; CM 337961, Sykora, 1949).

That the statement, as alleged, was made by the accused and that it was false is amply sustained by the evidence. Furthermore, the testimony of accused shows clearly that he knew the alleged statement was false when he submitted the application in question and subscribed the certificate contained therein certifying to the truth and correctness of his answers.

The only questions requiring consideration are (1) whether the alleged statement was of an official nature and (2) whether it was made with intent to deceive. Prosecution Exhibit No. 1, the photostatic copy of accused's application for appointment as warrant officer, shows on its face, by the seal of the Office of The Adjutant General, that it is an official copy of a document in the records of that office and, according to several time-stamp markings of intermediate offices of The Adjutant General imprinted thereon, that the original copy it represents was submitted through official channels to The Adjutant General. Such proof, unrebutted by competent evidence, is sufficient, prima facie, to show that this document and the statements contained therein are necessarily official in nature (par 130b, MCM, 1949). A copy of an official record of the National Military Establishment or of any bureau, branch, force, command or unit thereunder may be duly authenticated by the seal, inked stamp or other identification mark of the establishment, department, agency, bureau, force, command or unit (par 129b, MCM, 1949). Apart from the foregoing evidence, however, it was shown by the accused's testimony that he knowingly made and submitted the above application (Pros Ex 1) containing the alleged false statement to The Adjutant General

through official military channels pursuant to provisions of Department of the Army and the Air Force Circular (Pros Ex 2). It therefore follows that an application, such as the one submitted by the accused in this case, accomplished pursuant to official regulations, on the prescribed form, is official in nature (CM 281188, Greene, 54 ER 77,81). With respect to the second question, it has long been established that if an official statement is falsely made the intent to deceive may be inferred (CM 275353, Garris, 48 ER 42, Sykora, *ibid*).

Thus it is manifest from the record that the evidence adduced clearly establishes every element of the offense found beyond a reasonable doubt and constitutes a violation of Article of War 96 (CM 323089, Gale, 72 ER 41).

5. Accused is 31 years of age, married, and has two children. He completed high school in Gonzales, Texas, in 1935. In civilian life he was employed as a motor freight agent and as a County Service Officer for the Veterans Administration. His enlisted service began on 25 November 1940 and he attained the rank of staff sergeant. He completed the Quartermaster Officer Candidate School and was commissioned a second lieutenant, Army of the United States, on 15 July 1942. He was promoted to first lieutenant on 7 December 1942, to captain on 16 June 1943, to major on 28 January 1944, and to lieutenant colonel on 26 December 1945 upon release from active duty. He was recalled to active duty on 12 April 1947 as a major. His adjectival efficiency ratings average "Excellent." He served overseas from 23 January 1943 to 19 September 1945 and was awarded two battle stars for the Guadalcanal and Northern Solomons campaigns.

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 96.

Carl W. McAfee, J.A.G.C.

[Signature], J.A.G.C.

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

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

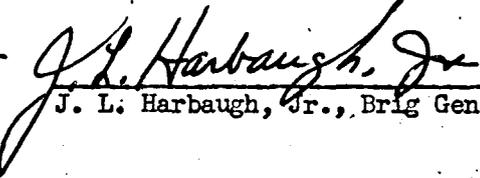
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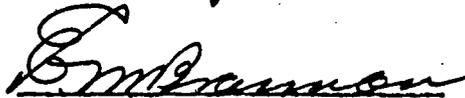
THE JUDICIAL COUNCIL

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

In the foregoing case of Major Jack W. Howard
(O-1576152), 9224th Technical Service Unit,
Transportation Corps, upon the concurrence of
The Judge Advocate General the sentence is con-
firmed and will be carried into execution.


Franklin P. Shaw, Brig Gen, JAGC

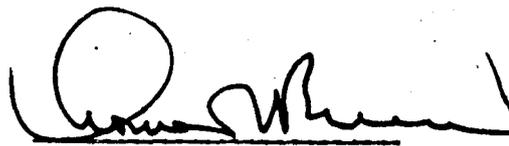

J. L. Harbaugh, Jr., Brig Gen, JAGC


E. M. Brannon, Brig Gen, JAGC
Chairman

15 November 1949

(GCMO 68, 25 Nov 1949).

I concur in the foregoing action.



THOMAS H. GREEN
Major General
The Judge Advocate General

16 November 1949.

Incl #2

During lunch hour on 1 August 1949, accused opened the battery safe in the orderly room of Battery "D", 933d Antiaircraft Artillery Battalion, and removed military payment certificates in the amount of \$430.00 from the battery payroll of \$8,816.00. Following lunch hour accused took the balance of the payroll from the safe, handed it to Captain John C. Tucker, the Commanding Officer of Battery "D", and assisted him in paying the troops. Before all the troops had been paid, the shortage of \$430.00 was discovered. At a subsequent investigation, accused admitted the theft and returned \$230.00 of the \$430.00 which he had stolen. Prior to trial, he made full restitution. The \$430.00 in military payment certificates was the property of the United States and was furnished and intended for the military service thereof (R 7; Pros Ex 1).

b. For the defense.

Accused elected to testify in his own behalf (R 8). He stated that he is married and the father of two children, a daughter ten years of age, and a son nine months of age (R 9). He had enlisted service from April 1941 until he was commissioned at "Camp Davis, OCS," in August 1943. He was at Pearl Harbor when it was bombed and was wounded by shrapnel. Subsequently, some five months after he was commissioned, he went to New Guinea and served in the Pacific through part of 1945. He was in combat and received a second wound during the landing at Morotai (R 8,9).

For approximately a year he had owed a Captain Newman a gambling debt of \$200.00, which accused could not pay because he did not have the money. He did not want his wife to know about the matter. Finally on 1 August Captain Newman telephoned accused and threatened to tell his wife and also "the colonel." Accused "lost [his] head" and took the money. He gave \$200.00 to Captain Newman and retained the remainder until he was questioned by a Mr. Bullock, at which time he admitted the theft and returned the rest of the money (R 9,10).

It was stipulated between the defense and the prosecution that if Captain Newman, 138th AAA Group Headquarters, were present he would testify that on 1 August he called the 138th Group Headquarters and requested information concerning the battalion policy with respect to collecting money owed by one of the battalion officers, and that he expressed the desire to see the battalion commander concerning the collection of the debt (R 10).

Captain Joseph A. LeClair, Jr., testified that he had known accused for two years, had served with him in two organizations, and that accused's efficiency and character were excellent (R 11).

Captain Thomas T. Rutter testified that he had known accused for approximately two and a half years; that accused's character and

reputation were considered excellent, and that accused was a very good family man (R 11,12).

Captain Roger H. LeMaster, testified that he had known accused for two and a half years, that accused had served under him for over a year, and that he considered accused an excellent officer. Captain LeMaster had played cards with accused and would not say that accused gambled excessively (R 12,13).

William Bullock, "CID" agent, testified that he interviewed accused on or about 1 August, and that accused was cooperative and made an oral statement. At that time accused turned over to Bullock \$230.00 in military payment certificates (R 13,14).

It was stipulated that Master Sergeant Charles W. Bronough would, if present, testify that the enlisted men of the battery thought very highly of accused (R 14).

The stipulated testimony of accused's battery commander, Captain John C. Tucker, and his battalion commander, Lieutenant Colonel Roy W. Horton, shows that accused was rated in the upper three of five officers in the battery and the upper half of thirty-seven officers in the battalion (R 14).

Mrs. Myrtle W. Warrington, accused's wife, testified that accused was an excellent husband and father (R 15).

4. The uncontradicted evidence together with accused's pleas of guilty and his judicial admissions warrant the findings of guilty of the offense alleged: larceny of military payment certificates, valued at \$430.00, property of the United States furnished and intended for the military service, in violation of Article of War 94.

It does not appear that the pleas of guilty were improvidently entered. Such pleas were not only consistent with the evidence but were confirmed by accused's admissions of guilt on the witness stand. The stipulation of fact introduced by the prosecution was in effect a stipulation of guilt but in view of the nature of the pleas, accused's testimony in the case, and the fact that the matters stipulated were susceptible of proof, the stipulation was properly received in evidence.

5. Accused is 33 years of age, married, and the father of two minor children. He is a high school graduate and attended Rensselaer Polytechnic Institute for seven months. In civilian life he was successively employed as a bookkeeper and enameler. He had enlisted service from April 1941 to August 1943 when he was commissioned a

second lieutenant in the Army of the United States. He was promoted to first lieutenant on 24 March 1945. He had foreign service in the Pacific from July 1941 until April 1943 and from April 1944 to July 1945. His current tour, in Japan, extends from July 1947. He claims to have been wounded in combat on two occasions. His efficiency ratings of record are as follows: Satisfactory (1); Very Satisfactory (1); Excellent (6).

6. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to sustain the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to be dismissed the service is authorized upon conviction of a violation of Article of War 94.

Robert J. [unclear], 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

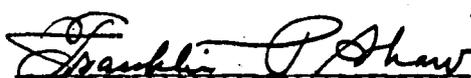
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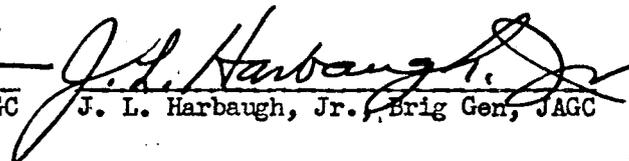
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THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant
Robert P. Warrington (O-1059095), Battery D, 993d
Antiaircraft Artillery Automatic Weapons Battalion,
upon the concurrence of The Judge Advocate General
the sentence is confirmed and will be carried into
execution.

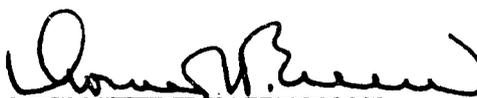

Franklin P. Shaw, Brig Gen, JAGC


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


E. M. Brannon, Brig Gen, JAGC
Chairman

9 November 1949

I concur in the foregoing action.


THOMAS H. GREEN
Major General
The Judge Advocate General

10 November 1949

(GCMO 66, 23 Nov 1949).

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

303

CSJAGK - CM 338650

27 DEC 1949

UNITED STATES)

FORT KNOX, KENTUCKY

v.)

Corporal FOREST L. FULWIDER)
(RA 6938115), Company D, 37th)
Armored Infantry Battalion,)
Division Artillery, 3rd Armored)
Division, Fort Knox, Kentucky.)

Trial by G.C.M., convened at Fort
Knox, Kentucky, 16 and 25 August
1949. Confinement for three (3)
months and forfeiture twenty-five
dollars (\$25.00) per month for a
like period. Confinement and for-
feitures remitted.

HOLDING by the BOARD OF REVIEW

McAFEE, BRACK and CURRIER

Officers of The Judge Advocate General's Corps

1. The record of trial in the case of the soldier 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 50e.

2. The accused was tried on 16 August and 25 August 1949 upon the following charge and specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Corporal then sergeant Forest L Fulwider Company D 37th Armored Infantry Battalion Division Artillery 3rd Armored Division did, at Fort Knox, Kentucky, on or about 15 April 1948, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Chicago, Illinois, on or about 15 July 1949.

He pleaded guilty to the specification 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, not guilty to the charge but guilty of a violation of the 61st Article of War. By exceptions and substitutions he was found guilty of absence without leave for the period alleged in violation of Article of War 61. No evidence of previous convictions was introduced. He was sentenced to be confined at hard labor at such place as the reviewing authority might direct for three months and to forfeit twenty-five dollars per month for a like period. The reviewing authority approved and remitted

the sentence. The results of trial were promulgated in General Court-Martial Orders No. 195, Headquarters Fort Knox, Kentucky, dated 21 September 1949.

3. The only question requiring discussion is whether the court was legally constituted.

4. By first indorsement dated 1 August 1949 the charges in the case were referred for trial to a general court-martial appointed by paragraph 41, Special Orders No. 161, Headquarters Fort Knox, Kentucky, 13 July 1949. On 2 August 1949 a court was appointed by paragraph 54, Special Orders No. 178, Headquarters Fort Knox, Kentucky. This order contained the following paragraph:

"All unarraigned cases now in the hands of the TJA of the GCM aptd by par 41 SO 161 this Hq cs will be brought to trial before the court hereby aptd. The employment of a reporter is authd."

On 16 August 1949 the court last referred to convened at Fort Knox, Kentucky, for the trial of the accused with the following members present:

"LT COL GRANGER G SUTTON Inf-Res Div Arty 3d Armd Div
 LT COL OZNI H CORNWELL Inf Div Tns 3d Armd Div
 MAJ PERCY R TURNLEY FA 3d Armd Gp 3d Armd Div
 MAJ WORTH M CURTISS Inf Cmbt Comd A 3d Armd Div
 MAJ JOHN B WEAVER CE-Res Hq Div Arty 3d Armd Div
 MAJ ROBERT E BYRNE JAGC Hq Sec 2128th ASU Sta Com (SJA Sec) LAW MEMBER

CAPT MILES V MCDONOUGH FA Hq Cmbt Comd A 3d Armd Div
 1ST LT HARLIS T WILDER Inf Div Arty 3d Armd Div
 1ST LT GEORGE E MASTICK Inf Hq 3d Armd Div
 1ST LT JOHN F WEBER JR Inf Div Tns 3d Armd Div

CAPT LISLE H NIVER Inf Hq Div Tns 3d Armd Div (dy SJA Sec) - TJA

CAPT ELISHA K AMOS JAGC Hq 3d Armd Div - Def Counsel"

After the court had been properly organized and the members thereof sworn, the accused was duly arraigned, whereupon the court granted the accused a continuance and adjourned until 23 August 1949.

On 24 August 1949, a court was appointed by paragraph 16, Special Orders No. 196, Headquarters Fort Knox, Kentucky. This order reads as follows:

"16. A GCM is aptd to meet at Hq 3d Armd Div Fort Knox Ky 24 Aug 49 or as soon thereafter as practicable for the trial of such persons as may be properly brought before it.

DTL FOR THE COURT

LT COL GRANGER G SUTTON Inf-Res Div Arty 3d Armd Div
 LT COL OZNI H CORNWELL Inf Div Tns 3d Armd Div
 MAJ PERCY R TURNLEY FA 3d Armd Gp 3d Armd Div
 MAJ ALBERT L SHANNON FA Cmbt Comd A 3d Armd Div
 MAJ WORTH M CURTISS Inf Cmbt Comd A 3d Armd Div
 MAJ JOHN B WEAVER CE-Res Hq Div Arty 3d Armd Div
 CAPT MILES V MCDONOUGH FA Hq Cmbt Comd A 3d Armd Div
 1ST LT OLIVER W HOLMES JAGC Hq Sec 2128th ASU Sta Com (SJA Sec) LAW MEMBER
 1ST LT HARLIS T WILDER Inf Div Arty 3d Armd Div
 1ST LT GEORGE E MASTICK Inf Hq 3d Armd Div
 1ST LT JOHN F WEBER JR Inf Div Tns 3d Armd Div

CAPT LISLE H NIVER Inf Hq Div Tns 3d Armd Div (Dy SJA Sec) - TJA
 1ST LT SAMUEL L ALTENBURG Inf Div Tns 3d Armd Div - Asst TJA

CAPT ELISHA K AMOS JAGC Hq 3d Armd Div - Def Counsel
 1ST LT JOSEPH B O'CONNOR JR Cav Co B 367th Armd Inf Bn 3d Armd Div
 (Dy SJA Sec) - Asst Def Counsel

All unarraigned cases now in the hands of the TJA of the GCM aptd by par 54 SO 178 this Hq cs will be brought to trial before the court hereby aptd. The employment of a reporter is authd."

This court met on 25 August 1949 for the trial of the accused. Thereupon the following occurred:

"PROSECUTION: Please the court, this is a continuation of the case of the United States versus Corporal Forest L. Fulwider. The accused is present together with his regularly appointed Defense Counsel, Captain Elisha K. Amos, and Special Defense Counsel, Major John W. Weldon.

"PROSECUTION: The record will also show that the members of the court present at the continuance granted on 16 August 1949 are now present with the exception of 1st Lieutenant Harlis T. Wilder, 1st Lieutenant George E. Mastick, and Major Robert E. Byrne, Law Member. The orders appointing the court, paragraph 54, Special Orders 178, Headquarters, Fort Knox, Kentucky, dated 2 August 1949, have been amended, and, with the permission of the court, I shall read that order.

"LAW MEMBER: All members present except myself have been sworn in; is that correct?

"Prosecution: That is correct. I wonder if I should announce those present and absent.

"LAW MEMBER: Those have been announced in the original record up to this point - those that are absent?

"PROSECUTION: Yes, Sir.

"LAW MEMBER: All you need to do is to announce the new members of the court present, which, in this case would be myself.

"PROSECUTION: 1st Lieutenant Oliver W. Holmes, JAGC, Law Member, is also present.

"PROSECUTION: Does the defense desire to exercise his right to challenge the Law Member for cause?

"DEFENSE: The defense does not.

"PROSECUTION: The new member will be sworn.

"1st Lieutenant Oliver W. Holmes, JAGC, the new member of the court was then sworn." (R 8,10)

The members present at the organization of the court on 25 August 1949 were:

Lieutenant Colonel Granger G. Sutton
 Lieutenant Colonel Ozni H. Cornwell
 Major Percy R. Turnley
 Major Worth M. Curtiss
 Major John B. Weaver
 Captain Miles V. McDonough
 First Lieutenant Oliver W. Holmes, Law Member
 First Lieutenant John F. Weber
 Captain Lisle H Niver, Trial Judge Advocate
 Captain Elisha K. Amos, Defense Counsel

Thereafter the trial judge advocate read the record of the proceedings of 16 August 1949 to the court. The accused then entered his plea and the trial proceeded (R 1-11).

5. Discussion

The court-martial appointed by paragraph 54, Special Orders No. 178, Headquarters Fort Knox, dated 2 August 1949, is hereinafter referred to as Court No. 1. The court-martial appointed by paragraph 16, Special Orders No. 196, Headquarters Fort Knox, dated 24 August 1949, is hereinafter referred to as Court No. 2.

It is noted that the orders appointing Court No. 2 had incorporated therein a provision to the effect that all cases, on which there had been no arraignment, were withdrawn from the court appointed by "par 54 SO 178 this Hq cs" and were referred for trial to the trial judge advocate of Court No. 2. Inasmuch as accused had already been arraigned before Court No. 1, it is apparent that the charges against accused were never properly withdrawn from Court No. 1 and referred for trial to Court No. 2. Such irregularity may not however, in itself, have been fatal to the proceedings, but it is noted that First Lieutenant Oliver W. Holmes was the only member of Court No. 2 present at the time of trial on 25 August 1949

who was not detailed as a member of Court No. 1. During the proceedings on 16 August 1949 the members of Court Number 1 were sworn. During the proceedings of 25 August 1949 First Lieutenant Oliver W. Holmes was the only member of Court No. 2 who was sworn. The Manual for Courts-Martial, 1949, provides:

"The prescribed oaths must be administered in and for each case and to each member, trial judge advocate *** before he functions in the case as such." (MCM 1949, par 103.)

Article of War 19 provides in part that the members of a general court-martial, the trial judge advocate and his assistants shall be sworn "before they proceed upon any trial."

It is apparent from an examination of the record that Lieutenant Colonel Granger G. Sutton, Lieutenant Colonel Ozni H. Cornwall, Major Percy R. Turnley, Major Worth M. Curtiss, Major John B. Weaver, Captain Miles V. McDonough, First Lieutenant John F. Weber and Captain Lisle H. Niver as trial judge advocate were not sworn as members of Court No. 2, upon the theory that the latter proceedings were a continuation of those had before Court No. 1. The order appointing Court No. 2, however, shows explicitly and in plain terms that the court-martial thereby appointed was a court de novo, complete and independent of Court No. 1.

It cannot justifiably be assumed, therefore, that the membership of Court No. 2 was a mere addition to the personnel of Court No. 1. Inasmuch as it is mandatory that each of the members of a general court-martial, and the members of the prosecution, be sworn before they proceed upon any trial in and for each case, it follows that the failure to swear the above named officers as members of Court No. 2 was error, the effect of which was to render Court No. 2 illegally constituted and its findings and sentence are without legal effect. (For similar holdings, see CM 317630, Richey, 66 BR 397; CM 317901, Zakrzewski, 67 BR 73; CM 334145, Anderson, 1 BR-JC 123).

The record of trial also shows that when Court No. 2 was organized on 25 August 1949 the accused was never afforded a challenge, either for cause or peremptorily, as to all of the members of the court except the law member. This was also fatal error (CM 333032, Beckoff, 81 BR 279, 286).

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

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

Joseph T. Brach . J.A.G.C.

Roger W. Currier . J.A.G.C.

JAN 31 1950

CSJAGK - CM 338650

1st Ind

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

TO: Commanding General, Fort Knox, Kentucky

1. In the case of Corporal Forest L. Fulwider (RA 6938115), Company D, 37th Armored Infantry Battalion, Division Artillery, 3rd Armored Division, 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 Article of War 50(e) this holding and my concurrence vacate the findings of guilty and 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 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 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 338650).

2 Incls

1. Record of trial
2. Draft of GCMO



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



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

309

NOV 28 1949

CSJAGQ - CM 338757

UNITED STATES

v.

Recruit JACK R. REYNOLDS
(RA 16287678), 7791 Head-
quarters Company, United
States Forces in Austria,
and Private CARL E.
CLOHESSY (RA 12116915),
7898 Quartermaster
Service Company.

UNITED STATES FORCES IN AUSTRIA

Trial by G.C.M., convened at
Vienna, Austria, 22 and 23 August
1949. REYNOLDS: Bad conduct
discharge (suspended), total fer-
feitures due and to become due
and confinement for six (6)
months. Disciplinary Barracks.
CLOHESSY: Forfeiture \$47 per
month for six (6) months and
confinement for six (6) months.
United States Army Stockade,
Zone Command, Austria.

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

1. The Board of Review has examined the record of trial in the case of the soldiers named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50a.
2. The accused were tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Recruit Jack R. Reynolds, 7791 Head-
quarters Company, United States Forces in Austria, and
Private Carl E. Clohessy, 7898 Quartermaster Service
Company, acting jointly and in pursuance of a common intent,
did, at Vienna, Austria, on or about 17 May 1949, wrong-
fully and unlawfully take and use for their own use and
benefit and without the consent of the owner, a certain
motor vehicle, to wit; a 1/4 ton 4x4 truck with station
wagon body, the property of Johann Breiteneder, with the
intent to deprive said owner temporarily of his property.

Specification 2: (Nolle Prosequi).

Specification 3: (Nolle Prosequi).

Each accused pleaded not guilty to the charge and specifications. Each accused was found guilty of the charge and Specification 1. A nolle prosequi was entered as to Specifications 2 and 3 by direction of the appointing authority. There was no evidence of previous convictions. The accused Clohessy was sentenced to be confined at hard labor for six (6) months at such place as the proper authority may direct and to forfeit forty-seven (\$47.00) dollars per month for a like period. The reviewing authority approved the sentence and designated the United States Army Stockade, Zone Command, Austria, as the place of confinement. The accused Reynolds was sentenced to be discharged the service with a bad conduct discharge, to forfeit all pay and allowances due and to become due and to be confined at hard labor at such place as the proper authority may direct for a period of six (6) months. The reviewing authority approved the sentence, 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, but suspended the execution of the bad conduct discharge until the soldier's release from confinement. The result of the trial was promulgated in General Court-Martial Orders Number 22, Headquarters United States Forces in Austria, APO 777, U. S. Army, dated 15 September 1949.

3. The sentence as approved by the reviewing authority with respect to the accused Clohessy does not involve a dishonorable or bad conduct discharge or confinement in a penitentiary and, therefore, the record of trial as it relates to said accused is not required to be reviewed by a Board of Review pursuant to Article of War 50e.

The Board of Review holds the record of trial legally sufficient to support the findings of guilty as to the accused Reynolds. The only question presented and which will be considered is the legality of the sentence adjudged against the accused Reynolds 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, 2 BR-JC 277; CM 335599, Woodruff, 2 BR-JC 175 and CM 335513, Learn, 2 BR-JC 135). 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 charge and Specification 1 thereof as to the accused Reynolds and legally sufficient to support only so much of the sentence as to the accused Reynolds as provides for discharge from the service with a 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 six (6) months.

J. L. Charles, JAGC
Laurel L. Chamberly, JAGC
John A. Hunter, JAGC

JAN 31 1950

CSJAGQ - CM 338757

1st Ind

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

TO: Commanding General, United States Forces in Austria,
APO 777, c/o Postmaster, New York, New York

1. In the case of Recruit Jack R. Reynolds (RA 16287678), 7791 Headquarters Company, United States Forces in Austria, and Private Carl E. Clohessy (RA 12116915), 7898 Quartermaster Service 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 Charge and Specification 1 as to the accused Reynolds and legally sufficient to support only so much of the sentence as to the accused Reynolds as provides for discharge from the service with a 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 six months. Under Article of War 50e this holding and my concurrence vacate so much of the sentence relating to forfeitures as to the accused Reynolds 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 Reynolds 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 338757).


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

2 Incls

- 1- Record of Trial
- 2- Drft GCMO

NOV 29 1949

CSJAGI CM 338827

UNITED STATES

v.

Recruit CLARENCE R. DOBBINS
(35634215), Reception and
Processing Detachment,
2128th Area Service Unit,
Station Complement,
Fort Knox, Kentucky.

FORT KNOX, KENTUCKY

Trial by G.C.M., convened at
Fort Knox, Kentucky, 23 September 1949.
Dishonorable discharge, total
forfeitures after promulgation and
confinement for seven (7) years.
Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HONAN, HILL and JOSEPH
Officers of the Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50g.
2. The accused was tried upon the following Charge and Specifications:
CHARGE: Violation of the 58th Article of War.

Specification 1: In that Recruit Clarence R. Dobbins, Reception and Processing Detachment 2128th Area Service Unit, Station Complement (Operating) Fort Knox, Kentucky did, at Bridgeville, Delaware, on or about 9 October 1945, desert the service of the United States, and did remain absent in desertion until he was apprehended at Wilmington, Delaware, on or about 26 November 1946.

Specification 2: In that Recruit Clarence R. Dobbins, Reception and Processing Detachment 2128th Area Service Unit, Station Complement (Operating) Fort Knox, Kentucky, did, at Fort Dix, New Jersey, on or about 29 November 1946, desert the service of the United States, and did remain absent in desertion until he was returned to military control at Fort Dix, New Jersey, on or about 6 January 1947.

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Specification 3: In that Recruit Clarence R. Dobbins, Reception and Processing Detachment 2128th Area Service Unit, Station Complement (Operating) Fort Knox, Kentucky did, at Fort Dix, New Jersey, on or about 27 January 1947, desert the service of the United States, and did remain absent in desertion until he was returned to military control at Canton, Ohio, on or about 23 May 1949.

He pleaded not guilty to all specifications and the Charge and was found guilty of the Charge and guilty of Specification 1, except the words "Wilmington, Delaware", substituting therefor the words "Fort Dix, New Jersey", of the excepted words not guilty, of the substituted words guilty; guilty of Specification 2, and guilty of Specification 3 except the word "Canton", substituting therefor the words "Fort Hayes", of the excepted word not guilty, of the substituted words guilty. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for ten years. The reviewing authority approved only so much of the findings of guilty of Specification 1 as involves a finding that the accused absented himself without leave at the place and time alleged, and remained so absent until 26 November 1946, approved the sentence, reduced the period of confinement to seven years, designated The Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50g.

3. The record of trial is legally sufficient to support the findings of guilty of Specifications 2 and 3 of the Charge and the Charge. The only questions requiring consideration are whether the evidence adduced at the trial is legally sufficient to support the finding of guilty of Specification 1 and the sentence, as approved by the reviewing authority.

4. At the time of the commission of the alleged offense in October 1945, Article of War 39 provided in part:

"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: * * *."

Paragraph 87b, Manual for Courts-Martial, 1928, at page 74, provided in part:

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"Where only so much of a finding of guilty of desertion as involves a finding of guilty of absence without leave is approved, and it appears from the record that punishment for such absence is barred by A. W. 39, the reviewing authority should not consider any such absence as a basis of punishment, although he may disapprove the sentence and order a rehearing. In this connection it should be remembered that absence without leave is not a continuing offense."

Paragraph 87b, Manual for Courts-Martial, 1949, at page 91, provides in part:

"When upon a charge to which the accused has pleaded not guilty a court-martial finds him guilty of a lesser included offense and does not advise him of his right with respect to the statute of limitations, and it appears from the record that punishment for such lesser included offense is barred by Article 39, the reviewing authority will disapprove so much of the findings and sentence as pertains to the offense found."

Article of War 39 as amended by the Act of 24 June 1948 (Public Law 759, 80th Congress) provides in part:

"ART. 39. As to Time.—Except for desertion or absence without leave 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 arraignment of such person: * * * Provided further, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law: * * *." (MCM, 1949, pp. 283, 284).

The lifting of the limitation on prosecutions for the offense of being absent without leave by the Act of 24 June 1948 did not have the effect of making the accused liable to be punished for this offense.

More than two years had elapsed between the date of the initial absence charged in Specification 1 and the date accused was arraigned. There is no doubt that the accused was absent without leave for the period specified in the approved finding and except for the bar of the statute limiting prosecutions for such an offense, a finding of guilty under Article of War 61 might have been properly approved by the reviewing authority.

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It follows that the reviewing authority was without power to consider the absence without leave beginning in October 1945 as a basis of punishment because punishment for such absence was barred by Article of War 39. (See CM 217712, Rosenbaum, 11 BR 225; CM 328127, Kulcsar, 76 BR 339; and CM 329581, Lemley, 78 BR 103.)

For the offenses set forth in Specifications 2 and 3 of the Charge, the maximum punishment is dishonorable discharge, total forfeitures after the date of the order directing execution of the sentence, and confinement for two and one-half ($2\frac{1}{2}$) years.

5. For the foregoing reasons, the Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 1 as modified, legally sufficient to support the findings of guilty of Specifications 2 and 3 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 ($2\frac{1}{2}$) years.

J. J. Noonan, J. A. G. C.
E. D. Hill, J. A. G. C.
R. E. Joseph, J. A. G. C.

CSJAGI CM 338827

1st Ind

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

TO: Commanding General, Fort Knox, Kentucky

1. In the case of Recruit Clarence R. Dobbins (35634215), 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 finding of guilty of Specification 1 as modified, legally sufficient to support the findings of guilty of Specifications 2 and 3 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 50a(3) this holding and my concurrence vacate the finding of guilty of Specification 1 of the Charge as modified and so much of the sentence relating to confinement at hard labor as is in excess of two and one-half years. 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 findings and 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:

(CM 338827)

1 Incl
Record of Trial

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



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

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CSJAGH CM 338837

NOV 23 1949

UNITED STATES)

v.)

Captain GRANGER KELLEY,
O-1171217, Headquarters
and Headquarters Battery,
517th Field Artillery
Battalion.)

UNITED STATES CONSTABULARY

Trial by G.C.M., convened at
Stuttgart, Germany, 20 September
1949. Dismissal and total for-
feitures after promulgation.

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

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

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

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

Specification: In that Captain Granger Kelley, Headquarters and Headquarters Battery, 517th Field Artillery Battalion, did near Karlsruhe, Germany, on or about 3 September 1949, with intent to deceive his Commanding Officer, namely, Lieutenant Colonel William H Nelson, Jr., officially state to the said Lieutenant Colonel William H Nelson, Jr., that "He had not taken a drink from a bottle in his possession," or words to that effect, which statement was known to the said Captain Granger Kelley to be untrue, in that the said Captain Granger Kelley had been drinking from a bottle in his possession.

CHARGE II: Violation of the 85th Article of War (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and the Specification thereunder, but not guilty of

Charge II and the Specification thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

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

a. For the prosecution.

At the time of the commission of the offenses charged, accused was the battalion motor officer of the 517th Field Artillery Battalion and was assigned to Headquarters and Headquarters Battery (R 40,41,45).

On 3 September 1949, the 517th Field Artillery Battalion made a motor march from Sonthofen, Germany, to a point north of Karlsruhe, Germany (R 41,45). The battalion departed from Sonthofen at approximately 0700 or 0800 hours and reached its destination at approximately 2000 or 2100 hours (R 6,10,22,42). At the outset of the motor march, accused rode in the front seat of a jeep driven by Private Alfred Jiantonio, and the assistant battalion motor officer, First Lieutenant Paul B. Richardson, rode in the rear seat (R 6,17). At that time accused was sober and showed no signs of prior drinking (R 10). Shortly after clearing the inspection point, accused stated that "he was going to have a bracer". Thereupon, he took a bottle out of his bag and offered Lieutenant Richardson a drink. The bottle was a "whiskey bottle", a "fifth" in size, and was three-quarters full of a light brownish colored liquid having the smell of liquor or whiskey. When Richardson declined, accused took a drink and put the bottle back in his bag (R 7,12,14,17,18). Sometime later, the jeep and its occupants came upon the kitchen truck which had fallen out because of brake trouble. The accused alighted and talked to the personnel repairing the truck (R 7,25,26). Upon reentering the jeep, accused said it was time for another "bracer" and took a second drink from his bottle (R 7). Shortly before noon he started to doze off. Lieutenant Richardson was afraid that accused would fall out of the front seat and he had accused exchange places in the jeep with him (R 8,18,20). Thereafter the accused slept intermittently. He would awaken and sing a little bit, take "a few more drinks" and go back to sleep (R 8).

During the course of the motor march, Lieutenant Richardson saw accused take four or five drinks from the bottle (R 11). The last time he saw the accused take a drink was sometime between 1330 and

1430 hours, at which time about one-third of the contents of the bottle remained (R 10,11). The jeep driver saw accused drink "twice or three times" from the bottle during the march, but did not remember seeing him take a drink after noon (R 18,19).

Numerous stops were made by accused during the day to investigate and assist in the repair of disabled vehicles. On several of these occasions accused reprimanded and argued with the personnel who were doing the repair work (R 7,8,9,27,32). Although none of these personnel observed accused drinking, the odor of liquor on his breath was apparent to those near him at the times when the halts were made (R 23,24,27,33).

After the battalion had bivouacked that evening, the battalion commander, Lieutenant Colonel William H. Nelson, requested Major Herron N. Maples, battalion executive officer, to find accused and investigate reports made by Lieutenant Richardson and the Headquarters Battery Commander relative to accused's actions during the day (R 41,43). At the direction of Major Maples, accused reported to the battalion commander, and after the two talked casually for a short time concerning the day's events, Colonel Nelson asked accused if "he [accused] had had a bottle with him during the day." Accused answered that he had. Colonel Nelson asked accused if he knew of his rights under the 24th Article of War, to which inquiry accused answered that he was aware of his rights under that Article and that he did not desire to have its provisions read to him. Colonel Nelson then asked accused "whether he had taken a drink out of that bottle" (R 41,46,47). No specific time was mentioned, and the accused appeared to understand the question (R 44,47). Accused answered the question in the negative, and according to Major Maples, when Colonel Nelson asked accused, "Are you sure?" accused said he was. Colonel Nelson asked accused whether his denial was an "official statement," and accused replied that it was. Colonel Nelson placed accused under arrest. At the time of Colonel Nelson's interrogation of accused, the odor of alcohol on the breath of accused was apparent to both the battalion commander and his executive (R 41,42,46).

b. For the defense.

Accused, after having been duly apprised of his rights, elected to become a witness in his own behalf (R 48). He testified that he is married and the father of one child. He entered the Army in February 1942, took basic training, and went to Officers' Candidate School. After being commissioned, he was assigned to Fort Sill, Oklahoma, where he remained until December, 1943. Thereafter he was transferred to the 93rd Infantry Division at Camp Gardner, Alabama, where he remained until late February, 1944. He accompanied the Division to Hawaii, remaining

approximately eleven months, then to the Marianas and on to Japan at the termination of the war. He remained on occupation duty in Japan for six months until returned to the United States on rotation. His present overseas tour commenced on 13 April 1949 (R 53).

He further testified that he had been a battalion motor officer for four years and was presently serving in that capacity with the 517th Field Artillery Battalion (R 49). On the night of 2 September he attended a formal party of the 7732d Artillery Group at Sonthofen and, although he drank considerably, not to the extent that he considered himself drunk (R 49). After the cocktails "ran out" he purchased a bottle of liquor from which he had several drinks and gave several drinks to others. He arose at approximately 0530 hours the next morning "suffering from a "hangover." After taking a drink from the bottle which he had brought from the party, he put the bottle in his bag, and carried it with his gear to Battalion Headquarters. He then checked the jeep which had been furnished to him as the battalion motor officer and "fell in at the tail of the column" (R 49,50).

Accused asserted that in addition to the one drink before leaving home, he had another at about 0900 hours, one "in the middle of the morning" and a final one just before lunch. He stated that at the time he left home the bottle was approximately one-half to two-thirds full and had one-third of its contents remaining when he arrived at the bivouac area. He denied having had any drinks after lunch (R 51).

With reference to his interview with Colonel Nelson, accused related that he reported to Colonel Nelson and advised him of the reasons for the several vehicular breakdowns during the motor march. Colonel Nelson said he understood accused had a bottle of whiskey in his possession during the motor march and accused admitted that was true. Colonel Nelson asked him whether he knew his rights under the 24th Article of War and accused said he did and declined having the Article read to him. Colonel Nelson then asked "Have you been drinking?" and accused denied it. Explaining his denial accused testified, "At that time I hadn't been drinking for a period of approximately twelve hours. I didn't know he meant that morning, and I said I had not. He asked me did I want to make that an official statement and I said yes." Since accused had not had a drink since 1100 or 1200 hours he considered his answer the truth (R 52). On cross-examination accused again said, "He Colonel Nelson did not specify any time, and I answered him on the assumption that he meant was I drinking during the past few hours" (R 56).

Accused admitted that he had drunk about one-quarter of a bottle of whiskey while on the motor march and that his breath probably carried the odor of liquor when he was interviewed by Colonel Nelson (R 56).

4. Accused was found guilty of a violation of the 95th Article of War in that he " * * * did near Karlsruhe, Germany, on or about 3 September 1949, with intent to deceive his Commanding Officer, namely, Lieutenant Colonel William H. Nelson, Jr., officially state * * * that 'He had not taken a drink from a bottle in his possession', or words to that effect, which statement was known * * * to be untrue."

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

"In order to support a conviction of the offense of knowingly making a false official statement, the record must show that the accused; (a) made a certain official statement, (b) that the statement was false, (c) that the accused knew it to be false, and (d) that such false statement was made with intent to deceive the person to whom it was made." (CM 324352, Gaddis, 73 BR 181,186 citing CM 262360, Campbell, 41 BR 49,58; CM 316750, Ortiz-Aponte, 66 BR 1,8; CM 318167, Green, 67 BR 173, 176,177; CM 318705, Jackson, 81 BR 421,433).

The uncontradicted evidence shows that accused, the battalion motor officer of the 517th Field Artillery Battalion, made a motor march with his organization on 3 September 1949, and that he had in his possession throughout the march a bottle of liquor from which he drank on several occasions between 0700 hours and approximately 1400 hours that day. After the battalion had bivouacked for the night, reports relative to accused's actions during the march were made by two officers of the battalion to the battalion executive, Major Maples, and by him to the battalion commander, Lieutenant Colonel William H. Nelson, Jr. At 2200 hours, accused reported to Colonel Nelson, pursuant to instructions from Major Maples, who was also present. After a general discussion between accused and Colonel Nelson as to the events of the motor march, Colonel Nelson asked accused if he had a bottle with him during the day. Accused answered that he had. Colonel Nelson then asked accused if he desired to have the 24th Article of War read to him. Accused answered in the negative stating that he was aware of the provisions of the Article. Colonel Nelson then asked accused a question relative to his drinking. According to Colonel Nelson and Major Maples the question asked accused was, "whether he had taken a drink out of that bottle." Accused answered that he had not, and upon being asked if he desired to make that answer an official statement, stated that he did. Accused was then placed under arrest.

Since the commanding officer of a battalion has the responsibility of supervising the operation of his organization, Colonel Nelson was

under a duty, after his battalion had bivouacked for the night, to review the events of the day and to investigate any reports of dereliction of duty on the part of his subordinates. In his interview with accused, Colonel Nelson was engaged in an official inquiry into the activities of the Battalion. It follows that any statement made to the battalion commander by his motor officer relative to his actions during the motor march would be an official statement. Accused's denial to his commanding officer, during his resume of the day's events, that "he had taken a drink out of that bottle," constituted an official statement. Accused was personally aware of the official character of his answer as indicated by the fact that he stated to his superior officer at the time of the interrogation that he desired that the statement be considered official (CM 280010, Blair, 52 BR 383,387; CM 244159, Camp, 28 BR 201, 206).

Lieutenant Richardson, the assistant battalion motor officer, and Private Jiantonio, the driver, observed accused drinking from a bottle in his possession at various times during the day. Accused, while testifying in his own defense, freely admitted such acts. It is established without contradiction, therefore, that accused was drinking liquor from a bottle in his possession during the day and his statement to the contrary to Colonel Nelson was unquestionably false.

Seeking to justify his reply to Colonel Nelson, accused testified that he misunderstood the question asked him. Accused asserted that Colonel Nelson's question was, "Have you been drinking?" which accused interpreted to mean, drinking during the past few hours. Since accused had not taken a drink after the morning hours he answered in the negative. We find it unnecessary to consider the validity of accused's defense. The court's finding that the question and answer were substantially as alleged and its rejection of the accused's version of the question and answer, to us appear to reflect the truth of the matter. The question being, in fact, substantially as alleged, it was not susceptible of misinterpretation and when accused answered in the negative his reply was palpably and unmistakably false.

The intent to deceive may be inferred where the statement is knowingly false (CM 314746, Garfinkle, 64 BR 215,222; CM 277595, Rackin, 51 BR 159,165; CM 275353, Garris, 48 BR 39,42). By admitting that he had been drinking while on duty accused would have made himself amenable to disciplinary action. The motive for accused's attempt to intentionally deceive his superior is apparent.

The making of a false official statement by an officer, knowing it to be false, and with intent to deceive, has consistently been held to

constitute conduct unbecoming an officer and gentleman, in violation of Article of War 95 (CM 336558, Armstrong (10 June 1949); CM 238574, Wilkins, 56 BR 373,377 and authorities therein cited; CM 280335, Alexander, 53 BR 177,180).

We conclude that the findings of guilty are warranted by the evidence.

5. The court sentenced accused to be dismissed the service and to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence. Such a sentence is not authorized for a conviction of a violation of Article of War 95.

"* * * except in time of war when reduction to the ranks is authorized (A.W. 44), the sentence of a court upon conviction of a violation of Article 95 must be dismissal, nothing less, and, if convicted of that offense alone, nothing more. * * *." (MCM, 1949, par. 116a)

Consequently, that portion of the sentence which includes a forfeiture of pay is illegal and void (CM 231119, Lockwood, 18 BR 139,143; CM 242557, Caudell, 27 BR 105,111).

6. Department of the Army records show that accused is approximately 38 years of age, married, and has one son, 12 years of age. A native of Arkansas, he was graduated from Eureka Springs High School in that state in 1930, following which he attended the University of Arkansas for two years. In civilian life he was employed as an electrician and automobile serviceman between 1933 and 1942. He had enlisted service from 18 February 1942 until 7 October 1942, and was commissioned a temporary second lieutenant, Army of the United States, on 8 October 1942, upon graduation from the Field Artillery Officers' Candidate School at Fort Sill, Oklahoma. He was promoted to first lieutenant on 22 September 1943, and to captain on 23 November 1945. He served in the Asiatic-Pacific Theater as a motor transportation officer from 17 April 1944 until 18 January 1946, and was separated from the service on 8 April 1946. Pursuant to his own application, he was subsequently recalled to active duty on 5 August 1946, and served in the Pacific Theater from 1 September 1946 until 14 March 1947. He requested relief from active duty and was separated on 9 April 1947. On 13 November 1947 he reentered the service as an enlisted man and served in that capacity until 28 July 1948, when he was recalled to active duty as a captain. He departed for overseas about June, 1949 and was serving in Germany at the time of the present offenses. His efficiency ratings between 1 July 1944 and 31 December 1946 (WD AGO Form 67) include two (2) ratings of Excellent and one (1) rating of Very Satisfactory. During the period

of 28 July 1948 to 10 March 1949 his efficiency report (WD AGO Form 67-1) over-all ratings [OA] were O95 and O93. For the period 11 March 1949-31 May 1949, an efficiency report was prepared, however, an over-all rating was not made.

7. The court was legally constituted and had jurisdiction of the person and of the offense. Except as hereinbefore noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, legally sufficient to support only so much of the sentence as provides that accused shall be dismissed the service, and legally sufficient to warrant confirmation of the sentence to dismissal.

Robert J. Connor, J.A.G.C.
Lewis F. Thull, J.A.G.C.
John H. ..., J.A.G.C.

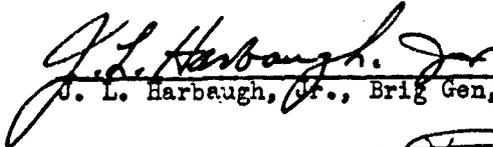
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

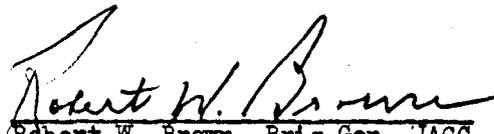
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THE JUDICIAL COUNCIL

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

In the foregoing case of Captain Granger Kelley, 01171217, Headquarters and Headquarters Battery, 517th Field Artillery Battalion, upon the concurrence of The Judge Advocate General so much of the sentence as provides for total forfeitures is disapproved. The sentence is confirmed but commuted to a reprimand and forfeiture of One Hundred Dollars (\$100.00) pay per month for six (6) months. As thus commuted the sentence will be carried into execution.


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


Robert W. Brown, Brig Gen, JAGC


Franklin P. Shaw, Major General, JAGC
Chairman

30 January 1950

I concur in the foregoing action.


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

(GCMO 3, 14 Feb. 1950)

6 February 1950



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

329

CSJAGK - CM 338838

3 NOV 1949

UNITED STATES

5TH ARMORED DIVISION

v.

Second Lieutenant ROBERT W.
BRYAN (O-2019133), Infantry,
Battery "C", 71st Armored
Field Artillery Battalion, 5th
Armored Division, Camp Chaffee,
Arkansas.

Trial by G.C.M., convened at Camp
Chaffee, Arkansas, 22 September 1949.
Dismissal, total forfeitures after promul-
gation, and confinement for one (1)
year.

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

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

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

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

Specification: In that 2nd Lieutenant Robert W. Bryan, Battery "C", 71st Armored Field Artillery Battalion, Camp Chaffee, Arkansas, did, at Camp Chaffee, Arkansas, on or about 31 May 1949, desert the service of the United States, and did remain absent in desertion until he was apprehended by civil authorities at New Orleans, Louisiana, on or about 16 August 1949.

CHARGE II and all specifications: (Nolle Prosequi).

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

Specifications 1 and 2: (Nolle Prosequi).

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

Specification 4: In that 2nd Lieutenant Robert W. Bryan, ***, did, at Camp Chaffee, Arkansas, on or about 1 June 1949, with intent to defraud, wrongfully and unlawfully make and utter to the Cannon Lounge, Camp Chaffee, Arkansas, a certain check in words and figures as follows, to wit:

| | |
|--|----------------|
| | 81-31 |
| THE FIRST NATIONAL BANK | 871 |
| Fort Smith, Ark. _____ | 1949 No. _____ |
| Pay to the Order of _____ | \$ 15.00 |
| Fifteen and -0-/100 ----- | DOLLARS |
| <u>/s/ Robert W. Bryan</u> 2nd Lt. Inf 02019133 | |

and by means thereof, did fraudulently obtain from Cannon Lounge, Camp Chaffee, Arkansas, fifteen dollars (\$15.00) in payment of said check, he, the said 2nd Lieutenant Robert W. Bryan, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank, Fort Smith, Arkansas, for payment of said check.

Specifications 5, 6 and 7: (Finding of not guilty on motion of defense).

Specification 8: In that 2nd Lieutenant Robert W. Bryan, ***, did, at Fort Worth, Texas, on or about 20 June 1949 with intent to defraud, wrongfully and unlawfully make and utter to The Fort Worth National Bank, Fort Worth, Texas, a certain check in words and figures as follows, to wit:

| | | | |
|------------------------------|------------------|--|----------------|
| Fort Worth, Texas _____ | June 20 | | 1949 No. _____ |
| THE FORT WORTH NATIONAL BANK | | | 37-5 |
| | | | 1113 |
| Pay to the Order of _____ | Yourselves ----- | | \$ 10.00 |
| ten and no/100 ----- | | | DOLLARS |
| <u>/s/ Robert W. Bryan</u> | | | |

and by means thereof, did fraudulently obtain from The Fort Worth National Bank, Fort Worth, Texas, ten dollars (\$10.00) in payment of said check, he the said 2nd Lieutenant Robert W. Bryan then well knowing that he did not have and not intending that he should have any account with the Fort Worth National Bank, Fort Worth, Texas, for the payment of said check.

He pleaded guilty to the specification of Charge I except the words "desert the service of the United States and did remain absent in desertion until he was apprehended by civil authorities at New Orleans, Louisiana," substituting therefor "absent himself without proper leave until on or about 16 August 1949," not guilty to Charge I "but guilty of a violation of the 61st Article of War"; guilty of Specifications 3,4,5,6,7 and 8 of Charge III and Charge III. During the trial the law member directed that the plea of guilty to Specifications 6 and 7 of Charge III be changed to not guilty. He was found guilty of the specification of Charge I except the words "desert," "in desertion," and "apprehended by," substituting therefor, respectively, the words "absent himself without proper leave from," "without proper leave," and "surrendered to," of the excepted words not guilty, of the substituted words guilty, not guilty of Charge I but guilty of a violation of the 61st Article of War; guilty of Specifications 4 and 8 of Charge III and Charge III, and not guilty of Specifications 3,5, 6 and 7 of Charge III. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing the execution of the sentence, and to be confined at hard labor at such place as the proper reviewing authority might direct for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

A duly authenticated extract copy of the morning report of Battery "C", 71st Armored Field Artillery Battalion, Camp Chaffee, Arkansas, for 31 May 1949 was received in evidence without objection. This extract copy of the morning report shows the accused as "duty to AWOL 0600" on 31 May 1949 (R 7, Pros Ex 1).

A duly authenticated extract copy of the morning report of the 4106th Area Service Unit, Army Guard Detachment, Camp Leroy Johnson, for 17 August 1949 was received in evidence without objection. This extract copy of the morning report shows accused from "AWOL" to attached and joined and "placed arrest of quarters this date" (R 7, Pros Ex 2).

The prosecution offered no evidence in support of Charge III and the specifications thereunder.

4. Evidence for the Defense

The accused was advised as to his rights as a witness and elected to testify in his own behalf. His testimony in so far as it pertained to the specifications of Charge III was limited to Specifications 3, 5, 6 and 7. In view of the findings of not guilty of these specifications this evidence will not be set forth.

The accused testified that he left high school in his senior year to enlist in the Air Force. He enlisted in January 1942 and after the usual basic training he attended radio school at Scott Field, Illinois. He went overseas in December of 1942 and served in Egypt, Libia, Sicily and England as radio operator, radar operator and "navigator at times." His decorations include "the Air Medal and the Three Oak Leaf Clusters and Good Conduct Medal and ETO with eight bronze service stars; American Theatre, Victory Medal and Occupation Medal, Distinguished Unit Citations with two clusters." While in England he was in a plane crash. The pilots were killed. The pilots were friends of his and this crash was the principal reason for his leaving the Air Force. While in France he was selected for "OCS." He was commissioned in June of 1945 as an infantry officer. On 8 September 1947 he was honorably separated from the Army. His family "are in business" and he worked with them for a while but began to miss the close friendship that he had known in the Army. He "began drinking quite heavily and hanging around bars and that sort of thing, to meet more people." He was not particularly interested in his work so he re-enlisted in the "paratroops." After jump school he applied for active duty. He was assigned to the "Leaders course at Fort Jackson" as "I&E officer." His unit was transferred to Camp Chaffee. Eventually he was assigned to the 71st Field Artillery Battalion which was commanded by Major Brown. In February 1949 he was in an automobile accident and hospitalized for 45 days. After this accident it became apparent to him that Major Brown was "doing his best to get me out of the Army." Major Brown told one of the other officers that "Bryan was strictly no good" and he wanted to "get him out of his outfit as soon as possible." "He" (Major Brown) "certainly had no actual complaint against my work or service in his unit. Everybody else was perfectly satisfied with it." In May of 1949 he received word that his mother was near death from a severe heart attack. He went home on emergency leave. His mother recovered from this attack but is still in a "very bad condition." While on emergency leave he went on a "more or less extended drunk for a couple of days."

"Well, I came back off leave in the latter part of May - on this emergency leave - and I don't know just exactly what happened when I got back here. It is all very vague in my mind. I know I went to Little Rock but how long I stayed or what I did while there, I don't really know. It is all sort of mixed up, but I can't seem to tie it in together over a period of time

for several days there at the end of May and first of June, but to the best of my recollection after I left here I was in Dallas, Fort Worth, Shreveport, Baton Rouge, New Orleans. I was just drinking and gambling and bumming around, more or less, trying to get away from myself, I guess.

* * *

"I told the police down at New Orleans who I was and I didn't have any identification with me and they called out to the Port out there and the CID Detachment at the Port didn't have any information on me so I told them the phone number here at the Battalion Headquarters - 630 - I told them to call that up and they could talk to my Commanding Officer and he could tell them who I was. So they did, and talked to Major Brown, and he told them who I was and that I was to be held. They carried me out to Camp Leroy Johnson there at New Orleans."
(R 9-11,13,14)

Captain Merrill B. Friend, a general medical officer and specialist in psychiatry, Station Hospital, Camp Chaffee, Arkansas, became acquainted with accused in February 1949 when accused was brought to the hospital to be treated for injuries suffered in an automobile accident. From 19 August 1949 to 30 August 1949 the accused was "under observation in the Neuropsychiatric Service at the Station Hospital." He interviewed the accused three times. Other officers observed the accused and daily reports were made by the wardmaster and the nurses on duty. "These reports and impressions went in to help us form a final opinion and diagnosis." The accused is a "neurotic."

"A patient who is suffering from a neurotic depressive reaction is a patient who, because of tangible stresses and strains in his environment is unable to muster up enough direct action to solve his problem and solve his tangible complex. Instead, he escapes from direct action by blaming himself, feeling guilty and actually punishing himself. He usually presents a past history of a man who has ups and downs, emotional conflicts; he is easily hurt and easily retreats when the pressure is very extreme, and then turns upon himself and blames himself over and over and over again. He is the type of individual who turns the normal amount of aggression that we consider necessary for a well-adjusted individual, in on himself, and in a way, by calling himself a lot of bad names and criticizing himself, he is beating the rest of the world to the punch, and so he helps soften the blow and we aren't quite as disappointed because he is suffering enough already."

At the time of the offense the accused was so far free from mental defect, disease and derangement as to be able to determine right from wrong and to adhere to the right. He possesses sufficient mental capacity to

understand the nature of the proceedings against him and intelligently conduct his defense. In his opinion punishment other than dismissal from the services would not rehabilitate the accused. "In fact, if anything it would probably make him more maladjusted" (R 18-23).

A neuropsychiatric report pertaining to the accused and containing substantially the same evidence as given by Captain Friend from the witness stand was received in evidence "solely in mitigation" (R 23, Def Ex A).

5. Discussion

In Charge I and its specification the accused was charged with desertion beginning 31 May 1949 and terminated by apprehension on 16 August 1949. He pleaded guilty to and was found guilty of the lesser included offense of absence without leave in violation of Article of War 61 for the period alleged. This finding of guilty is amply sustained by the plea of guilty, the extract copies of the morning reports which were received in evidence without objection and the accused's admission from the witness stand. The accused also pleaded guilty to and was found guilty of Specifications 4 and 8 of Charge III and Charge III. The prosecution did not offer any evidence in support of these specifications. While it may have been preferable for the prosecution to have introduced some evidence in support of these specifications, accused's pleas of guilty, entered after a full explanation of their effect, justify the findings of guilty of these specifications and the charge (CM 276481, Arey, 48 BR 353,357).

6. Department of the Army records show the accused to be 26 years of age and unmarried. He is a high school graduate. Accused testified concerning his military service. In addition to the service mentioned by the accused, the records show that his efficiency ratings prior to his separation from the Army on 8 September 1947 are generally "Excellent." Since his re-entry on active duty his overall efficiency rating is "O64." During October 1946 he was reprimanded by the Commanding General of the 9th Infantry Division, under Article of War 104, for being drunk and disorderly to the prejudice of good order and military discipline. On 22 December 1948 he was again reprimanded under the provisions of Article of War 104 by the Commanding General, 5th Armored Division, for being under the influence of intoxicants and asleep in a beer parlor.

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 authorized upon conviction of a violation of Article of War 61 or 96.

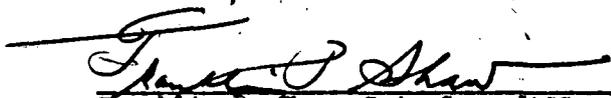
Charles E. McAfee, J.A.G.C.
Joseph F. Brock, J.A.G.C.
Roger H. Currier, J.A.G.C.

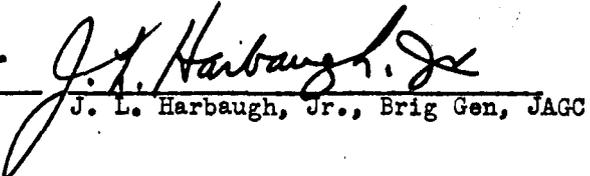
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THE JUDICIAL COUNCIL

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

In the foregoing case of Second Lieutenant Robert W. Bryan
(O-2019133), Infantry, Battery "C", 71st Armored Field Artillery
Battalion, 5th Armored Division, Camp Chaffee, Arkansas, upon
the concurrence of The Judge Advocate General the sentence is
confirmed and will be carried into execution. The United
States Disciplinary Barracks or one of its branches is designated
as the place of confinement.

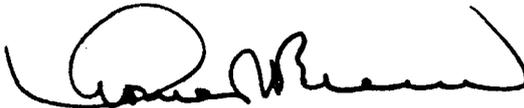

Franklin P. Shaw, Brig Gen, JAGC


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


E. M. Brannon, Brig Gen, JAGC
Chairman

17 November 1949

I concur in the foregoing action.



THOMAS H. GREEN
Major General
The Judge Advocate General

CG, 5th Armored Div
Camp Chaffee Ark
noted above and
for 28 Nov 49
11/18/49

November 18, 1949

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

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CSJAGK - CM 333032

8 MAY 1949

UNITED STATES)

ZONE COMMAND AUSTRIA

v.)

Recruit ROBERT A. BECKOFF)
(RA 19246809), Troop B, 68th)
Constabulary Squadron.)

) Trial by G.C.M., convened at Camp
) Truscott, Salzburg, Austria, 7-11
) March 1949. Dishonorable discharge
) and confinement for thirty (30)
) years. Penitentiary.

HOLDING by the BOARD OF REVIEW
SILVERS, SHULL and LEVIE

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.

2. This is a trial upon rehearing. Accused was tried upon the following charges and specifications:

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

Specification 1: In that Recruit Robert A. Beckoff, Troop B, 68th Constabulary Squadron, then Private, 68th Constabulary Squadron, did, acting in conjunction with Private Claude Phelps, Junior, Troop B, 68th Constabulary Squadron, at or near Hard, Austria, on or about 18 June 1948, with intent to commit a felony viz, murder, commit an assault upon Anton Naegle, by willfully and feloniously shooting at him with dangerous weapons, to wit, pistols.

Specification 2: In that Recruit Robert A. Beckoff, ***, did, acting in conjunction with Private Claude Phelps, Junior, Troop B, 68th Constabulary Squadron, at or near Hard, Austria, on or about 18 June 1948, with intent to commit a felony, viz, murder, commit an assault upon Josef Schaedler, by willfully and feloniously shooting at him with dangerous weapons, to wit, pistols.

Specification 3: In that Recruit Robert A. Beckoff, ***, did, acting in conjunction with Private Claude Phelps, Junior, Troop B, 68th Constabulary Squadron, at or near Hard, Austria, on or about 18 June 1948, with intent to commit a felony viz, murder, commit an assault upon

Hubert Schaertler, by willfully and feloniously shooting at him with dangerous weapons, to wit, pistols.

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

Specification: In that Recruit Robert A. Beckoff, ***, did, at or near Langen, Austria, on or about 19 June 1948, with malice aforethought, willfully, deliberately, feloniously and unlawfully kill one Franz Berlinger, a human being, by shooting him with a pistol.

He pleaded not guilty to, and was found guilty of, all charges and specifications. Evidence of one previous conviction was introduced. Three-fourths of the members present at the time the vote was taken concurring, 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, and to be confined at hard labor for a period of thirty (30) years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50(e).

3. Evidence for the Prosecution

CHARGE I and its Specifications

At about 2020 hours on 18 January 1948 two men, later identified as accused Beckoff and a companion, Private Claude Phelps, approached Hard, Austria, which is in the French Zone, about six kilometers from the Swiss border. At Hard there was a check-point manned by two uniformed Austrian gendarmes, Schaedler and Schaertler, which was then being inspected by the Hard Commandant of Gendarmes, Naegele. Beckoff and Phelps were dressed in nondescript clothes, without any insignia, and, from their appearance, it was difficult to determine their nationality or status. There were "DP" (displaced persons) camps in the vicinity and the gendarmes suspected these men to be "DPs" who were attempting to cross the border illegally (R 26-29, 51-52, 65-66).

As the two men approached the check-point Naegele ordered the gendarmes to ask them for identification papers. Accused indicated that he had none and attempted to continue on towards Switzerland. Naegele thereupon ordered the gendarmes to arrest them. As to what transpired then, Naegele testified:

"A. I repeated my order and I went to the accused because he pulled a letter out of his pocket. I took a look at the letter for a short time and I read 'Beckoff' and 'Augsburg', and the address of a unit. In the next moment Beckoff stepped backwards two steps. I still had the letter in my hand, and while jumping backwards, he again reached in his chest pocket and pulled a pistol out and pointed with the pistol to me,

at me. He charged the pistol in this position' (indicating) and then finally aimed at me with the pistol. While Beckoff pulled his pistol, I made two steps backwards and gave the order 'Down', that all the others should fall to the ground. Beckoff went under cover." (R 29)

* * *

"Q. What did you say Beckoff did, if anything, after he retreated behind the stonepile?

A He shot at me. I correct myself. He shot into the direction where I was.

Q How many times did he shoot?

A Several times." (R 32)

* * *

"Q Did you shoot at Beckoff after or before he shot at you?

"A I shot at Beckoff after he had shot two or three times."

* * *

"Q How soon was it after you gave Schaedler and Schaertler the order to disappear that Beckoff made his first shot?

"A Five seconds or six seconds." (R 34)

This testimony was substantially corroborated by Schaedler and Schaertler (R 52-54,66).

After about a minute Beckoff and Phelps retreated along the side of the road, stopping to take cover and shot as they did so and they finally disappeared in the distance at about 2030 hours (R 36,56).

CHARGE II and its Specification

On the following day, 19 June 1948, Hohenstein and Berlinger, two uniformed Austrian gendarmes who were on street patrol, went to the vicinity of the coal mine near Langen, Austria, to check the identification papers of any strangers they might find in the area. They stopped at a small building containing a storeroom and talked to the storeroom manager, Edwin Doerler, for a few minutes, and then Hohenstein went to the mine office, leaving Berlinger, who was armed with a German Mauser carbine, in the storeroom. Hearing conditions in the office were bad because of the noise made by the motors of three air compressors which were located immediately under the building (R 71-74, 85).

Berlinger was seated in Doerler's office when he saw a man crossing the street. He jumped up, went out and stopped the man, and brought him back into the office. Doerler identified the accused as the man Berlinger had brought into the office. The latter, holding his rifle at the "ready" position, asked Beckoff for identification papers. Beckoff "pulled several papers out and threw them to the floor. Cigarettes, and money, too." Beckoff then pulled out a handkerchief and, with his right hand, pushed the rifle. Berlinger and Beckoff then went out of the office (R 84,86,94-95).

What occurred immediately thereafter is not entirely clear as there were no eyewitnesses and the noise of the compressors apparently prevented those who were in the vicinity from hearing what transpired. However, from all of the testimony and from the attendant circumstances, it appears that Beckoff succeeded in disarming Berlinger, that immediately thereafter Berlinger was fatally shot in the head with a .45 caliber bullet, and that, a moment later, Beckoff was seen running away with a pistol in his hand. Arthur Jaeger, an engineer whose office was next to Doerler's in the same building, saw Beckoff come out of Doerler's office with the rifle in his hands, saw him drop the rifle and run away, and saw Berlinger follow Beckoff to the street where the former fell to the ground. Jaeger rushed out of his office and picked up Berlinger's rifle and found that it was on "safety." There was blood where Berlinger was lying and Beckoff was running toward Langen. Jaeger fired the rifle at Beckoff who turned and fired a pistol at Jaeger. Each fired three times (R 98-101, 104).

Dr. Franz Joseph Holzer, the doctor who performed the autopsy on Berlinger's body on 22 June 1948, testified that death was caused by bleeding and by injury to the brain. He had found a bullet in the back part of the brain. After receiving such injuries a person might live and continue to walk for "maybe a few minutes" (R 110-112). The bullet which was removed from Berlinger's brain was identified as being an American .45 caliber projectile and was received in evidence as Prosecution Exhibit 20 (R 129,180).

On 21 June 1949, after being duly advised of his rights under Article of War 24, the accused was interrogated by and gave a written statement to agents of the Criminal Investigation Division of the United States Army. As to the incident at the check-point at Hard on 18 June 1949, this statement is in substantial agreement with the testimony given by the three Austrian gendarmes. With respect to the incident at the mine at Langen on 19 June 1949 after Berlinger, the Austrian gendarme, took him into the office, Beckoff stated:

"*** the Policeman was about 3 feet from me and had the carbine pointed towards my stomach. He told me to take everything out of my pockets and throw it on the ground. I did as he said. At this time I still had the US Army Colt concealed inside my shirt, on my left side. The Austrian Policeman then searched my pockets and noticed the bulge under my shirt but I do not think that he knew it was a pistol. He told me to take it out but I said no you take it out. I did not want to take it out because I was afraid that when he saw it he would shoot. I raised my hands over my head and told the old man Doerler to take it out but he said nothing. The Policeman then started shouting and at this time I reached inside my shirt with my right hand and took out my pistol and threw a round into the

chamber and fired one shot. It all happened so fast that I don't remember much about what happened. When I drew the pistol the policeman was facing me and he jumped a little. I fired the shot in his general direction, but I do not know what happened to him because I ran out very fast and started to leave at a run. Someone fired several shots at me as I ran away. I returned the fire with the last two shots I had. ***" (R 249, Pros Ex 21)

4. Evidence for the Defense

Captain Bruce L. Bushard, MC, a psychiatrist, testified that he had examined the accused on 8 July 1949. He found that the accused had the intelligence of "about the level of a person 13 years of age"; that the accused manifested hysteria which "indicates a great suggestibility in a person, but does not render him not responsible for his actions"; and that the accused was able to distinguish between right and wrong and to adhere to the right (R 232,237).

Arthur Jaeger was called by the defense and testified that the accused had fired three shots at him, two from a bridge on the road, and the third when he reached an open field beyond the bridge. Doerler testified that he had found three cartridge cases, two on the bridge and one on a curve of the road. He had searched the area in and around his office but had been unable to find any cartridge case there. Testimony of Phelps, given at the previous trial, was read to the effect that originally Beckoff had had seven rounds of ammunition and that after the incident at Hard he had only three rounds (R 254,256,257,264,267).

The commanding officer and the first sergeant of the unit to which Beckoff had been assigned during June 1948 both testified that the accused had been a good soldier and had done a superior job as a truck driver. It was stipulated that if the commanding officer of the European Command Military Prison, where accused had been held in confinement, were present, he would testify that the accused's conduct in prison had been "outstanding" and that he had been "trustworthy" and an "industrious and tireless worker" (R 259,260; Def Ex C).

5. Discussion

Both at the trial and in his brief counsel for the defense argued strenuously that neither at Hard, nor at Langen, did the Austrian gendarmes have any authority to detain Beckoff. In support of this argument counsel has called attention to the various Allied directives which provide, in substance, that Allied nationals and persons subject to Allied military control may only be detained by Austrian Federal Police Gendarmerie where military police are not immediately available and where the person involved has committed one of certain specified violent crimes.

Apart from any consideration as to what effect, if any, the acceptance of this contention would have upon the case, there would only be merit to it if Beckoff had been attired in a proper and recognizable uniform of the United States Army, or if the gendarmes had otherwise known that he was an American soldier. However, the testimony clearly discloses that he was not so attired or known. There were "DP" camps in the area of Hard, which is located quite close to the Swiss border. We may take judicial notice of the fact that after the termination of hostilities in Europe, and even before that date, many persons in Western Europe who were neither soldiers nor nationals of the United States, and particularly displaced persons, were to be found wearing various items of clothing which had been manufactured for use by the American Army. Until Beckoff had been definitely identified as an American the Austrian gendarmes had a right to detain him and to demand identification papers. The mere statement by Beckoff that he was an American, and the production of an envelope addressed to an American soldier, did not constitute proper identification and in order to obtain even this meager evidence it was, of course, necessary to stop and interrogate him. Inasmuch as Beckoff could not be visually identified as an American, he was subject to being stopped by the Austrian authorities until such time as he established that he was an Allied national and, therefore, not under Austrian jurisdiction (CM 332935, Phelps). Moreover, even assuming that the defense is correct in its contention that the Austrian gendarmes had no authority to stop Beckoff, did their action of stopping him and requesting identification justify him in drawing a pistol and opening fire on them? We think not. Had he killed one of the gendarmes at Hard a plea of self-defense would scarcely have been upheld since there were no reasonable grounds present which would have warranted the accused in believing such an act "to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them" (MCM, 1949, p 230).

The admissibility in evidence of Beckoff's pre-trial admission was challenged. He was arrested by the French authorities on the morning of 21 June 1949 and was taken to Bregenz, Austria. At about 1830 hours that evening, while he was in the custody of two French officials in an automobile in front of Gendarmerie Headquarters at Bregenz, several agents of the Criminal Investigation Division of the United States Army arrived on the scene. One of them immediately advised Beckoff of his rights under Article of War 24 and informed him that the agents would see him as soon as they could get a clearance from the French. At about 2230 hours the agents arrived at the gendarmerie station at Hard where Beckoff was being interrogated by the French. They waited until the interrogation had been completed and then they obtained food for Beckoff and gave him some cigarettes. He was again advised of his rights under Article of War 24. No promises of any kind were made to Beckoff. He then made a verbal statement concerning his recent experiences. When he had finished he was asked whether he had any objection to making a

written statement and whether he would swear to such a statement. Upon his consenting to such a procedure a typewriter was borrowed from the French and Beckoff dictated a statement which was typed and which he signed. Beckoff read the statement before signing it. A week later Beckoff reaffirmed and swore to the statement before a summary court officer. The statement which had been made by the accused to the French was not offered in evidence (R 133,134,143,144,159,160,162,163,189; Pros Ex 21).

Concerning the voluntariness of his signed statement accused testified that while in the custody of the French he had been handcuffed, stripped of his clothing, guarded by a police dog, interrogated for three hours at one time and for two hours at another, and fed nothing all day (R 200-203). Despite some contrary indications in the testimony of Phelps (Def Ex B) the accused did not specifically claim that he had been physically manhandled by the French. He was advised of his rights under Article of War 24 by the agents of the Criminal Investigation Division before they interrogated him. No promises or threats were made by the agents and they treated him fairly at all times. Accused admitted having made and signed a statement in Bregenz and that he had sworn to it and signed it again before Lieutenants Elliott and McKee about a week or two later while he was in the stockade at Salzburg (R 204,206-207). Over objection by the defense the statement was received in evidence (R 249, Pros Ex 21).

While any statement made by the accused to the French may have been tainted by the treatment allegedly accorded him by them, and, if the court believed his testimony in this regard, would have been inadmissible in evidence, such undue influence, if any there was, did not extend to the statement made by the accused to the Criminal Investigation Division agents after he had been fully advised concerning his rights. This is especially so in view of the fact that he reaffirmed the statement a week or two later. (CM 233543, McFarland, 20 ER 15; CM 245979, Williams, 29 ER 353; CM 325492, Mosely, 74 ER 263.) Moreover, not only did the law member fully advise the other members of the court concerning the effect of the admission of the statement in evidence but the evidence dehors the statement of the accused was legally sufficient to sustain the findings and the sentence (R 249).

CHARGE I and its Specifications

The three specifications of Charge I allege violations of Article of War 93 in that the accused, in conjunction with another, did "with intent to commit a felony viz, murder, commit an assault upon Anton Naegele /Joseph Schaedler; Hubert Schaertler/ by willfully and feloniously shooting at him with dangerous weapons, to wit, pistols." Based upon general testimony as to the positions taken by the three gendarmes when the shooting started, the argument is advanced by the defense that

the physical facts are such as to preclude the application of the rule of law set forth at page 246 of the Manual for Courts-Martial, 1949, to the effect that "if a man fires into a group with intent to murder some one, he is guilty of an assault with intent to murder each member of the group." When the accused and Phelps faced the gendarmes from the opposite side of the road the dispersal of the latter was not such as to preclude their being called a "group." Moreover, the contention overlooks the fact that when the accused and Beckoff continued to fire as they retreated laterally along the road the relative position of the three gendarmes changed so that a shot fired at one was necessarily a shot fired at all three. The circumstance that the gendarmes were taking advantage of available cover is likewise ineffective to mitigate the accused's act.

As was stated in CM 271098, Phoenix, 46 ER 39,45:

"An assault with intent to murder is an attempt to murder; it is an assault aggravated by the concurrence of a specific intent to murder. If a person shoots at another with the intent to murder, the fact that the shot misses its mark does not alter the offense. If a person fires into a group of people with intent to murder someone, he is guilty of an assault with intent to murder each member of the group (MCM, 1928, par. 1491). The intent to murder, essential to this aggravated assault, is established if the facts are such that had death resulted from the assault the offense would have been murder (Wharton's Criminal Law, 12th ed., Vol. 1, sec. 841; CM 265699, Ferry; CM 270939, O'Gara). Here, the two accused fired some ten or fifteen shots at a group of military policemen. It is obvious that they knew their acts were well calculated to cause grievous bodily harm to any or all of the group. Knowledge by the accused that the act would probably cause such bodily injury establishes the intent to kill (MCM, 1928, par. 148a). Thus, had death here resulted from their acts the offense would have been murder. Accordingly, the evidence amply sustains the findings of guilty of the four Specifications of the Charge."

CHARGE II and its Specification

"Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse. The death must result within a year and a day of the act or omission that caused it." (MCM, 1949, par 179a, p 230.)

Inasmuch as premeditation was not alleged herein, the offense is not capital and the punishment therefor is not made mandatory by statute (AW 92).

It is clear from the evidence that the death of Berlinger resulted from the act of accused Beckoff in firing his pistol into the victim's head after he had forcibly disarmed Berlinger of his carbine. When the carbine was found it was on safety and there is no substantial evidence tending to show that accused believed or had reason to believe that Berlinger was about to inflict bodily harm or death upon him. The gendarme did no more than to restrain Beckoff for purposes of proper identification. We conclude that the restraint was both legal and proper under the circumstances. Berlinger lay mortally wounded in his own blood when Jaeger fired in his pursuit of the accused. The latter incident can have no bearing on the crime already committed. Malice in murder may exist where there is no premeditation and may be inferred from the "intent to oppose force to an officer or other person lawfully engaged in arresting, keeping in custody, or imprisoning a person, *** provided the offender has notice that the person killed is such officer or other person so employed" (MCM, 1949, par 179a, p 231). It has also been uniformly held that where a deadly weapon is used in a manner likely to cause death and death actually results from such use, the law will presume malice from the act (CM 314939, Greene, 64 BR 293,299; CM 324519, Davis, 73 BR 251,263).

6. The record shows the accused to be approximately 24 years of age. It does not appear that he has any dependents. He enlisted in the Regular Army at Fort Lewis, Washington, on 13 December 1945 for three years.

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 holds the record of trial legally sufficient to support the findings of guilty and the sentence.

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

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

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

CSJAGK - CM 333032

1st Ind

MAY 5 1949

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

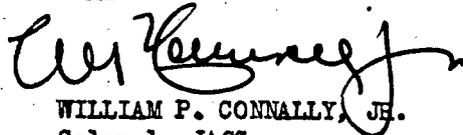
TO: Commanding General, Zone Command Austria, APO 541, c/o Postmaster,
New York, New York.

1. In the case of Recruit Robert A. Beckoff (RA 19246809), Troop B, 68th Constabulary Squadron, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confirming action is not by The Judge Advocate General or the Board of Review deemed necessary. Under the provisions of Article of War 50 you now have authority to order the execution of the sentence.

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

(CM 333032).

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.

CSJAGH CM 334097

FEB 28 1949

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UNITED STATES)

v.)

Captain ERNEST E. ANDERSON,)
O-1003901, 8293d Service Unit,)
Hawaiian Casual Depot, formerly)
a member of the 8265th Service)
Unit, Hawaiian AG Dept, United)
States Army, Pacific, APO 958.)

UNITED STATES ARMY, PACIFIC

Trial by G.C.M., convened at
APO 958, 30 July and 12, 13,
14, 17 and 19 August 1948.
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: In that Captain Ernest E. Anderson, 8265th Service Unit, did, at Fort Kamehameha, Territory of Hawaii, from about 30 September 1946 to about 6 April 1948, feloniously embezzle by fraudulently converting to his own use more than \$50, lawful money of the United States, property of the Channel Locker Fund, Fort Kamehameha, Territory of Hawaii, which was entrusted to him in his capacity as custodian of said Channel Locker Fund.

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

Specification: In that Captain Ernest E. Anderson, 8265th Service Unit, did, at Fort Kamehameha, Territory of Hawaii, from about 30 September 1946 to about 6 April 1948, feloniously embezzle by fraudulently converting to his own use more than \$50, lawful money of the United States, property of the Channel Locker Fund, Fort Kamehameha, Territory of Hawaii, which was entrusted to him in his capacity as custodian of said Channel Locker Fund.

He pleaded not guilty to and was found guilty of the Charges and Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

The evidence is substantially as follows:

The accused is in the military service of the United States and between 30 September 1946 and 6 April 1948, was assigned to the 8265th Service Unit, Hawaiian Casual Depot, APO 954 (R 18,19,24,40,44,274). During the period 30 September 1946 to 19 March 1947 accused served as the custodian of the "Channel Locker Fund" in accordance with his appointment to that position (Pros Exs 1,2). The fund was official in character during the last-mentioned period. In March of 1947, however, the South Sector Command directed that locker funds be eliminated as official funds (R 41), and accused was relieved as official custodian of said fund on 19 March 1947 (Pros Ex 2). The fund continued in operation, however, and accused carried on as the custodian of the fund (R 22).

The Channel Locker Fund was established to distribute liquor at Fort Kamehameha, presumably to make liquor available to officer members at a comparatively low cost (R 19,20). The respective officers of the organization contributed to the fund a "Members Deposit" which was used as working capital in the operation of the fund (Pros Ex 5 (Ex I)). Further operating capital was obtained by virtue of a mark-up in the sales price over the purchase price of the liquor (Pros Ex 6, page 8, Ex 5J).

An official audit was directed at the time the fund was closed as an official fund (R 45,244). Mr. Andrew J. Andres performed the audit starting 24 March 1947. (R 45). He found the fund to be solvent as of 24 March 1947 with the exception of \$57.28 (R 49), \$54.00 of which shortage appeared to be the result of a robbery from the fund in December of 1947 (R 50). This left an unaccounted-for shortage of \$3.28 (R 50). While making his audit, Mr. Andres did not verify the accounts payable but accepted them as they appeared on the books of the fund (R 47,50). Over one year later, on 17 May 1948, Andres, at the request of the "CID", made a confirmation of the accounts which were payable at the date of his original audit by personally contacting the wholesalers who had made sales to the fund (R 48). He found that the accounts payable when verified by the dealer's records were some \$2000.00 more than what the books had shown them to have been when he audited them (R 48,49). This indicated that the fund was insolvent, having a deficit

of \$2000.00 on 24 March 1947, rather than the mere shortage of \$3.28 as shown by the original audit. The fund appears to have been \$2000.00 short, however, when accused assumed custodianship thereof (R 218; Pros Ex 6, pp 2,7).

The records of the fund were kept essentially as follows: The receipts and assets were listed in a "council book." (R 23,219). An inventory of stock was attached monthly to the council book (R 40). Other records ancillary to the council book were the monthly bank statement, check stubs, cancelled checks, deposit slips and a monthly report of operations (Pros Exs 3,4; R 189,219). The council book could not be located and was not produced at the trial (R 24,2526). Lieutenant Colonel Harry F. Townsend, who monthly audited the books, last saw the missing council book in the fall of 1947, at which time he left it on a desk in the office of accused (R 28). General Prisoner Dirwoodie, formerly an employee of the Charnel Locker Fund, had the records of the fund in his possession in March 1948. Dirwoodie deposited the records, including the council book, on top of a locker in his quarters, but after the investigation of the fund began and he was ordered by accused to produce the records, the council book was discovered missing (R 205; Pros Ex 10, p.10).

The books of the fund were audited and the inventory "spot checked" by Lieutenant Colonel Townsend each month until sometime in the fall of 1947 (R 23,27,40,42). The results of these audits in each instance indicated the fund to be solvent (R 23,34). Lieutenant Colonel Townsend did not ascertain the accounts payable by personally contacting the dealers, but merely accepted the statements as they appeared in the records furnished him (R 38).

The first indication that the fund was not solvent was on 5 April 1948 when a representative of the Pearl Harbor Officers' Club notified accused that a check drawn on the fund in the amount of \$321.40 had been returned by reason of insufficient funds (Pros Ex 6, p.3). Accused then ordered Dirwoodie to prepare a compilation of assets and liabilities. Accused then obtained a statement from the bank and ordered Dirwoodie to submit all the records of the fund. Dirwoodie produced the records but the council book was missing. Accused discovered that the fund's debts exceeded its liabilities by some \$13,000.00 and notified Lieutenant Colonel Townsend (Pros Ex 6, p.4).

Captain H. W. Wells, Fiscal Officer, Headquarters South Sector Command, was ordered to perform an audit of the fund (R 54). His audit revealed a deficit of \$14,293.34 (R 77; Pros Ex 5).

Dirwoodie testified that he would sometimes turn over to accused the cash on hand for safekeeping over holidays. He further testified

that accused did not always return all of such monies, but that he estimated that over all such transactions there was returned to him some \$500.00 less than the amount he had given accused (R 180,181,212). He also testified that he had given accused \$35.00 of the fund's money which to his knowledge had not been returned (R 185). He further testified that accused commented in March 1948 that he, the accused, was aware that the fund was "about \$10,000 down," and that he, Dinwoodie, concurred, and that then the accused said "Do you think we can make it up?" to which Dinwoodie replied "Yes, I think we can over a period of time." (R 184)

In accused's statement made on 30 April 1948 before CID Agent Gregor, the accused charged Dinwoodie with making statements against the character of accused's wife "for the purpose of inducing" accused "to refrain from taking any official action." The statements attributed to Dinwoodie were claimed to have been made to Warrant Officer McArthur and were to the effect that accused's wife, while she was in San Francisco, went out evenings leaving the children behind unattended. This accused labeled an "untrue unadulterated lie." Accused countercharged Dinwoodie with "living with a nurse in Wahiawa or Schofield Barracks." (Pros Ex 6, pp. 9,10). Accused later in his statement to the CID further described Dinwoodie as the "most rotten, incontemptible, lowest individual that I have ever met" and charged Dinwoodie with "keeping two, possibly three," homes and with "not supporting his wife or his children."

During the course of the investigation CID Agents Charles H. Gregor and LaCroix conducted a search of accused's quarters in quest of the missing council book. Agent Gregor testified that accused on that occasion volunteered the statement "I took some money from the Locker Fund which I shouldn't have" (R 147). Throughout his typewritten statement made to the "CID", accused denied ever converting monies of the fund and states that he had no suspicion of Dinwoodie's conversion of funds (Pros Ex 6).

The accounts payable increased steadily throughout the year 1947, although some payments on account were made. The representatives of these wholesalers dealt with either Dinwoodie or accused (R 79,87,116). The delinquency of these accounts was brought to accused's attention and many times he would write a check or order Dinwoodie to write a check on account. Seldom was the account paid in full and the accused sometimes promised payments which were not forthcoming (R 79,126).

Prosecution Exhibit 7 consists of two checks signed by Captain James F. Beers, as Secretary of the Officers' Club, Fort Kamehameha. These checks, payable to "Capt E. E. Anderson," were drawn on the Bishop National Bank of Hawaii, Hickam Field Branch, and have been duly honored.

The first of the two checks, dated 17 November 1947, and in the amount of \$42.50 contains the limited indorsement as follows: "Capt. E. E. Anderson Deposit Only Channel Locker Fund A.P.O. 954." This check bears cancellation dated 22 November 1947. Duplicate deposit slip dated 22 November 1947 found in the fund's records indicates deposit of a check identified as "Beers" in the amount of \$42.50 (Pros Exs 3,4).

The second check, dated 31 October 1947, is in the amount of \$153.00 and contains no limited indorsement, but is indorsed "Capt E. E. Anderson." The latter check bears a perforated bank cancellation showing said item to have been paid on 12 November 1947. The next succeeding duplicate bank deposit slip as contained in the fund's records indicates a deposit of \$137.90, only \$39.85 of which was in cash. The remaining cash deposits throughout the rest of the month of November 1947 total less than \$153.00. None of the November 1947 duplicate deposit slips contain a check identified as "Beers" in the amount of \$153.00 (Pros Exs 3,4).

Both of the afore-mentioned checks were given in payment for liquor purchased from the Channel Locker Fund (R 153; Pros Ex 9; R 178). In accordance with the established practice, the various officers' clubs generally did not pay for the liquor supplied by the Locker Fund until it was consumed. The club officer would then prepare a draft on the club's account sufficient to pay for this liquor. Such checks were made payable to the custodian rather than to the fund, but normally a limited indorsement was inscribed on the back of the check making it payable only to the Locker Fund (R 163,165,171).

A third check was introduced into evidence. This check was drawn on the Bishop National Bank of Hawaii in the amount of \$376.64 and is made payable to "Major J. W. Scales, Acting Treas. of Entertainment Committee" and is signed by "L. H. Ripley" as Secretary-Treasurer of Fort Shafter Officers' Club. On the reverse thereof, the following indorsements appear "Payable only to: Captain E. E. Anderson, J. W. Scales, Major AGD, Capt E. E. Anderson, Chg. Hickam." This check is dated 31 August 1947, and bears a perforated bank cancellation indicating that said item was paid on 2 September 1947 (Pros Ex 8). Further, upon the face of the check there appears a stamp consisting of a small circle within which appears the word "cash" over the numeral "3". The check was drawn in payment for liquor obtained from the Channel Locker Fund (R 167,170). Normally such checks were written with a limited indorsement "payable only to Channel Locker Fund," but Lieutenant Colonel Lyman H. Ripley, the signer of the check, could not recall why it was not so indorsed in this particular instance (R 169). A duplicate deposit slip dated 5 September 1947, contained in the records of the Channel Locker Fund, shows a deposit of \$518.55, \$225.00 of which was cash. Another

duplicate deposit slip dated 10 September 1947 shows a deposit of \$278.10 in cash to the account of the Channel Locker Fund (Pros Ex 3). Both deposits appear on the Channel Locker Fund's monthly bank statement dated 31 August 1947 (Pros Ex 4).

4. Evidence for the defense.

Accused signified to the court that he fully understood his rights with reference to testifying and elected to remain silent (R 262).

Master Sergeant Kenneth Y. H. Ahana testified that at some time in 1946 he was employed to keep the books of the fund and at that time accused's predecessor, a Lieutenant Cohen, was the custodian of the fund (R 218). Ahana continued on as bookkeeper of the fund after accused succeeded Lieutenant Cohen as custodian until he was relieved in approximately January 1947 (R 219), which was just prior to the elimination of the fund as an official fund (R 41). The fund was solvent at all times during the period that Ahana was bookkeeper (R 219). It would have been impossible for accused to falsify the inventory or to extract monthly statements of creditors in order to embezzle from the fund, and, at the same time, to maintain balance of the fund's books during the period that Ahana kept the books (R 235,236). Ahana was succeeded by a sergeant (R 219,220,221). Ahana testified that he was relieved in "approximately" January 1947 (R 219,223,224) and that he instructed his "successor" (R 220), "a sergeant," (R 220,221) in the manner of keeping the books, but Ahana was not certain whether this occurred immediately after he was relieved or a month or two later (R 225). [General Prisoner Dinwoodie had testified that he took over as bookkeeper on 6 June 1947 (R 74)7. Ahana could not identify Dinwoodie as the "sergeant" he instructed (R 221), and his testimony indicated that he had instructed two different sergeants at two different times in the keeping of the books (R 219,221).

Dinwoodie, recalled as a witness for the defense, testified that when accused was notified on 5 April 1948 that a check had been returned for insufficient funds, he ordered Dinwoodie to prepare a compilation of assets and liabilities. Dinwoodie, on 8 April 1948, submitted to accused a sheet of paper showing "cash on hand" as \$11,556.23, which Dinwoodie later testified was in error, and that he meant that figure to be "outstanding bills." (R 227,228,229; Def Ex 4).

When testifying as a prosecution witness Dinwoodie upon cross-examination identified Defense Exhibit 2 as a true copy of a sworn statement made by him and it was admitted in evidence. In the statement Dinwoodie confessed that he embezzled regularly from the fund. Specifically he stated that he took "overages" which he approximated at \$25.00 per

week. He took different kinds of liquor in broken case lots in the approximated amount of \$50.00 worth per week. He also sold liquor regularly to the Officers' Club without accounting for it, for which, he approximates, he netted \$75.00 to \$80.00 per week (Def Ex 2; R 201). Dinwoodie admitted falsifying the records. His method was to destroy monthly statements of the vendors of the fund and substitute therefor the individual statements which accompanied each shipment of liquor. These statements would include only the liquor contained in that one particular purchase and did not indicate the total outstanding balance due (Def Ex 2).

In his statement Dinwoodie further stated that he did not believe that accused was converting Locker Fund money to his own use, but he qualified this upon examination by the court by saying he had no actual proof that accused was so converting the funds monies (Def Ex 2; R 212).

Mrs. Marjorie L. Anderson, wife of accused, testified that she was present during the search of accused's quarters, but was attending her children and was not in the same room with Agent Gregor and accused at all times. Mrs. Anderson stated that she did not hear accused make any statement or admission such as that charged by Agent Gregor (R 232). She also testified that she was at the Wagon Wheel Restaurant with her husband at a time when Dinwoodie was also there, but did not see any monies change hands (R 234). At that time accused was being treated at the hospital and was on a hospital leave for the day. Accused had no need for money that day and made no large purchases after the time specified by Dinwoodie and before returning to the hospital (R 235).

Colonel Townsend testified that in his opinion Andres was not a competent auditor (R 252,258). He voiced this opinion upon personal contact with Andres during the time that the 24 March 1947 audit was being performed (R 252,258). All monthly audits performed by Lieutenant Colonel Townsend indicated solvency of the fund (R 248). He affirmed the fact that Dinwoodie had submitted Defense Exhibit 4 as a reflection of the fund's financial status upon which he had indicated "cash on hand" to be \$11,556.23, and that Dinwoodie later disclosed that the \$11,556.23 should have been indicated as "outstanding bills." (R 242).

An extract copy of Department of the Army Memorandum No. 210-10-7 dated 9 October 1947 prohibiting "the sale or dealing in" intoxicating liquors upon any premises used for military purposes of the United States was introduced as an exhibit for the defense (Defense Exhibit 1).

5. The evidence adduced clearly establishes that the accused served as custodian of the Chammel Locker Fund during the period 30 September 1946 to 6 April 1948; that on 30 April 1948 an audit of the fund disclosed a deficit of \$14,293.34; and that the major portion of the deficit resulted from the peculations of General Prisoner, formerly Technical

Sergeant Dinwoodie, who served as steward and bookkeeper during the latter part of accused's custodianship of the fund. Although the accused occupied this fiduciary stewardship, the defense, when confronted with the evidence above summarized, offered no explanation as to the portion of the deficit shown by the audit and which was not accounted for otherwise. In this connection the Board of Review has recently stated in CM 323764, Mangum, 72 BR 397 at page 403, as follows:

"* * 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.)"

In further support of the facts presented by the record of trial in the instant case, considered in the light of the legal precedent above cited, the accused appears to have made the following statement to CID Agent Gregor during a search of the accused's quarters for "council books" discovered to be missing at the outset of the investigation of the shortage: "I took some money from the Locker Fund which I shouldn't have." Similarly indicative of a troubled conscience is accused's query of Dinwoodie in March of 1948, following his awareness of a \$10,000.00 shortage in the fund, viz: "Do you think we can make it up?"

Although there has been properly introduced in evidence a pretrial statement of accused wherein he generally denies any conversion of the funds in question, or that he knew a shortage existed, he has nowhere made a specific denial of these damaging admissions attributed to him by Gregor and Dinwoodie. There is no specific evidence introduced by him, or others in his behalf, tending to explain away or discredit these statements, except that of Mrs. Anderson who testified to the

effect that she did not hear accused make the statement charged by Gregor, but who also admitted that she was not listening. So far as it appears in the record these incriminating statements attributed to the accused stand uncontradicted by any competent evidence and thus the court would be fully justified in finding that these statements were in fact made.

The prosecution introduced into evidence two checks which were shown to have been given in payment for liquor purchased from the fund. One check was introduced for the purpose of demonstrating the normal course of business between the Fort Kamehameha Officers' Club and the Channel Locker Fund in the purchase of liquor from the fund. The check demonstrating the normal procedure was a check for \$42.50, dated 17 November 1947, made out to "Capt. E. E. Anderson," and signed by Captain James F. Beers as Secretary of said club. On the reverse of the check is inscribed a limited indorsement "Capt. E. E. Anderson. Payable only Channel Locker Fund." A check identified as "Beers" in the indicated amount of \$42.50 appears on the fund's duplicate deposit slip dated 22 November 1947. The Channel Locker Fund's monthly bank statement shows a deposit of \$495.59 on 22 November 1947, which was the total amount shown to have been deposited by the duplicate deposit slip containing the \$42.50 check identified as "Beers." The other check, also signed by Beers in his same capacity and in payment for liquor purchased for the Officers' Club, is dated 31 October 1947, and is drawn in the amount of \$153.00 payable to "Capt E. E. Anderson." On the back of this check, however, there appears no restrictive indorsement, but the check is indorsed by "Capt. E. E. Anderson" and indicates presentation to and payment by the drawee bank on 12 November 1947. None of the duplicate deposit slips show a deposit in this amount to the fund's account. All of the credits shown on the monthly bank statement are represented by duplicate deposit slips. The duplicate deposit slips indicate large deposits of members' personal checks, but for one month next following the cashing of the check for \$153.00 the total cash deposits to the fund's account are less than \$153.00.

From these facts the only reasonable conclusion which can be drawn is that accused accepted a check for the Channel Locker Fund in the amount of \$153.00 payable to him personally in payment for liquor purchased from the fund, and that he cashed said check and obtained the proceeds in cash and converted the same to his own use instead of following the usual and customary practice of depositing the check, properly indorsed, to the credit of the Channel Locker Fund. Such irregular conduct would appear to require a specific, not general, explanation by the defense. Any facts which could minimize or dispel the natural presumption that the monies so obtained were converted by accused to his own use were peculiarly within accused's own knowledge,

and upon a failure to show such facts, the court was justified in finding that the monies so obtained were converted to accused's own use.

The same principles apply with equal force to the transaction respecting the check for \$376.64, which was made by the Fort Shafter Officers' Club. The testimony of Lieutenant Colonel Ripley shows that this check also was given in payment for liquor purchased from the fund. Although it was not made directly to accused as payee, as were the checks given by Captain Beers, it was indorsed by the designated payee, "Major J. W. Scales," to the accused personally, and accused in turn, made the check payable to himself rather than to the Channel Locker Fund. It was shown that this was all part of one transaction and that it was customary to write drafts on Officer Club accounts through the entertainment officer when liquor was purchased from the Locker Fund. This check bears a stamp reading "cash" which indicates payment in currency by the drawee bank upon presentation of the check.

The defense's objections to the admission of Prosecution Exhibits 7 and 8, which exhibits consist of the checks under consideration, present the question of whether accused's signatures thereon were properly identified (R 214). Prosecution Exhibit 6, which was accused's pretrial sworn statement and contained the purported signature of accused was admitted into evidence previously, however, without objection (R 137). In this regard where the purported signature of any person is admitted into evidence without objection it may be used as a standard of comparison to establish the genuineness of other purported signatures of that person (In Re Goldberg, 91 F.2d 996). On the basis of the same precedent, the Board of Review in CM 324725, Blakeley, 73 BR 307 at page 325, has stated:

"* * * Moreover, an Officers' Qualification Card relating to accused and apparently signed by him as required by pertinent directives (Par 93, TM 12-425, 17 June 1944) having been introduced in evidence without objection by the defense, the court had before it an undisputed specimen of accused's signature (In re Goldberg, 91 F (2d) 996)."

The signature on Prosecution Exhibit 6 was identified as that of accused by Agent Gregor, who testified that it was signed by accused in his presence and that the exhibit had been in his custody since that time. The court under these circumstances was further authorized by statute to use the signature on Prosecution Exhibit 6 as a basis for comparison in establishing the genuineness of other purported signatures of accused in accordance with 28 USCA 638 which is as follows:

"In any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any

person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness. (Feb. 26, 1913, C79, 37 Stat 683)."

As recounted, there was evidence which showed that accused received two checks in payment of debts owing to the fund, and that the checks, on their face, were payable to accused personally. The checks were indorsed in blank by accused and were cashed, but no explanation has been offered as to the disposition of the proceeds. While it is shown that it was the normal course of business for accused to place restrictive indorsements, in favor of the fund only, on checks received by him on account of the fund, it is not shown that accused was without authority to indorse such checks in blank. Superficially it would appear that this evidence shows an embezzlement of the checks rather than an embezzlement of money as alleged. We are of the opinion, however, that there is no variance. Accused's actions with respect to the checks appear, in the absence of anything to the contrary, to be authorized. His acts in indorsing and cashing the checks could not be considered as conversions of the checks unless it was shown that such acts were unauthorized. It was not until the proceeds were received by him that embezzlement occurred, and then the property embezzled was the proceeds of the checks and not the checks (Peck v. U.S., 65 F2d 59,62; CM 188571, Simmons, 1 BR 123; CM 218647, Moody, 12 BR 119,125-126).

Evidence showing other specific instances of accused's embezzlements, additional to his overall failure to explain that portion of the deficit which may properly be charged to him, is the testimony of Dinwoodie that of the funds given by him to accused for safekeeping accused failed to return an amount of approximately \$500.00.

To recapitulate, we find that of the total deficit in the Channell Locker Fund explanation, for approximately \$8,000.00 thereof may be found in the thefts committed by Dinwoodie. The record is not clear as to whether a \$2,000.00 shortage existing in the fund prior to accused's stewardship is computed in the \$14,000.00 deficit. In fairness it must be concluded that as to the accused, sufficient explanation is afforded in this amount. There, nevertheless, remains approximately \$4,000.00 of the shortage for which accused has failed to account. As hereinbefore shown, his failure to offer adequate explanation therefor created a presumption of guilt of the offenses charged against him (Mangum, supra). It is reiterated that the evidence giving rise to the presumption is uncontradicted, and compels us to the conclusion attained by the court in its findings.

6. Another question is presented in the record of trial by virtue of accused's membership in the Channel Locker Fund. Although there is judicial precedent to the effect that a partner cannot be guilty of embezzlement of partnership funds, we are of the opinion that the rule is not applicable in this case. The fund was an unincorporated association of officers at Fort Kamehameha. The object of the association was to make liquor available to the members thereof. Whether the purpose was to make possible purchase of liquor at reduced prices, or whether it was to make the liquor conveniently available or whether there was any other specific reason is not shown. But it is clearly shown that it was not an association designed for the purpose of profit. This association continued its existence regardless of changes in its membership. The retiring of a member by reason of death, resignation, or expulsion worked no dissolution of the association. In *Rohde v. United States*, 34 D.C. App. 249, the court said in upholding the conviction of embezzlement by a treasurer of an unincorporated association:

"* * * The association in this instance was not organized for any purpose of trade or profit. There could, therefore, be no mutual participation of members in profit or loss. The retiring of a member by reason of death, resignation, or expulsion worked no dissolution of the association. It continued its existence regardless of changes in its membership. An association for such purposes and under such conditions is not a partnership. Assuming that, under certain conditions, it might possibly be held liable as a partnership at the suit of others than members, by virtue of the principle of estoppel, yet, as between its own members, it cannot be held to be a partnership. *Lafond v. Deems*, 81 N.Y. 507; *Burke v. Roper*, 79 Ala 138-122; *Ash v. Guie*, 97 Pa 493-499, 39 Am.Rep. 818."

The Board concludes, therefore, that the Channel Locker Fund was not a partnership in the sense that one of the members thereof could not be convicted of embezzling its funds.

The offense of embezzlement by an officer may be properly charged under both Article 93 and 95. It is not error to charge the same offense under different Articles of War when one of the charges is based on the civil aspect of the offense and the other is based upon the military aspect, although accused may properly be punished for his acts only in their more important aspects (CM 267843, Bonar, 44 BR 129; CM 241597, Fahey, 26 BR 305, 3 Bull JAG 10).

7. In arriving at the conclusions upon which this its opinion is based, the Board of Review has fully and carefully considered the brief and inclosures thereto, submitted by Lieutenant Charles A. Moran and Mr. Morris N. Freedman, Special Defense Counsel, appended to the record of

trial and the brief submitted by Lieutenant Colonel Harold A. Furst, in behalf of the accused.

The record of trial does not show that accused's substantial rights were in any way prejudiced when he was permitted to exercise his challenges and was arraigned prior to the granting of a continuance. Our examination of the record shows clearly that the court and the prosecution were commendably cautious and indulgent in their efforts to assure accused of his legal rights (R 2-16). The regularly appointed defense counsel and assistant defense counsel were excused by the court only after accused's rights to counsel were fully and lucidly explained to him and he insisted in his desire to proceed pro se. Both of his challenges for cause were sustained by the court and he was advised that he retained this right throughout the course of the trial. The reasons assigned by him as the bases for these challenges and his conduct in presenting them contradict the assertion that accused "was utterly confused" or that his mental faculties and physical acumen were depleted to such an extent at the time so as to render him incapable of conducting this phase of the proceeding in his own behalf. Further, he availed himself of his right to a peremptory challenge. It is to be noted that during the conduct of the later phases of his trial accused was represented by able and competent counsel of his own choice.

8. Records of the Army show that accused is 28 years of age, married, and has two children. He graduated from high school in 1936. During 1939, while in the Army, he attended the University of Hawaii, where he majored in mathematics and criminology. There is no information as to his civilian employment. He served in enlisted ranks from 3 August 1937 to 7 September 1943. Having satisfactorily completed the Adjutant General's Officer Candidate School, he was discharged on 7 September 1943 in the grade of Technical Sergeant (CIC) to accept appointment as second lieutenant, AUS, and was ordered to active duty on 8 September 1943. He was promoted to first lieutenant on 19 August 1944, and to captain on 21 June 1945. He is presently a member of the Organized Reserve Corps. He is in Category III with termination date on 31 July 1951. He is authorized to wear the following decorations: Philippine Islands Liberation, Asiatic Pacific Campaign, American Defense Service, and World War II Victory Medals. His efficiency ratings range from "Excellent" to "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. 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.

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

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

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

CSJAGU CM 334097

JUL 13 1949

U N I T E D S T A T E S)
)
 v.)
)
 Captain ERNEST E. ANDERSON,)
 O-1003901, 8293d Service Unit,)
 Hawaiian Casual Depot, formerly a)
 member of the 8265th Service Unit,)
 Hawaiian AG Dept, United States)
 Army, Pacific, APO 958.)

UNITED STATES ARMY, PACIFIC
Trial by G.C.M., convened at
APO 958, 30 July and 12, 13,
14, 17 and 19 August 1948.
Dismissal, total forfeitures,
and confinement for two (2)
years.

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

1. The accused was tried by general court-martial convened at Headquarters, United States Army, Pacific, on charges which, in two identical specifications laid under Articles of War 93 and 95 (Charges I and II, and their specifications respectively) alleged that at Fort Kamehameha, T.H., from about 30 September 1946 to about 6 April 1948, he embezzled, by fraudulently converting to his own use, "more than \$50, lawful money of the United States, property of the Channel Locker Fund, Fort Kamehameha, Territory of Hawaii," as custodian of said Channel Locker Fund. He was found guilty of both specifications and charges and was sentenced to dismissal, total forfeitures and confinement at hard labor for two years. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The Board of Review, in its opinion, dated 28 February 1949, expressed the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation and has submitted its opinion to The Judicial Council as required by Article of War 50^d(2).

2. The Channel Locker Fund (hereinafter referred to as the "Fund") was established in October 1943, for the purpose of supplying alcoholic beverages to its members at comparatively low cost. It purchased liquors on credit and maintained a stock in a "locker" at Fort Kamehameha from which sales were made to members, and possibly to others. The Fund is referred to in the evidence as semi-official, and the accused was designated as custodian thereof by official orders in September 1946. At that time there was a deficiency in the assets of the Fund amounting to over \$2,000 incurred under the predecessor of the accused, which was covered by a certificate when the accused became custodian.

From September 1946 until March 1947 the Fund continued to operate with official recognition and was the subject of monthly official audits. In March 1947 a directive was received at Headquarters, Fort Kamehameha, apparently an oral one from Headquarters South Sector Command, that the Fund should be "entirely eliminated as far as an official fund was concerned." The last official audit, made in March 1947, showed the Fund

to be solvent (minor discrepancies not material to the issues of this case were noted). Apparently the operation of the Fund was continued without interruption until April 1948, its business being conducted substantially as from the beginning, except that official supervision and audits were discontinued. From March to September 1947 inclusive, an officer, who was during that period Commanding Officer or Executive Officer, Fort Kamehameha, made unofficial monthly audits, based on records maintained by the Fund, which included a council book in which were recorded receipts and expenditures, a check book, bank statements, and statements from wholesale liquor dealers from whom liquors had been purchased. That officer did not check with the creditors to verify the outstanding obligations as shown by the records presented to him. From October 1947 to April 1948 there was little or no supervision of the operation of the Fund.

Early in April 1948 a check issued by the Fund was returned unhonored by the drawee bank because of "insufficient funds". This focused attention on the Fund and caused an investigation to be made, as results of which Technical Sergeant Roland M. Dinwoodie, an employee of the Fund from June 1946 to April 1948 was tried by court-martial, and the charges, against the accused in this case were instituted.

3. One aspect of the prosecution's case was the effort to show that between the dates set forth in the specifications, the Fund incurred a "shortage" which on 30 April 1948 had reached an amount in excess of \$14,000. Assuming the competency of this evidence in all material particulars, its effect may be summarized as follows:

During the year 1947, and particularly during the latter part thereof, large purchases of liquor from wholesalers were made by the Fund, the bills for which were not paid, or were paid only in part, with the result that by April 1948 the outstanding obligations of the Fund exceeded its assets by \$14,293.34, as disclosed by an audit (Pros. Ex. 5).

Some of the deficiency resulted from peculations by the witness Dinwoodie, who, on the stand at the trial admitted that "he had taken funds belonging to the Channel Locker". He was not interrogated as to the details or as to the amounts involved, and there is nothing, except in Defense Exhibit 2 (discussed in par. 10, infra), from which any indication of the extent of those peculations can be obtained. The Board of Review estimates from the statements contained in Defense Exhibit 2, that they approximated in total value \$8,000. It finds further that a deficiency as of 28 February 1947 in the amount of \$2,269.91, indicated by a reconstruction in May 1948 of the last official audit of the Fund (see Exhibit K to Pros. Ex. 5), cannot be attributed to the accused in determining the question of his guilt or innocence, because of the lack of clarity in the record and the possibility that this amount may be accounted for by the shortage shown to have existed when the accused became custodian (par. 2, supra).

Crediting the accused with the foregoing amounts and subtracting them from the "shortage" shown by the audit covered by Prosecution Exhibit 5, the Board of Review concluded that the difference, approximately \$4,000, represents a shortage "for which the accused has failed to account" and

that such failure "creates a presumption of guilt of the offenses charged against him" which the Board of Review finds to be uncontradicted and to compel it "to the conclusion attained by the court in its findings".

4. The Council cannot concur in the conclusions of the Board of Review, supra. Assuming for the present that the estimates made by the Board represent a reasonable approximation of the aggregate of the peculations admitted by Dinwoodie, and accepting the conclusion that the additional sum of \$2,269.21 must be excluded in computing the amount for which the accused may be held to account, the record shows that there were other losses to the Fund which, although they may be said to be the results of mismanagement, would have to be credited to the accused in computing any deficiency for which it might be said that there is a failure to account. These include losses from sales at less than cost to the Fund of unpopular brands of whiskey, and sales at prices below cost of popular brands as "specials". The record of trial indicates that such sales were made with the express or tacit approval of the superior officer of the accused who, first as commanding officer and executive officer, and later as unofficial auditor and patron of the Fund, had a large part in determining its policies.

In the opinion of the Council, the evidence leaves no room for doubt that the Fund during the year 1947 suffered losses through both mismanagement and through peculations by Dinwoodie. However, any effort on the basis of this record reasonably to approximate the aggregate of such losses or the losses due to any particular cause would involve speculation in such degree as to involve the substitution of guesswork for evidence.

Finally, in this connection, it must be noted that the so-called "shortage" of \$14,293.34 on the basis of which, after deductions as stated, an inference of guilt is made, at most was no more than what an audit indicated to be the difference between the assets and liabilities of the Fund computed as of 30 April 1948 (see par. 6, infra). What was alleged, and must have been proven if the findings of guilty are to stand, is that the accused embezzled by converting to his own use, "more than \$50 lawful money of the United States". Proof of insolvency, that is that the liabilities (in this case cash deposits and accounts payable) exceeded the assets (cash on hand and in bank and inventory) falls far short of the evidence from which the law permits an inference of embezzlement to be made; and the Council is compelled to the conclusion that, accepting the evidence hereinbefore summarized as competent in all material particulars, it does not contain even prima facie evidence of the guilt of the accused of the embezzlement of money alleged.

5. There is serious question of the competency of Prosecution Exhibit 5. It is styled "Certificate of Audit, Channel Locker Fund, Fort Kamehameha, T.H.". It was received in evidence over the objection of the defense, based on the grounds, inter alia, that it was "untrue", "misleading" and consisted of records "not checked for accuracy" and

"garnered by the CID and offered to this man (referring to the reviewing and approving officer who indorsed the certificate) as supervisor to the auditor, with no check of their truthfulness" and "all your information in there, the purported signatures of Captain Anderson, the various and sundry documents, sales slips, have not been verified. We don't even have a stable chain of custody of the records".

The certificate is dated, Headquarters, South Sector Command, Fort Ruger, T.H., 25 May 1948, and addressed to Commanding Officer, Fort Kamehameha, T. H. It recites that the audit of which it purports to set forth the result was made at the request of Agent Charles H. Gregor of the CID, and with the authority of the Chief of Staff, South Sector Command, for the purpose of assisting in an investigation involving an alleged existing shortage. It names the accused as the custodian of the Fund from 30 September to 30 April 1948, and certifies that the auditor had examined "the above fund in accordance with the procedures prescribed in TM 14-1008", and that, in the opinion of the auditor, "subject to the comments", the financial statements attached "fairly present the financial condition of the Channel Locker Fund, Fort Kamehameha, T.H. on 30 April 1948", and the results of its operation for the period from 1 March 1947 to 30 April 1948 inclusive. The certificate refers to and makes a part thereof, documents listed as Schedules I-III inclusive, and Exhibits A to L, inclusive.

Other items of documentary evidence which must be considered in connection with Prosecution Exhibit No. 5 are Prosecution Exhibits Nos. 3 and 4. These two exhibits likewise were received in evidence over the objection of the defense.

Prosecution Exhibit No. 3 apparently consisted of eleven file folders, dated from June 1947 through April 1948, containing duplicate bank deposit slips, sales records, and various certificates signed by accused as to money received and spent in connection with the operation of the Fund. All of these records were withdrawn at the close of the trial. Photostatic copies of twenty duplicate deposit slips of the Fund for the months of August, September, October and November 1947 were appended to the record of trial, but no copies of the remainder of the documents of which this exhibit consisted were incorporated in the record.

Prosecution Exhibit No. 4 apparently consisted of two check books, containing cancelled checks and bank statements pertaining to the Fund, all of which were withdrawn at the conclusion of the trial. Again copies of only part of the records constituting the exhibit are incorporated in the record. These are photostatic copies of monthly bank statements covering the months October 1946 - February 1947 and June 1947 - April 1948 and of a "Duplicate Statement for March, April and May 1947". The record shows the "Duplicate Statement" to have been furnished to the auditors by a CID agent who obtained it from the bank (Pros. Ex. 4, R 65). Endorsed on the statements covering the months October 1946 - February 1947, are lists of outstanding checks, and balances, according to check book and bank statement, certified as correct over the hand and typewritten signature "Ernest E Anderson ERNEST E. ANDERSON Capt. AGD Custodian".

Prosecution Exhibits 3 and 4, with the exception of the documents covering the month of April 1948, were identified by the witness, Dinwoodie, as records of the Fund (R 74, 75, 76).

Nowhere in the record, except to the extent that it may have been included in the computations set forth in the certificate of audit (Pros. Ex. 5), is there anything to indicate just what was shown by the documents included in Prosecution Exhibit 3 and 4 other than the deposit slips and bank statements, copies of which are appended to the record. The effect of these omissions on the rights of the accused in respect of appellate review is discussed in paragraph 13, infra.

6. Analysis of Prosecution Exhibit 5 indicates that the audit which it covers was based on data from various sources, in addition to the documents included in the records of the Fund. Schedule I "Balance Sheet, 30 April 1948" reads, as follows:

"Reference
Exhibit

Assets:

| | | | |
|-------------|-------------------------------------|---------------|------------|
| A | Cash in Bank | | |
| | Bishop National Bank, Hickam Branch | \$ 281.14 | |
| B | Cash on Hand | 35.00 | |
| B | Merchandise Inventory | <u>787.20</u> | |
| | Total Assets | | \$1,103.34 |

Liabilities:

| | | | |
|-------------|-----------------------|------------------|--------------|
| C | Deposits - 29 Members | 580.00 | |
| D | Accounts Payable | <u>14,816.68</u> | |
| | Total Liabilities | | 15,396.68 |
| | | | (14,293.34)* |

Taking up the items under "Assets", in order, the item "Cash in Bank", is based on Exhibit A, a reconciliation of the bank account of the Fund as of 30 April 1948. The amount, \$281.14, was arrived at by subtracting the item "Outstanding Checks" from the item "Balance per Bank Statement, 30 April 1948" of Exhibit A. It might be inferred that the information regarding outstanding checks was obtained from the check books of the Fund (Pros. Ex. 4, hereinafter mentioned), and the bank balance of \$588.33 may have been obtained from the same source. On the other hand, the latter amount may have been obtained from the bank statement for 30 April 1948, included in Prosecution Exhibit 4. The item "Cash on Hand \$35.00" was derived from Exhibit B, a certificate, dated 9 April 1948, signed by Lee Morris, Major, Inf. Major Morris was not a witness at the trial. None of the witnesses who participated in making the audit testified that the cash was counted by the auditors, and the reasonable inference from the record is that this figure is based on the certificate of Major Morris (Exhibit B). There is no evidence that the auditors made an inventory of the stock.

As for the entries under "Liabilities", the item "Deposit - 29 Members \$580.00" is based on Exhibit C, an unsigned paper purporting to list by name the members of the Channel Locker Fund as of 30 April 1948. Exhibit C recites that the list was prepared "on information furnished by Captain Cue of the Investigating Board at Fort Kamehameha". The item "Accounts Payable \$14,816.68" is based on Exhibit D, which is a list purporting to show accounts payable as of 30 April 1948.

According to the testimony of Captain H. W. Wells, who indorsed the certificate of audit as approving and reviewing officer, the audit was based on documents and papers furnished by CID Agent Gregor. Gregor testified that he requested the audit and obtained from Captain Cue the records of the Fund (apparently the documents contained in Prosecution Exhibits 3 and 4) which were turned over to the auditors. Gregor indicated to the auditors the form and nature of the audit desired, furnished them with a list of the liquor dealers with whom the Fund had done business, and asked them to examine the records, but not to take the figures shown in the files as representing the outstanding indebtedness. Gregor supplied the auditors with information and provided them with statements of the amounts claimed by wholesale liquor dealers, obtained from the dealers by one of Gregor's fellow agents.

7. The basic rule for admitting the testimony of an auditor in cases of this kind is stated in the Manual for Courts-Martial, 1928, as an exception to the general rule that a writing must be introduced to prove its content, and in pertinent part reads as follows:

"When the original consists of numerous writings which can not conveniently be examined by the court, and the fact to be proved is the general result of the whole collection, and that result is capable of being ascertained by calculation, the calculation may be made by some competent person and the result of the calculation testified to by him, as, for instance, if the fact to be proved is the balance shown by account books. In such cases it must be shown to the court that the writings are so numerous or bulky that they cannot conveniently be examined by the court; that the fact to be proved is the general result of the whole collection; that the result is capable of being ascertained by calculation; that the witness is a person skilled in such matters, and capable of making the calculation; that he has examined the whole collection and has made such a calculation; and that the opposite party has had access to the books and papers from which the calculation is made. * * *"
(Par. 116a, p. 119, MCM 1928)

To render evidence of this nature competent a condition precedent is the establishment of the competency of records on which the computation is based (20 Amer. Jur. 400; Fournier v. United States, 58 F (2d) 3, 6; Hartford Accident and Indemnity Co v. Collins-Dietz-Morris Co. 80 F (2d) 441; Berthold Jennings Lumber Co. v. St. Louis I. M. & S. Ry. Co. 80 F (2d) 32, 445, certiorari denied 297 U.S. 715; United States v. Michener, 152 F (2d) 880 and cases therein cited; CM 202601 Sperti, 6 BR 179-180).

The mere fact that the document was an official report did not make it admissible (par 117a, p 120, MCM 1928).

The testimony of persons who participated in the audit and in the investigation of which it was a part, and the contents of Prosecution Exhibit 5 itself show that the data incorporated in this exhibit and used in arriving at the findings therein set forth, consisted in large and material part of document dehors the records of the Fund. As to the authenticity of many of them there is a total lack of evidence. That some were mere records of hearsay obtained by interviews, or the recorded conclusions of investigators, based on unidentified records is shown. The Council is compelled to conclude that Prosecution Exhibit 5 contains no competent evidence of the financial condition of the Fund, was erroneously received in evidence and cannot be considered as providing any basis for inference that the accused embezzled money as alleged.

8. There remains for consideration the question whether or not, independently of Prosecution Exhibit 5, the record contains evidence of a money shortage or other evidence from which it can be inferred that the accused embezzled money of the Fund as alleged. The principal evidence pertinent in this connection is as follows:

a. Testimony of some of the creditors of the Fund showing outstanding bills as of 30 April 1948 against the Fund as follows:

| | |
|--------------------|-----------------------|
| Johnston & Buscher | \$4,366.50 (R 88-90) |
| American Factors | 2,855.71 (R 97, 98) |
| Hotel Import Co | 2,153.27 (R 102, 108) |
| McKesson & Robbins | 592.35 (R 113) |
| Pacific Liquor Co | 963.80 (R 120) |
| Total | <u>\$10,931.63</u> |

b. The statement in the testimony of CID Agent Charles H. Gregor that the accused on the evening of 28 April 1948, during a search of accused's quarters for the council book of the Fund which was missing, told Gregor "I took some money from the Locker Fund which I shouldn't have." (R 147).

c. Testimony of Dinwoodie to the effect that during a "holiday period" he gave accused approximately \$1,500 in cash, representing sales of the Fund covering a period of two weeks, and later received back from the accused approximately \$1,000 (R 180-181, 212).

d. Testimony of Dinwoodie that, during the fall of 1947, in response to a telephonic request of accused, he delivered \$35.00 to accused at the "Wagon Wheel" restaurant in Honolulu, which accused knew to belong to the Fund and was never repaid so far as Dinwoodie knew (R 185, 186).

e. A check dated 31 October 1947 in the amount of \$153.00, drawn on the Bishop National Bank of Hawaii, Hickam Branch, by the Officers' Club, Fort Kamehameha, T. H., James F. Beers, Captain, CAC, Secretary,

payable to the order of Captain E. E. Anderson, and indorsed "Capt E. E. Anderson" (Pros. Ex. 7). This check was drawn by Captain Beers in payment for liquor purchased from the Fund for the Fort Kamehameha Officers' Club. It was stipulated that this check was presented for "payment or deposit" at the Hickam Field Branch of the Bishop National Bank of Hawaii (R 154). An examination of the photostatic copy of the check appended to the record of trial discloses a perforated bank cancellation showing that the check was paid by the bank on 12 November 1947 (Pros. Ex. 7). The bank deposit slips of the Fund for November 1947 fail to show that the check was deposited to the credit of the Fund, the deposit of a like amount of money or any cash deposits equal to the amount of the check (Pros. Ex. 3).

f. A check, dated 31 August 1947, in the amount of \$376.64, drawn on the Bishop National Bank of Hawaii, Honolulu, by the Fort Shafter Officers' Club, L. H. Ripley, Secretary-Treasurer, payable to the order of Major James W. Scales, Acting Treasurer of Entertainment Committee, and bearing indorsement on the reverse side as follows:

"Payable only to:
 Captain E. E. Anderson
 James W. Scales
 Major AGD"

and

"Capt E. E. Anderson"

The photostatic copy of the check attached to the record of trial shows a perforated bank cancellation indicating that the check was paid on 2 September 1947 (Pros. Ex. 8). This check was drawn in payment for liquor obtained from the Fund by the Fort Shafter Officers' Club. There is no record that this check was deposited to the credit of the Fund. A duplicate deposit slip, dated 5 September 1947, included in the records of the Fund, shows a deposit of \$225.00 in cash on that date to the credit of the Fund. Another duplicate deposit slip, dated 10 September 1947, shows a deposit of \$278.10 in cash to the credit of the Fund (Pros. Ex. 3). There is no evidence connecting these cash deposits with the check.

The evidence shows that it was the practice of both the Officers' Club, Fort Kamehameha and the Fort Shafter Officers' Club, in issuing checks in payment for bills for liquor purchased from the Fund to inscribe thereon indorsements to the effect that the checks were for deposit only to the credit of the Fund, and the evidence for the prosecution indicates that, so far as the persons who issued these two checks were concerned, the failure so to indorse them was inadvertent.

The signatures "Capt E. E. Anderson" on the foregoing checks were not proven directly to be the signatures of the accused. The court had before it at least one signature which it could have used for purposes of comparison, namely the signature on Prosecution Exhibit 6. The record discloses that the law member referred to as available to it for such use the signatures on numerous checks included in Prosecution Exhibit 4, which were withdrawn at the conclusion of the trial (see par 13, infra).

9. Accused elected to remain silent and did not testify in his own behalf at the trial. Counsel for the defense, however, requested the court to consider the statement accused had made out of court to Gregor on 29 and 30 April 1948 and which had been admitted in evidence as Prosecution Exhibit 6 (R 262). In that statement accused explained in some detail the operation of the Fund, did not deny that a "shortage" of about \$13,000 existed in the Fund, but asserted that he had "nothing to hide" was "innocent" and denied ever borrowing "a thin dime" from the Fund (Pros. Ex. 6, p 29). Gregor testified that he had shown to accused a \$353.00 check drawn by the Fort Shafter Officers' Club in payment of liquor and indorsed to Captain Anderson by Major Scales, and that accused had stated that the bill was long overdue, and that he, the accused, in the meantime had paid the Fund and that the check merely represented reimbursement to him "of what money he had already paid the club" (under-scoring supplied). No reference to this check appears in Prosecution Exhibit 6. The check referred to by Gregor is probably the check for \$376.64, described in more detail in paragraph 8f above.

10. While testifying as a prosecution witness, Dinwoodie upon cross-examination identified a document as a true copy of a sworn statement made by him on the 30th of April 1948 to the CID Agent, Gregor. It was offered in evidence by the defense for the purpose of impeachment and was received in evidence as Defense Exhibit 2 (R 199-201). In that statement Dinwoodie confessed that he had embezzled regularly from the Fund. Specifically, he admitted that he took and kept for his own use "overages" (apparently cash paid by members for purchases made during previous weeks, not shown on the record of sales covering the week of payment), which he estimated to have averaged approximately \$25.00 per week; that he took for his own use liquors, both in case and broken case lots, some of which he and his friends consumed, and some of which he sold, these approximating in value \$50.00 a week. He recounted specific instances of such sales, and stated that in November 1947 he had lost his entire pay check in gambling, and borrowed money, which he paid with whiskey and money which he took from the Fund. He also said that he had sold liquor to a sergeant at the Officers' Club, averaging two cases a week valued at about \$75.00 or \$80.00. In response to a question by Gregor as to the method used "to keep Captain Anderson from ascertaining the shortage" he stated:

"I did not send him a monthly statement from the liquor wholesalers but would send him bills covering particular shipments or more often, the only bills that he saw were the ones which came to him instead of to me as was the usual procedure. He never asked to see them."

Defense Exhibit 2 evidently was introduced to impeach Dinwoodie by showing that he made statements before the trial which were inconsistent with his testimony on the stand. Thereafter the prosecution introduced as its Exhibit No. 10 another statement made by Dinwoodie on 29 April 1948 upon his initial interrogation which was self exculpatory in nature. It contained assertions which, while not directly charging the accused with embezzlement of the property of the Fund, were clearly calculated to suggest it. Dinwoodie related statements to him by others seriously reflecting on the integrity of the accused. The content of the document as a whole was such as, if credited, to be highly damaging to the accused. Apparently the prosecution intended by its introduction to

show that Dinwoodie had previously made statements consistent with his testimony at the trial. It was clearly inadmissible. In order to repel the impeaching effect of a prior inconsistent statement by means of a prior consistent statement, it must appear that the latter was made before there was any motive to misrepresent (Ellicot v. Pearl, 35 U.S. 271, 291-292, 10 Peters 412, 438-440). The circumstances under which the statement of 29 April 1948 was obtained clearly indicates such motives. It is exceedingly doubtful that the cautions of the law member were sufficient to preclude prejudice to the accused or to render harmless the erroneous admission of the document into evidence.

11. Summarizing the competent evidence in the record, there is a showing that the Fund on 30 April 1948 owed to wholesale liquor dealers \$10,931.63; and possibly that the balance in the bank to the credit of the Fund on that date was \$588.33; but there is no competent evidence of the value of the other assets of the Fund. It appears that Dinwoodie made an inventory of the stock of the Fund on 8 April 1948, and gave the accused a longhand note (Def. Ex. 4) in which he had made entries opposite "Cash on hand" and "Present Stock" of "11,556.23" and "663.20", respectively. In his testimony Dinwoodie did not state that this report was correct, and admitted that the entry under "Cash on hand" was incorrect. This document has no evidentiary value as proof of the condition of the Fund. Obviously it was introduced by the defense to discredit Dinwoodie and was, at most, impeaching evidence, not competent as to the substantive issues of the case (CM 296457, Leavitt, 58 BR 117, 128; CM 328121, Wilson, 76 BR 287, 296; CM 329711, Tumang, 78 BR 145, 147).

There was received admissible evidence from which it may be inferred that the accused received the proceeds of the two checks described in paragraph 8e and f, supra. That portion of the documentary evidence introduced by the prosecution of which copies accompany the record as exhibits does not show that the proceeds of those checks were used for the benefit of the Fund. However, it does not show that they were not so used and the only indication of any showing of the disposition of either of these items is that contained in the testimony of Gregor (apparently referring to the proceeds of the check described in 8f, supra) that the accused had told him a check endorsed by Major Scales to him merely represented reimbursement for an account he had already paid the club.

The testimony of Dinwoodie that the accused had received from him on one occasion cash, about \$500.00 of which was not returned, and on another occasion \$35.00, which so far as he knew had not been returned, are entitled to little weight. The credibility of this witness is subject to serious question; and in any event the evidence shows that not all of the deposits in bank or payments by the Fund were made by Dinwoodie.

The statement of Gregor in his testimony at the trial that on 28 April 1948 the accused made to him the admission that he had taken money from the Fund (see par. 8b, supra), also is considered by the Council as entitled to little or no weight. The evidence shows that Gregor interrogated the accused at great length on 29 and 30 April 1948, with a

stenographer present and recording the answers of the accused; that the accused was advised of his rights under the 24th Article of War, and, stating that he thoroughly understood them, voluntarily answered every question propounded. Nevertheless, in the course of this investigation extending over parts of two days, Gregor made no reference whatever to any such admission. It is hardly reasonable to infer that, had the accused on 28 April made any such admission as Gregor attributed to him at the trial, Gregor would have failed to advert to it and to seek an explanation of the assertions made by the accused during the interrogation of 29 - 30 April, that he had nothing to hide, was innocent and had not borrowed "one thin dime".

Although it was apparently unknown at the time of the trial, and on the record the testimony of Gregor stands unimpeached, the Council feels that in the interest of justice it cannot ignore facts concerning this witness, indicated in the review of the staff judge advocate and supported by inclosures to the brief submitted by counsel for the defense and forwarded with the record. These show that Gregor was sentenced on 1 February 1943 by Judge Wallace, General Sessions Court of New York, to serve a sentence of from five to ten years in a state prison, based on conviction of the crime of grand larceny, first degree; and that on 23 May 1946 Gregor was released from Sing Sing Prison to permit his induction into the Army. Among the papers submitted in this connection is a copy of a statement by Gregor confessing to the commission of frauds against his employer by causing to be presented and paid scores of fraudulent claims, aggregating in amount approximately \$44,000.00.

12. After careful consideration of all of the evidence in this case the Council feels compelled to the conclusion that, although gross mismanagement and neglect by the accused of the affairs of the Fund are proven, and many suspicious circumstances are shown, the evidence wholly fails, directly or by inference, to show the conversion to his own use by the accused of money as alleged. In addition, the record is replete with errors in the admission of evidence which was incompetent and directed to the most vital issues of the case and which cannot but have materially prejudiced the substantial rights of the accused.

13. Finally, the Council feels it is imperative to note that the record of trial (see par. 5, supra) shows that many of the documents received in evidence were withdrawn, and copies of only a part of them forwarded with the record. It is difficult to determine just what the evidence before the court was in many and probably vital respects. The statements of the law member in this connection are quite confusing. For example at page 62 is an entry showing that the law member overruled the objection of the defense to the introduction of Prosecution Exhibits 3 and 4 and that, in response to a question by the defense as to whether such records would take the place of the audit (Pros. Ex. 5), the law member replied "No, they will supplement the audit.". The law member subsequently (R 63) announced that Prosecution Exhibit No. 3 had been admitted in evidence, and with reference to a request of the prosecution that the writings constituting this exhibit be withdrawn at the conclusion

of the trial, and true copies substituted therefor, the law member stated:

"The court will rule on that later on, because if it appears to the court that the audit embraces all those records and nothing but those records it will be granted. You will make the motion at a future date, but as for now they are admitted into evidence as prosecution's Exhibit 3."

Following interrogation of the witnesses, Gregor and Captain Cue at some length, with reference to the identity of the papers introduced as Prosecution Exhibits 3 and 4, the law member announced:

"The court would desire they be authenticated. In regard to your previous request to withdraw these bulky items, the court would like to state that these folders cannot conveniently be examined by the court. The only reason for their introduction is to prove the fact that is stated therein to be the general result of the whole collection, that is the audit. And since that result is capable of being ascertained by calculation and the calculation already been proven to have been made by some competent person, although the result of that calculation has not as yet been testified to, it will show the balance shown by the account books. Since the writings are so bulky and numerous and they cannot be conveniently examined by the court, and the fact that they would be proved to be the general result of the whole collection, the court does not desire they be incorporated into the record. They will be withdrawn at the conclusion of the trial, and we will take the calculation of the audit based on these bulky items. Opportunity will be afforded the defense to cross examine witnesses upon these books and papers, to question any or all of them, as he may desire." (R 72)

After some discussion the law member announced that Prosecution Exhibit 4 had been admitted:

"Subject to being withdrawn at the conclusion of the trial, and their only purpose of admission as just previously stated." (R 72)

Later after the prosecution had rested and the defense had raised a question as to the proof of the signatures on checks introduced as Prosecution Exhibits 7 and 8, the law member announced:

"No recourse will be made on assumption in the instant case, however, the court has before it prosecution's Exhibit 4. The prosecution's Exhibit 4 contains numerous checks signed by the accused as custodian of the Channel Locker Fund. Is it the intention of the defense to state that these checks are not the handwriting of the accused? It is believed by the court there is sufficient evidence before it to show that these are checks signed by the accused as custodian of the Channel Locker Fund, or the Channel Fund. When the genuineness of the handwriting of any person may be involved any admitted handwriting of such person shall be competent evidence for a basis of comparison by the court to prove or disprove such genuineness. The motion is overruled."(R 215)

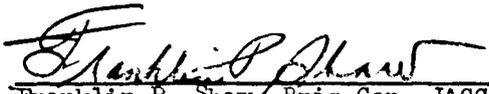
It is apparent that, at least insofar as the checks included in Prosecution Exhibit 4 are concerned, papers, neither the originals nor copies of which are available to us for examination, were introduced and treated by the law member as substantive evidence in the case, in connection with issues separate and distinct from the computations of the audit, and there is indicated the possibility that other documents contained in Prosecution Exhibits 3 and 4 may have been so considered and relied on by the court in arriving at its findings. The possibility is indicated that the findings in this case were based on evidence, much of which is not available to those charged with the duty of appellate review of the case. In this connection the following extract from an opinion of the Board of Review cited in CM 328619, Horton (77 BR 167) is pertinent:

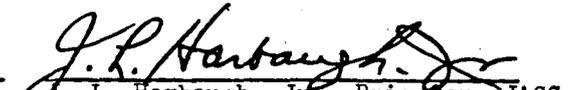
"Prosecution's Exhibits 5 and 7, and Defense Exhibit A are represented, by references in the record and by the index thereto, to be written pre-trial statements by accused. Respecting the fatality of the omission of exhibits of this nature from the record as forwarded for review under Article of War 50 $\frac{1}{2}$ the Board of Review has held:

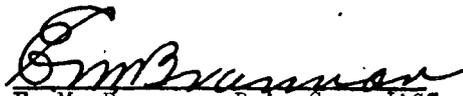
"It is evident that this statutory review could not be performed in this case with respect to the convictions of the offenses involved in Charges I and II and their specifications for the reason that there is no complete record of trial upon these charges and specifications within the contemplation of either Article of War 33 or Article of War 50 $\frac{1}{2}$. * * * Through no fault of his, accused has been, by the deficiency of the record, deprived of the right conferred by law to have the complete proceedings at his trial upon these charges and specifications reviewed in an appellate capacity. This right is of a highly substantial character, and it must be concluded that its denial to him is fatally injurious within the contemplation of the 37th Article of War. In cases in which records of trial were incomplete in the sense that it appeared that they had been in part prepared from unauthorized sources, it has been held by the Board of Review, with the concurrence of The Judge Advocate General, that the records were legally

insufficient to support the findings and sentences adjudged (C.M. 156085, Mayo; 156084, Alsup). It has been held by state courts in cases in which there was not an automatic appellate review as is provided for by Article of War 50 $\frac{1}{2}$, that if, by reason of the loss of an important part of a record, a defendant is unable through no fault of his to perfect his appeal, the judgment will be reversed (State vs. McCarver, 20 S.W. (Mo.) 1058; (CM 192451, Hajek) (CM 227459, Wicklund, 15 BR 303)."

14. For the reasons stated The Judicial Council is compelled to hold that the record of trial is legally insufficient to support 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

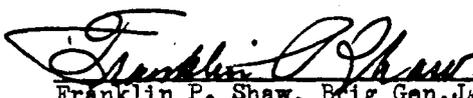
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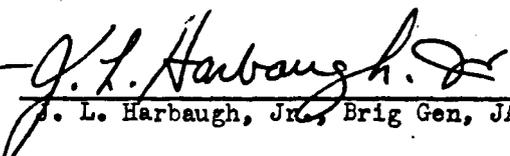
CM 334097

THE JUDICIAL COUNCIL

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

In the foregoing case of Captain Ernest E. Anderson,
O-1003901, 8293d Service Unit, Hawaiian Casual Depot, formerly
a member of the 8265th Service Unit, Hawaiian AG Dept, United
States Army, Pacific, APO 958, upon the concurrence of The
Judge Advocate General, the findings of guilty and the
sentence are disapproved.


Franklin P. Shaw, Brig Gen, JAGC


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


E. M. Brannon, Brig Gen, JAGC
Chairman

13 July 1949

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


THOMAS H. GREEN
Major General
The Judge Advocate General

26 July 1949

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

JUL 29 1949

377

CSJAGH CM 334745

UNITED STATES)

7TH INFANTRY DIVISION)

v.)

) Trial by G.C.M., convened at
) Seoul, Korea, 22 and 23 November
) 1948. To be hanged by the neck
) until dead.

) Private EVERETT HIGGS, RA
) 35813083, 7th Signal Company,
) 7th Infantry Division.)

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 soldier named above and submits this, its opinion, to The Judge Advocate General and the Judicial Council.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Everett Higgs, 7th Signal Company, 7th Infantry Division, APO 7, did, at Camp Sobinggo, Seoul, Korea, on or about 26 August 1948, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Lee Chun Ja, a human being by cutting and stabbing her with an unknown instrument.

He pleaded not guilty to and was found guilty of the Charge and its Specification. No evidence of previous convictions was introduced. He was sentenced to be hanged by the neck until dead, all members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Sanity.

Subsequent to arraignment, but prior to pleading to the general issue, the defense entered a special plea of insanity as a bar to trial and introduced the following evidence in support thereof:

In the month of May preceding the trial, while in his hut, Master Sergeant J. D. Shaffer observed the accused passing by the door with two large rocks in his hand. At the time accused stated he was going to get a "gook." Subsequently, Shaffer saw accused throw a rock down into a shallow culvert and then "take off" around the building. Shaffer heard a commotion which sounded as though a magpie had been hit, but he ascertained that instead, a dog belonging to Sergeant Budda had been struck. Shaffer went after accused, apprehended him, and took him to the orderly room. There, the accused denied to the owner of the dog that he had killed it. The denial was ineffectual and the owner attacked him. When they were separated, accused left, going in the direction of the huts. He was then observed to grasp a broom which was hanging on a nail, and to break off the handle (R 10-11). Thereafter, he entered Hut #9 where Corporal Raymond M. Fernandez was then present. Accused was looking for Sergeant Brudy who was not there at the time. Accused was struck by a revolving fan which was in operation and retaliated by striking the fan with a stick. The blow was of such force that the fan was knocked from the table and broken (R 11-12). Both Sergeant Shaffer and Corporal Fernandez were of the opinion that accused had been drinking (R 11,12).

A report of the foregoing incidents was made to Captain Carl C. Vorlander of accused's unit, and he barred accused from the "EM Club" for thirty days, in an effort to prevent him from drinking (R 13). During the thirty day period, according to Captain Vorlander's recollection, upon cross-examination, no incidents involving accused were reported to him. Also, accused's section chief and the motor officer reported he was doing a good job (R 13).

With the exceptions of the incident reported to him and the alleged offense in the instant proceedings, Captain Vorlander did not know of anything against accused's record. His investigation of the "dog and rock" case did not suggest to him that inquiry into accused's sanity was indicated, but did lead him to the conclusion that accused "Just * * could not drink." Nothing in accused's conduct, however, had ever caused Captain Vorlander to question his sanity (R 14,15).

Major David P. Lauer, Captain Asher Woldow, and First Lieutenant Harold J. Levy, all Medical Corps Officers, identified Defense Exhibit 2 as a report of their proceedings as a Board of Officers appointed to inquire into accused's sanity. Their testimonial findings and opinions as to accused's sanity are identical to their findings and opinion expressed in the report, and the latter is set forth:

"The patient, Private Higgs, is a markedly withdrawn individual with an emotional flatness and evidence of deep tension. There is a past history indicating the presence of hostile impulses and sadistic tendencies close to the surface but formerly controlled except when the patient was over-indulging in alcohol.

"He shows frequent bursts of laughter inconsistent with subject matter being discussed, and also lack of interest proportionate to the seriousness of his situation.

"This condition has been present for several years, and has progressed from a point of Schizoid Personality to an early Schizophrenia.

"Several episodes of impulsive behavior in the recent past including the episode of the alleged murder indicate that an active psychosis has existed in this man.

"At the time of the alleged offense, the accused, Private Higgs, was not so far free from mental defects, disease or derangements as to be able, concerning the particular act charged, to distinguish right from wrong, or adhere to the right.

"The accused at the time of the instant examination does not possess a sufficient mental capacity intelligently to conduct or cooperate in his defense.

"DIAGNOSIS:

"Schizophrenic Reaction, catanonic type, manifested by emotional flatness and withdrawal, episodes of impulsive, aggressive, sadistic behavior, and chronic alcoholism. Severe predisposition, impairment severe, stress moderate." (R 17,20, 23-25; Def Ex 2)

Major Lauer and Captain Woldow admitted that their experience in psychiatric work was limited; and Major Lauer added that his principal field was internal medicine (R 18,22).

Lieutenant Levy admitted upon cross-examination that, in his preliminary examination of accused, he had concluded that accused was sane (R 26). He stated, however, that this was a tentative opinion based upon his observation of accused in a controlled environment, and that subsequently, upon receiving reports of his behavior in an

uncontrolled environment, his opinion changed. In his preliminary examination, however, he did have knowledge of the "dog and rock" incident, and of accused's involvement in a murder (R 27,29).

Sergeant Jim R. Mayfield served as accused's guard on a trip to Japan from Korea and return, which was concluded on 13 November. On the return trip, accused stated to Mayfield that "he didn't feel as though he committed any crime or done anything wrong. It seemed more or less a dream to him. He did not feel that he had done anything wrong." Mayfield observed that accused did not seem to realize the seriousness of the situation confronting him, and was very jolly and did not seem to have any worry at all on the trip back (R 33-34).

Upon cross-examination, Mayfield answered in the negative the following question: "Sergeant, did you at any time hear the accused make the remark that he was going to beat this case on an insanity plea?" (R 36)

Rebuttal.

Captain R. V. Fitzgerald and Captain Franklin M. Phillips identified Prosecution Exhibit B as a report of their neuropsychiatric examination of accused (R 35,39). In pertinent part the report states:

"* Observation at this hospital has disclosed no evidence of schizophrenia. He has been conscious, well-oriented and rational. His behavior on the ward has been in no way unusual. On 22 October 1948 he was presented to the Neuropsychiatric Disposition Board at which time Doctors Waggoner and Aring, Civilian Consultants in Psychiatry and Neurology from the Surgeon General's Office, were present. It was the unanimous opinion that the patient was free of psychosis and should be returned to Korea for whatever legal procedure might be contemplated.

"* It was found that this man is so far free from mental defect, disease and derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right. He is also considered to be fully capable of participating in the conduct of his own defense."
(Pros Ex B)

They expressed the same opinion in their testimony (R 35-36,38-39). On cross-examination Captain Fitzgerald testified that in the eight-day period in which he had observed accused, he was also observing 150 other patients. Although thus limited, his observation of accused was nevertheless sufficient for his diagnosis. Captain Fitzgerald also recounted

an incident in which accused tore the ticking on his bed and hit his head against his cubicle. In Captain Fitzgerald's opinion this exhibited wilfulness, but he also agreed that the acts were impulsive. When Captain Fitzgerald interviewed accused, he found the latter's answers to questions were not at all irrelevant or illogical, and showed no evidence of the presence of mental diseases. Further, there was no indication that accused was suffering any delusions, false ideas, or hallucinations. Accused was not under the influence of alcohol at any time while he was under Captain Fitzgerald's observation (R 36-37).

Captain Phillips testified that during the period he had accused under observation, he was also observing 35 to 40 other patients. He was aware of the previous diagnosis made of accused and also that accused was charged with the murder of a Korean woman. His opinion that accused was sane was based on interviews with accused. No psychological tests were used, because of lack of personnel and due to the fact that the use of such tests was not indicated. Captain Phillips did not have any information about accused from persons who knew him. The accused's acts of tearing up the ticking in his quarters and going on a hunger strike for a short period after he learned he was going to be returned to Korea, were indicative of a passive aggressive sort of personality, reacting in stress (R 40-42).

Captain William E. Kerns, who conducted the pretrial investigation in the case, interviewed accused on three different occasions during the investigation, and did not observe any words or actions which would indicate that accused was insane. Accused, however, was never under the influence of liquor in his presence (R 43).

The court overruled the plea of insanity in bar of trial (R 44).

4. Evidence.

a. For the prosecution.

At about 2000 hours 26 August 1948, Recruits Benjamin R. Dougherty and Arthur G. Hamon, both of the 7th Signal Company, left Camp Sobinggo, Seoul, Korea, in a jeep. Outside the main gate they picked up three Korean girls and took them to the old 7th Signal Officers' Quarters on Camp Sobinggo (R 50,51,54). Hamon took the jeep back to the company and returned accompanied by Corporal Raymond M. Fernandez. At this time the three soldiers paired off with the three Korean girls. Fernandez, Hamon, and Dougherty identified Prosecution Exhibits C, D, and E as a picture of one of the girls and she was further identified as the girl who paired off with Hamon (R 45,54,55).

Kim, Ok Ja, otherwise known as "Jackie," and Lee, Chung Ja, also known as "Susie" testified that they and a third Korean girl, Lee, Chun Ja who was also known as "Cutie" were picked up by two "G.I.s" outside Camp Sobinggo on the evening of 26 August and taken to an empty house in the camp. They identified Prosecution Exhibits C, D, and E as pictures of Lee, Chun Ja or "Cutie." After arriving at the empty house one of the "G.I.'s" left and later returned accompanied by another "G.I." (R 64-68).

At 2130 hours the same night accused had Private First Class Jack Brison, 7th Signal Company, accompany him to the Old Signal Officers' Quarters stating there were some women up there. When they arrived at the old "BOQ" accused went around to the back (R 60-61).

The group at the old Bachelor Officers' Quarters had seen a flashlight coming over an embankment and moved underneath a tree close by the house. Then accused came up and joined the group and announced that he was going to "shack-up" with the girl that Hamon had. Fernandez testified that when accused first came over the embankment he struck the girl. Accused berated the girl although she told him she would "shack-up" with him (R 46,47). Accused and the girl moved around to the front of the house where Brison was, and Fernandez, Dougherty, and Hamon started to leave (R 61). Accused was beating the girl and told Brison to get the other "G.I.'s" back. Fernandez told accused that the girl was "okay" and accused stopped beating her (R 61). Fernandez, Hamon, and Dougherty left the scene and Brison followed them (R 47,52, 56,61). Kim, Ok Ja and Lee, Chung Ja had observed accused beating Lee, Chun Ja, and when another "G.I." interrupted, observed accused beat him. They became frightened and hid in a bush where they heard Lee, Chun Ja calling for Lee, Chung Ja. The latter did not answer as she was frightened. The calls weakened and stopped (R 65,67). Within a few minutes after leaving the area Fernandez, Dougherty, and Hamon heard a shriek coming from the direction of the Old Officers' Quarters (R 47,52,56). Accused came running down the road, seized Brison by the sleeve of the shirt and said he had killed the girl. The following morning Brison discovered a bloodstain on his shirt sleeve (R 61,62). Accused and Brison overtook Fernandez, Dougherty, and Hamon who were running in the direction of the company area (R 48,52,57). At that time, according to Fernandez, accused stated, "Let's get out of here; she's dead." (R 48). According to Dougherty, accused stated: "Don't go up there, she's dead," or something like that. Hamon was more explicit and testified that accused said, "Come on, I have killed her; she's dead." (R 57).

Later Brison and Fernandez saw accused in the latrine. At the time Brison observed what appeared to be bloodstains on accused's hands

(R 62). Fernandez did not observe anything of this nature but testified that accused had a bar of soap in his hands and said "If you say anything about this, I'll do this," accompanying his words by squeezing the bar of soap (R 48).

Private Arthur I. Pinard, 32nd Infantry, who was at Camp Sobinggo on the night of 26 August, heard screams emanating from the area about the old Bachelor Officers' Quarters. He went to the main gate, reported the incident to the patrol, and went along with the patrol to investigate. When they arrived at the old Bachelor Officers' Quarters they found Lee, Chun Ja, who was known to Pinard from the time he served as an "MP." She was still alive, gasping for breath. "Sounds" were coming from her, "gurgling sounds"; "She was gasping through blood," and it seemed as though her eyes were moving. While Pinard was watching the body, the sounds ceased, there was no further movement of the body, and Pinard knew "she had died." (R 69-71).

Captain Archibald S. Miller was summoned to the scene and observed the body. He identified Prosecution Exhibits C, D and E, as pictures of the scene taken in his presence and testified that he was familiar with the person represented (R 73,74). The pictures show the body of a woman sprawled upon the ground, her dress in disorder, and the upper front portion of the body, and the face, apparently stained with blood.

Lee, Kyun Ja, also known as "Lucille," testified that at about 11:20 on the night of 26 August 1948 she was taken by an "M.P." to the front of an empty house in the Sobinggo area at Seoul to identify a dead girl. She identified Prosecution Exhibits C, D and E as pictures of Lee, Chun Ja, and added that Lee, Chun Ja was the person whom she identified on the night of 26 August, and that when she made the identification Lee, Chun Ja was dead (R 68,69).

The prosecution announced that "* * as Prosecution's Exhibit O, it is stipulated by and between the prosecution, the defense and the accused, that were Captain Sherman B. Lindsey, Captain, Medical Corps, Surgeon of Special Troops, 7th Infantry Division, APO 7, present, he would testify as follows:"

The oral presentation of the stipulation is not set forth in the record.

Prosecution Exhibit O which is attached to the record of trial is set forth:

"This is to certify that I was called to see the body of a Korean Woman near 7th Signal area on 26 August 1948 at about 2300 hours. She was lying on her abdomen in a pool of clotted

blood. On her neck was clotted blood and wound in the neck. I did not examine the wound. At the time I arrived she was dead. The body was taken to the 34th General Hospital several hours later.

/s/ Sherman B. Lindsey
 SHERMAN B LINDSEY
 Captain, MC
 Surgeon, Special Trps" (Pros Ex O)

The prosecution also announced its tender to the court of Prosecution Exhibit P "another bit of stipulated testimony, that if Mendel Krim, Medical Corps, the laboratory officer of the 34th General Hospital, APO 1054, were present, he would testify as follows." The oral presentation of the stipulation is not set forth in the record.

Prosecution Exhibit P, attached to the record, is as follows:

"1. This is the body of an unidentified Korean female about 20 years old. The deceased is about 62 inches tall and weighs about 140 pounds. She is a well developed female and has black long hair. The deceased is wearing an American style blouse and skirt. She also has on a pair of tightly fitting panties that are on above her waist. The extremities and upper portion of the body are covered with mud and blood. Rigor and livor mortis are present. Blood is exuding from her mouth. The following wounds were found:-

- a. A deep penetrating wound of the lower left chest posteriorly about 5 cm to the left of the spine and about 2 cm long.
- b. A puncture wound of the right lower chest anteriorly about 3 cm to the right of the sternum and about 2 cm long. Depth of wound cannot be determined.
- c. A superficial laceration of the right cheek about 2 cm long.
- d. A superficial laceration running transversly across the lower portion of the neck and about 10 cm long.
- e. A perforating wound of the left side of the neck at the angle of jaw about 2cm long which communicates with the interior of the mouth.

"2. The injuries described above appear to have been caused by a sharp instrument. The wound edges are extremely sharp and regular. Death was apparently due to hemorrhage, resulting from above-described wounds." (Pros Ex P)

Immediately after the reading of the stipulated testimony of Mendel Krim, the Prosecution stated: "It is also stipulated by and between the prosecution, defense, and accused that this laboratory analysis relates to the same Korean national shown in the pictures marked Prosecution's Exhibits C, D, and E." (R 92)

Captain William E. Kerns testified that he was the pretrial investigating officer in the case, and that during his investigation in the early part of September, he interviewed accused on three occasions.

At one of the three interviews Captain Kerns had "a question and answer session" with accused at the inception of which he explained to accused his rights under the 24th Article of War. Accused thereupon stated that he did not wish to make a statement. Captain Kerns had in his possession at the trial a copy of the questions asked of and the answers made by accused at the interview. Concerning specific questions and answers appearing therein Captain Kerns testified as follows:

- "Q. Now referring to page 2 of the question and answer session, did you find this question, 'What was your mental attitude?'
- A. Yes, I do.
- Q. At what time did that question have reference, Captain Kerns?
- A. That had to do with his mental attitude at the time that he was on the way up to the scene of the crime and while he was at the scene of the crime.
- Q. What answer appears?
- A. 'I felt OK. I was not angry.'
- Q. On page 3, does the question 'What became of the weapon' appear?
- A. Yes, it does.
- Q. What answer was given to that question?
- A. 'It was thrown away. It was a T&L knife (linesman knife) wooden handle." (R 75,76)

With specific reference to the disposition of the knife he testified on cross-examination:

- "Q. After he made that statement and you procured this information from him. I'd like to know a little more about what went on at the time he identified the knife. What was the discussion that is on page 3. Why did he mention the knife at that time?

- A. We were talking about various things and came down to the place and I asked him what became of it, the weapon. At the time these questions were taken, I did not have access to the CID report and did not know anything except rumor about the case.
- Q. Did you ask him whether he secured this information himself or was it hearsay?
- A. What information this hearsay information refers to?
- Q. On page 3 in regard to the knife?
- A. It is not hearsay. I asked him what became of the weapon. He replied it was thrown away..
- Q. But did he throw the knife away or did someone else throw it?
- A. No, sir, he led me to believe he threw it away.
- Q. Did he say, 'I threw the knife away'?
- A. I believe he did. He said, 'I threw it away.'" (R 76,77)

Harry V. Enston, 25th Criminal Investigation Detachment, testified that on 27 August 1948 he was detailed to investigate the death of a Korean girl, and that in the course of the investigation his attention was attracted to accused. Subsequently at 0125 hours, 28 August 1948, Enston secured a statement from accused. Prior to taking the statement Enston apprised accused of his rights under Article of War 24, and thereafter employed no force, threats, violence, or promises to induce accused to make the statement. Enston identified Prosecution Exhibit G as the statement which he secured from accused, and stated that the initials appearing on each of the first five pages thereof were the accused's initials and were placed thereon by accused, that the statement was signed by accused in Enston's presence and that the statement was sworn to before Captain Harry J. White, Chief of the "CID," a Summary Court officer (R 77-79).

Upon cross-examination Enston testified that he learned of accused's implication in the murder at 11:00 p.m., the 27th of August, but thirty minutes prior to the time he interrogated the accused, and that, together with the fact that accused consented to give his statement, explained the unusual hour, (0125 hours) at which the statement was finally typed by the stenographer. In addition to Enston and the stenographers, Agent Barnicle was present. Enston admitted that certain of accused's answers contained in the statement appeared to be conclusions of accused. With reference to questions specifically directed to the homicide, Enston testified as follows:

"Q. 'Q. Did you have the knife in your hand when you first saw them?'

'A. I don't know whether I did or not. I don't remember getting it in my hand.' 'Q. Do you remember the first time you cut the girl?' 'A. No, I don't.'

A. Further back in his statement, he states that he does, and that he did have a knife in his hands at the time." (R.80)

Enston would not say that his questioning over a period of two and one-half hours drove the conclusion into accused's mind. The statement was admitted in evidence subject to being stricken, in the event accused's testimony should establish that it should not have been admitted (R 81).

After being apprised of his rights, accused elected to testify for the limited purpose of showing the circumstances under which he had made the statement in issue. He denied that Agent Enston read and explained the 24th Article of War to him but stated that Enston told him that the 24th Article of War meant either "I [accused] did talk or I [accused] didn't talk and that was a brief way of putting it to me [accused]." In any event, Enston did not have the book with him. Accused had been with Brison all day and night on 27 August and up to "1:25" of the 28th. During that time, the question of the murder came up and accused found out "who all was there, why they were there and how come I was to go there." With reference to his recollection of the event accused vaguely remembered leaving the company and arriving on the scene. He did not remember hitting or cutting anyone. He made his statement because he did not want to get anyone else mixed up in it, and because he had gotten "a lot from the other boys. * * [He] had got all of them." His statement was made "on what someone told [him]." Some information was obtained from Brison, and some information was obtained from the interrogation of Loomis by Captain Miller, which interrogation was conducted in accused's presence. When accused drank he forgot things, would not know what he had done, and as a result he made the statement because he did not want to mess up someone else for something he could have done. The contents of the statement did not reflect what he remembered. The reason he made mention of a knife to Captain Kerns was that he had been accustomed to carrying an "Army T & L knife" and "didn't have the knife the next day." He could have lost the knife, did not remember having it "that day," and did not recall having any use for it (R 81-84).

In response to the question "Do you have any conscious recollection of striking that girl?" put to him by defense counsel, accused answered "No, I do not." The next question by the defense counsel "Were you angry at the girl?" was unanswered, being interrupted by the following colloquy:

"LAW MEMBER: You offered this witness for the purpose of showing whether or not this statement is voluntary or not, and you are going far afield and making the accused wide open to cross-examination by the trial judge advocate.

DEFENSE: I am showing that this statement reflects the conclusions of the accused.

LAW MEMBER: You offered the witness for the purpose of showing whether or not the statement was voluntarily made." (R 84)

Accused thereafter stated with reference to the voluntary character of his statement:

"Well, sir, with a sentence like this over someone, it is enough to put him in fear somewhat. They did bring, this CID, at the 25th, they did bring a blackjack into the room and stated that they would get rough if I didn't talk and they also said they had witnesses to convict me--whether I talked or not, they could go ahead and convict me, so I made the statement." (R 84)

Upon cross-examination he reiterated that Enston told him that under Article of War 24 he either "talked or did not talk," but the accused added that after reaching the office "he [Enston] more so put it to me * * that I [accused] did have to talk." Accused also testified that he dimly remembered leaving the company, but did not recall arriving at the scene. He did not recall how he returned to the company, but it seemed as though he was "running or something." He did not actually remember anything until the next morning when he "vaguely remember(ed) running from someone," but he did not know why he was running. He recounted that a week earlier he had taken a knife from a company truck. He described the knife as an "Army T & L 29, a folding knife." and admitted that it was missing after the event in question. He reiterated that he could have "done it" but added that he did not see any reason why he should. He identified his initials on the first five pages of the statement and his signature on the sixth page. He stated that he read the statement and fully understood its contents (R 85-87).

In his statement accused admitted that on the night in question he went to the old Officers' Quarters where he saw a group of three soldiers and two Korean girls, and that he slashed one of the girls two or three times with a knife. He did not recall clearly all the details of the incident as he had been drinking.

On 30 August, Enston and Barnicle went to the 7th Division Stockade and asked accused to pose for pictures at the scene of the

crime. Accused acquiesced and various photographs were taken at the scene in some of which accused did the arranging. Concerning the photographs in which accused did the arranging Enston testified as follows:

- "Q. Show the court some of those in which the accused did the arranging.
- * * *
- A. Exhibit Y2 taken by the photographer, Cramer of the 123rd Signal, the accused did take this pose himself--where he came down over the hill.
- * * *
- A. This Y4, Private Higgs demonstrating to the agent how he grabbed the victim on the night of the 26th of August 1948. Exhibit Y6, Private Higgs demonstrating to the agent how he held the victim on the ground and beat her prior to the cutting. Exhibit Y8, Private Higgs pointing to the place where he thought he, vaguely, stabbed the girl on the night of the 26th of August 1948. The dark portion here (pointing to picture) is the blood stains on the ground. Exhibit Y10, Private Higgs in the background showing how he grabbed Brison by the right arm of the shirt thereby leaving bloodstains on Brison's right sleeve. Exhibit Y11 showing Private Higgs and Brison as they were about to pass the other men when Private Higgs stated, 'Come on, let's go; she's dead.' Exhibit Y12 showing the approximate area where Private Higgs stated that he had thrown the weapon that he had used to assault the girl. This picture here shows the experts using mine detectors, trying to locate the weapon." (R 90)

These pictures were admitted in evidence as follows: (Y2, Pros Ex H; Y4, Pros Ex I; Y6, Pros Ex J; Y8, Pros Ex K; Y10, Pros Ex L; Y11, Pros Ex M; Y12, Pros Ex N; R 91). The defense objected to both the admission of the photographs and the printed matter contained thereon, and the court directed that the printed matter be removed.

b. Evidence for the defense.

Accused elected to testify concerning the circumstances under which the pictures were taken. Prior to direct examination, Defense Exhibits 3 and 4, the written descriptions which had been affixed to Prosecution Exhibits I and K prior to their introduction, were received in evidence. The descriptive matter set forth in Defense Exhibit 3 is as follows:

"Subject, Pvt Everett HIGGS, demonstrating to Agent in white shirt how he grabbed the victim on the night of 26 August 1948."
(Def Ex 3)

The descriptive matter in Defense Exhibit 4 is as follows:

"Subject, Pvt Everett HIGGS, pointing to place where he thought he fatally stabbed victim on night of 26 Aug 1948. Blood stain on ground is where victim's body was found." (Def Ex 4)

Concerning Defense Exhibit 3 accused testified as follows:

- "Q. I hand you Defense's Exhibit 3, and with it Prosecution's Exhibit I and will you state to the court what, if anything, you told the agent whose picture appears therein as to your actions pertaining thereto.
- A. Well, sir, he brought me up here and these boys was there. They showed the agent what position they were in, so this agent asked me did I know how I got this girl when she was cut and I said no. He says, 'Take hold of me someplace,' and as he was a short guy, I just reached up and laid my hand on his head, and they take my picture." (R 96)

He added that the locus of the picture designated on Prosecution Exhibit K and his pose therein were directed by the agent. He had no personal recollection of "that incident," and was merely standing by a spot on the ground "pointing to it at the direction of the agent."

On cross-examination accused stated he had no idea of whether the pictures were accurate reproductions of the events in question. He would not, however, say they were "all wrong." His testimony concerning Prosecution Exhibits J, I and K is set forth:

- "Q. I'm asking you according to your testimony, do you have any objection to the accuracy of that reconstruction of the scene of the crime marked Prosecution's Exhibit J; do you object to it?
- A. Well, sir, I don't think they should have put this on and made a statement that I made these statements.
- Q. Aside from that, are you going to tell this court that that was not the way it was?
- A. No, I am not going to tell.
- Q. You are not going to say that is not the way it was. As far as you know, that it may be an accurate reconstruction of the scene of the crime?
- A. As far as I know.

- Q. As far as you know, thank you. I hand you herewith Prosecution's Exhibit I. Do you have any objections to the accuracy of that reconstruction?
- A. Yes, because he places me in these positions.
- Q. Are you going to tell the court that is not the way it was-- that is not the way that you grabbed the deceased by the hair?
- A. I can't tell them that it is not; I can't tell them that it is.
- Q. Then you have no testimony to offer?
- A. This guy here tells me to put my hand that way. He tells me all this. See, all these pictures right here, they place me in these spots.
- Q. And are you prepared to tell the court then that is not the way it was? Do you state to the court, Higgs, that it was not the way it was?
- A. Let me see now. These pictures, I don't understand them myself.
- Q. Specifically, Higgs, I ask you again with special reference to Prosecution's Exhibit I, to your knowledge is that picture an inaccurate reconstruction of the manner in which you grabbed the deceased by the hair?
- A. What do you mean by inaccurate?
- Q. Is that picture wrong; is that not the way it was; was it some other way?
- A. I don't know.
- Q. Then as far as you are concerned, that picture may be accurate for all the knowledge you profess at this time?
- A. What I am trying to tell you is that they put me in these positions.
- Q. I am sure that testimony is before the court. I am asking you again, are you prepared to state that is not the way it was--referring again to Prosecution's Exhibit I?
- A. I don't know.
- Q. But as far as you know that reconstruction is accurate as far as any possible knowledge on your part is concerned?
- A. I guess so; I don't know.
- * * *
- Q. We are addressing our remarks about Prosecution's Exhibit K, which shows the accused purportedly pointing at a stain of blood upon the driveway. You state you object to that photograph, Higgs, and what is the ground of your objection?

A. Well, because he put me in this position. He asked me to point at it, and I did, and they take my picture, and he was taking another one's word.

Q. Was there in fact no stain on the driveway at the point in question?

A. I don't remember; it's been so long, whether there is a stain or not.

Q. You don't remember whether there is a stain or not?

A. No." (R 101,102).

Corporal Fernandez recalled as a witness for the defense testified that he was present when the pictures in issue were taken, and that accused gave no instructions in the taking of the pictures, but that accused was posed by Enston from information given to Enston by Fernandez and others present (R 93,94).

On cross-examination Fernandez testified that to the best of his knowledge the pictures are an accurate reconstruction of the events as he saw them (R 94).

Lee, Chung Ja recalled as a witness for the defense testified that prior to her leaving the vacant house she heard no argument and no one was angry with anyone else (R 92).

5. The prosecution's evidence, which stands uncontradicted, shows that on the night of 26 August 1948 at Camp Sobinggo, Seoul, Korea, the accused had one Brison accompany him to an abandoned officers' quarters in the Camp, stating that there were some women up there. Earlier, three other soldiers, Fernandez, Dougherty, and Hamon had gone to the abandoned quarters with three Korean women, including the deceased, Lee, Chun Ja who had paired off with Hamon. When accused arrived at the abandoned quarters, he announced his purpose of "shacking up" with Lee, Chun Ja. Although she voiced her acquiescence in accused's proposal, he berated her and beat her. The others at the scene started to leave and Fernandez remonstrated with accused for striking the girl. After Fernandez, Brison, Dougherty, and Hamon had left, Lee, Chun Ja's two girl companions who were hiding in a bush, heard Lee, Chun Ja calling one of them by name, but the calls gradually weakened and died away. Fernandez, Hamon, and Dougherty were proceeding toward their company area when they heard a shriek coming from the old Officers' Quarters. Brison was following them at a distance when he was overtaken by accused who seized him by the arm and said he had killed her. The following morning Brison discovered a bloodstain on his shirt sleeve where it had been seized by accused the previous night. Accused with

Brison hurried on and caught up with the other three soldiers. At this time, he made reference to the girl being dead, and according to Hamon, stated that he had killed her. Later, in a latrine, Brison observed what appeared to be bloodstains on accused's hands. At this time, accused, in a threatening manner, advised Fernandez to keep silent. In a pretrial statement accused admitted that on the night in question at the abandoned Officers' Quarters, he slashed a Korean girl two or three times with a knife. Other soldiers who were in the Camp Sobinggo area on the night in question investigated shrieks which were heard to emanate from the vicinity of the abandoned Officers' Quarters, and found Lee, Chun Ja just prior to her death. An autopsy disclosed that she died of multiple wounds inflicted by a sharp instrument. The evidence compels the conclusion that Lee, Chun Ja, met her death at the hands of accused.

Murder, as defined by paragraph 148a, MCM 1928, p 163, which was in effect at the time of the alleged offense and at the time of sentence therefor, is the unlawful killing of another with malice aforethought. Unlawful means "without legal excuse or justification". The record is void of suggestion that there existed either excuse or justification for the killing. Malice aforethought may be inferred from the use of a dangerous weapon used in a manner calculated to endanger human life. Accused's admitted slashing of deceased with a knife thereby causing her death is such an act from which malice may be inferred.

There is, however, evidence in the record that at the time of the homicide accused was drunk, and inferentially such a claim was made by accused in his testimony. The effect of drunkenness upon the criminal responsibility of one charged with homicide has been ably stated in CM 319168, Poe, 68 BR 141,172-173, as follows:

"The distinction between the complete defense of insanity which has been caused by excessive drinking and the mitigating circumstances of mere drunkenness is well recognized (CM 294675, Minnick, supra, p. 19). Although voluntary intoxication not productive of an unsound mind is not a complete defense to the crime of murder, in military practice it is properly considered on the question as to whether accused was able to entertain the malicious intent which is an element of that offense. If, as a result of voluntary intoxication, an accused's intellect is so obliterated or dulled as to be incapable of malice aforethought, his act of homicide committed during such intoxication is, at most, voluntary manslaughter (CM 305302, Mendoza, 20 BR (ETO) 341). However, even though an accused's deliberative powers are impaired by drunkenness to such an extent that his actions are governed by passion and hysteria, this fact alone

will not serve to reduce to manslaughter his impulsive, but nevertheless intentional, taking of human life where such violence has not been called forth by adequate provocation (CM 284389, Creech, 16 BR (ETO) 249,260). * * *.

"The question of the degree of accused's intoxication and the effect of his imbibing on his volition is generally one of fact for the court (CM 294675, Minnick, supra, p. 21). * * *."

The record fails to show any act of the deceased which could be said to have provoked the homicidal attack made upon her, nor does it show that any illusory provocation existed in accused's mind. Further, the record shows that accused in his pretrial statement admitted that at the time and place in question he slashed a girl two or three times with a knife, and otherwise the record shows that following the fatal attack on deceased accused fled from the scene and spontaneously admitted to another soldier who had witnessed the original assault that he had killed the girl. Later, accused sought by threat to compel one of his companions to remain silent concerning the incident. From these circumstances, we, as did the court, conclude that his capacity to entertain malice was not impaired by intoxication.

All the elements of murder are shown by the record of trial, and the uncontradicted evidence compels us to a conclusion apposite to the findings of the court.

Subsequent to arraignment, the defense raised the issue of accused's sanity, and in support of the contention that accused was insane at the time of the commission of the offense within the definition thereof contained in MCM 1928, the defense offered evidence of two bizarre acts of accused happening within a short space of time on a day more than a month antecedent to the offense in question. It was shown, also, that at the time of these acts, the accused was intoxicated. The defense also introduced the testimony of three medical officers, one of whom was a qualified psychiatrist, who expressed the common opinion that accused was insane at the time of the commission of the offense in question, and also that at the time of trial he was unable to cooperate in his own defense. Upon cross-examination of the qualified psychiatrist of the three, it was shown that on preliminary examination of accused he had expressed an opinion that accused was sane. In rebuttal to the evidence offered by the defense, the prosecution introduced as witnesses two medical officers, qualified psychiatrists, who testified that in their opinion accused, as to the offense charged, was able to distinguish right from wrong and to adhere to the right, and that he was able to cooperate intelligently in his own defense. There was thus presented to the court an issue of fact to be resolved by weighing the conflicting evidence and, on all the evidence in the record, we are unable to find that the court attained an incorrect result (CM 332151, Missik).

The prosecution introduced in evidence a series of photographs showing accused in various poses, and Enston, the "CID Agent" testified that the photographs represented accused's reenactment of the offense. The accused testified for the limited purpose of rebutting Enston's version of the taking of the pictures and testified that far from being a reenactment of the offense the pictures represented him in poses which he was directed to take by Enston. On cross-examination by the prosecution accused was required to answer questions which were outside the scope of his direct examination and which compelled accused to testify on the merits of the case. Thus, he was asked whether he could deny that the pictures accurately portrayed the event in issue. At first glance it would appear that we are confronted with the situation found in CM 326450, Baez, 75 BR 231, where in a similar situation it was held that accused had been compelled to be a witness against himself, thereby rendering the proceedings null and void.

We find, however, that in this case the rule does not apply because the accused earlier in the case, under the guise of testifying for the limited purpose of showing the circumstances under which he had made his pretrial statement, in reality testified as to the merits of the case. Thus, to oppose the admission of his pretrial statement in evidence, accused testified that he had no memory of the incident in question and that the statement was based on information he received from others. He testified that he did not remember hitting or cutting anyone, and more specifically denied having any conscious recollection of striking "that girl." Such testimony could be considered as tantamount to the proposition that since accused had no memory of the incident he could not have been the perpetrator thereof. In effect he was denying his criminality. In such situation his cross-examination is subject to the following rule:

"* * When the accused testifies in denial or explanation of any offense, the cross-examination may cover the whole subject of his guilt or innocence of that offense. Any fact relevant to the issue of his guilt of such offense or relevant to his credibility as a witness is properly the subject of cross-examination. The accused can not avail himself of his privilege against self-incrimination to escape proper cross-examination."
(Page 127, MCM 1928).

The cross-examination of accused concerning the photographs in substance elicited no more from accused than was elicited by his own counsel on direct examination concerning the pretrial statement. In each instance the tenor of accused's replies was that he had no memory of the event in question.

To allow cross-examination on the merits, where accused has, upon direct examination testified thereto, despite the limitations announced by the defense, is not only legitimate but fair. This does not amount to compulsory self-incrimination within the defined prohibitions. "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." (CM 335586, Wilkins, 4 May 1949)

It is of no consequence that, in testifying concerning the photographs, accused upon direct examination, did not cross the boundaries announced by the defense. By once testifying concerning the merits he could be recalled for additional cross-examination thereon and that cross-examination could be conducted after accused had returned to the stand to testify for a limited purpose (CM 316558, Summer, 65 BR 341, 360).

The defense objected to the admission in evidence of accused's pretrial written statement on the ground that it was involuntarily made by accused. The prosecution's evidence showed that Harry V. Enston, a "CID" agent, learned of accused's implication in the murder at 11:00 p.m. on the night of 27 August 1948, and that thirty minutes later he interviewed accused with the latter's consent. Enston advised accused of his rights under the 24th Article of War and subsequently secured a statement from accused which was not induced by force or promises. The statement was completed, typed and signed by 0125 hours, 28 August 1948, less than two hours after the inception of the interview. As opposed to the prosecution's version of the circumstances surrounding the securing of his statement, accused claimed that he was informed that the 24th Article of War meant that he either made a statement or did not make a statement, and that later it was "more so put to him * * * that he did have to talk." He also claimed that a blackjack was brought into the room and he was threatened with rough treatment if he did not talk. Here again was an issue of fact to be resolved by the court and the record fails to show any reason why we should disturb the result attained by the court. We, as did the Law Member, conclude that accused's pretrial statement was voluntarily made after he had been apprised of his rights under the 24th Article of War.

The other matters urged by accused, that he had no recollection of the events narrated in his pretrial statement, and that he so narrated the events in order to exonerate others, affect the weight to be accorded the statement but not the competency thereof (*Murphy v. U.S.*, 285 F 801, 808, certiorari denied, 43 S.Ct. 322, 261 U.S. 617, 67 L.Ed 829; *CM 325492, Mosely*, 74 BR 263,269).

6. It is contended by counsel for the accused that Article of War 92, as amended by Public Law 759, 80th Congress (10 USCA 1564, 62 Stat 627) was effective prior to the date of the offense alleged in this case, and that, hence, for the sentence of death to be lawful it would be necessary to show that accused committed premeditated murder. Although not necessary to our conclusion in this case, we are of the opinion that the record of trial amply supports an allegation of premeditation. The contention of counsel for the defense is, however, without merit. The basis of the defense contention is his interpretation of Section 244, Public Law 759, 80th Congress. Said Section states: "This title shall become effective on the first day of the eighth calendar month after approval of this title." Public Law 759 was approved on 24 June 1948. In effect, it is argued that the eighth calendar month is August and that the eighth calendar month after the date of approval of the Act would be 1 August 1948. Thus, had the act recited that it would become effective on the first day of the first calendar month after approval, the Act would have become effective on 1 January 1949. It is obvious that the interpretation placed on Section 244 is untenable.

Although we are of the opinion that the context of the Section under consideration plainly shows that the act was not to become effective until the passage of at least seven months, i.e., months in the sense in which they appear in a calendar, and not months as equal divisions of time, we find that our conclusion is in accord with what must be considered the intent of Congress as disclosed by the hearings of the Sub-Committee on H.R. 2575, the legislative forerunner of Public Law 759.

We have reference to the following colloquy occurring during General Hoover's explanation of the amended Articles of War:

"General HOOVER. * * *

"Our section 44 of the bill provides that the amendments shall become effective on the 1st day of the fourth calendar month after approval of this act. I am not sure that that gives us time enough. The object of it is to give us time to prepare changes in the Manual for Courts Martial, to publish the book, and get the Army acquainted with the changes before the act actually goes into effect.

* * *

"Mr. BROOKS. Wouldn't it be preferable to change this previous section in reference to the date the act should become effective, so as to put it say on the 1st day of the next year and not have these circumstances arise that way?

"General HOOVER. It could very properly be extended to any time that you think proper. Four months is a little short.

"Mr. BROOKS. I mean some distant date, so you could dispose of these cases and you wouldn't be trying a man for a set of circumstances which are no longer a crime under the new law.

"General HOOVER. I think, for example, if it were put into effect after the sixth calendar month, it would as a practical matter permit the disposition of those cases." (Subcommittee hearings on H.R. 2575, pp 2136-2137)

Further, our conclusion is in accord with that of the President as expressed in Executive Order 10020 prescribing the Manual for Courts-Martial, U.S. Army, 1949, wherein it was ordered that:

"This manual shall be in force and effect in the Army of the United States on and after February 1, 1949, with respect to all court-martial processes taken on or after February 1, 1949; Provided, that nothing contained in this manual shall be construed to invalidate any investigation, trial in which arraignment has been had, or other action begun prior to February 1, 1949; and any such investigation, trial, or action so begun may be completed in accordance with the provisions of the Manual for Courts-Martial, 1928: * *."

Under Section 245, Public Law 759, 80th Congress, it is provided as follows:

"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."

The sentence in this case is authorized by law.

7. Accused is twenty-three years of age. He had prior service as an enlisted man from 31 January 1944 to 22 December 1945. He states that he served in the European Theatre for eighth months during that enlistment and that he was a prisoner of war for four months. He was

discharged as a Private First Class from Company I, 422nd Infantry, 106th Infantry Division. His current enlistment extends from 14 October 1947, and at the time of the instant offense he was serving in Korea.

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

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

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

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

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

CSJAGU CM 334745

30 January 1950

UNITED STATES

7th INFANTRY DIVISION

v.

Private EVERETT HIGGS,
RA 35813083, 7th Signal
Company, 7th Infantry
Division

Trial by G.C.M., convened at
Seoul, Korea, 22 and 23 November
1948. To be hanged by the neck
until dead.

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

1. Pursuant to Article of War 50d(1) the record of trial by General Court-Martial and the opinion of the Board of Review in the case of the soldier named above have been submitted to the Judicial Council which submits this opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to, and was found guilty of, a violation of Article of War 92 in that he did, at Camp Sobinggo, Seoul, Korea, on or about 26 August 1948, murder one Lee Chun Ja, a human being by cutting and stabbing her with an unknown instrument. No evidence of any previous convictions was introduced. He was sentenced to be hanged by the neck until dead, all the members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty and the sentence and to warrant confirmation of the sentence.

3. Evidence pertinent to the sanity of the accused.

a. Evidence adduced by the defense. Prior to pleading to the general issue, the defense entered a special plea of insanity in bar of trial. In support of this plea it was shown that in May 1948 the accused, while drunk killed a dog with a rock. After the owner of the animal had assaulted him, the accused armed himself with a broom handle and sought his assailant. During the search he was struck by a revolving fan which he had failed to observe, whereupon the accused struck the fan with the broom handle, knocking it from the table. The accused denied any recollection of the incident when questioned by his company commander on the following morning. The company commander believed that the accused's action in this incident resulted from his inability to control himself while under the influence of alcohol and barred him from the enlisted men's club for one month in order to keep him from obtaining liquor.

A guard, who had accompanied the accused on a trip from Japan to Korea in November 1948, testified that during the trip the accused had told him that "he didn't feel as though he committed any crime or done anything wrong. It seemed more or less a dream to him". The witness also made the observation that the accused did not seem to be worried and was in a jolly mood.

Major David P. Lauer, Captain Asher Woldow and First Lieutenant Harold J. Levy, all medical officers, members of a Board of Medical Officers convened at the 382d Station Hospital to inquire into the accused's sanity, identified Defense Exhibit 2 as the report of their proceedings dated 13 October 1949. The board's diagnosis as stated in the report and in their testimony was:

"Schizophrenic Reaction, catatonic type, manifested by emotional flatness and withdrawal, episodes of impulsive, aggressive, sadistic behavior, and chronic alcoholism. Severe predisposition, impairment severe, stress moderate."

The Board found that the accused was not mentally responsible at the time of the offense and that, at the time of the examination he did not possess the requisite mental capacity intelligently to conduct or cooperate in his defense.

On cross examination it was brought out that two members of the board, Major Lauer and Captain Woldow were not psychiatrists. Lieutenant Levy had a year of general rotating internship in a general hospital with special emphasis on psychiatry and a year of residency in psychosomatic medicine. A short time before the examination he became Chief of Neuro-psychiatry at the 382d Station Hospital. Lieutenant Levy admitted that in a preliminary report made on 2 October 1948 he had expressed the opinion that the accused had been mentally responsible at the time of the offense. He explained that he had changed his opinion on the basis of further observation indicating greater disturbance on the part of the accused than he had thought originally and additional information as to the accused's previous behavior. The additional information of prior behavior included at least one outburst of uncontrolled aggressive behavior for which the accused had no adequate explanation and which appeared to be spontaneous. It could be explained only on the basis of greater inner tension than could be evaluated on the preliminary examination of the uncommunicative accused. He admitted, however, that prior to his preliminary report he had been informed of the dog incident and that the accused was charged with murder.

b. Rebuttal

The officer who conducted the pretrial investigation testified that during the course of three interviews of the accused he observed nothing which indicated that the accused was insane.

Captain R. V. Fitzgerald and Captain Franklin M. Phillips, members of a board of medical officers convened at 361st Station Hospital for the purpose of further inquiry as to the accused's sanity, identified Prosecution Exhibit B as their report, dated 28 October 1948 and testified in support thereof. The report, which was concurred in by Colonel Marren, Commanding Officer of the 361st Station Hospital and its Chief of Neuro-psychiatric Service, stated in part:

"Observation at this hospital has disclosed no evidence of schizophrenia. He has been conscious, well-oriented and rational. His behavior in the ward has been in no way unusual. On 22 October 1948 he was presented to the Neuropsychiatric Disposition Board at which time Doctors Waggoner and Aring, Civilian Consultants in Psychiatry and Neurology from the Surgeon General's Office, were present. It was the unanimous opinion that the patient was free of psychosis and should be returned to Korea for whatever legal procedure might be contemplated."

The Board found that the accused was mentally responsible at the time of the offense and that he possessed the requisite mental capacity to participate in and conduct his own defense.

Captain Fitzgerald testified that he had been engaged in neuropsychiatric work for the past sixteen months and had examined approximately 1500 patients during that period. He admitted that he had observed 150 patients during the eight day period in which he had observed the accused. Captain Phillips testified that in addition to his medical degree he also had a degree in psychology and that for the past year he had been a ward officer of the Neuropsychiatric Service of the 361st Station Hospital where he had observed over 1000 patients. He admitted that while he was observing the accused he had also observed thirty-five or forty other patients.

Both psychiatrists testified that their opinion was based primarily on interviews of the accused. They were aware of the fact that while under observation the accused had torn the ticking on his bed in an attempt to fashion a noose, hit his head against a cubicle and engaged in a short hunger strike. Captain Fitzgerald stated that in his opinion these acts exhibited wilfulness, but also agreed that the acts were impulsive. In Captain Phillips' opinion these acts were indications of a passive aggressive sort of personality, reacting in stress.

The court overruled the plea of insanity in bar of trial.

4. Evidence for the Prosecution.

The evidence on the merits is set out in detail in the opinion of the Board of Review. Briefly summarized the evidence shows that at about 2200 hours on the night of 26 August 1948 the accused interrupted a tryst between three soldiers, Fernandez, Dougherty and Hamon and three Korean girls, one of whom was Lee Chun Ja, the deceased, at an unoccupied set of officers' quarters at Camp Sobinggo, Seoul, Korea. Accused, who was accompanied by a soldier named Brisson, was drunk and appeared to be angry. The accused seized Lee Chun Ja and beat her although she indicated a willingness to accommodate the accused in the carnal desires which he had

previously expressed. The other soldiers, followed by Brison, left the scene intending to return to their barracks. The other Korean girls hid in some nearby bushes. Dougherty and Hamon testified that as they were leaving they heard the deceased exclaim "Oh knife".

The two Korean girls heard the deceased calling for one of them, her cries becoming successively weaker. Shortly after leaving the officers' quarters, Fernandez, Hamon and Dougherty heard a scream and saw the accused running down the road. As the accused overtook the other soldiers he spontaneously exclaimed that the girl was dead and one of the soldiers testified he also said that he had killed her. When he passed Brison he also seized the latter by the arm, saying, "Let's go". The next morning Brison noticed some stains on his shirt sleeve which he believed to be blood.

After returning to the barracks the accused was observed washing his hands. Brison testified that he had appeared to have bloodstains on his hands. Fernandez testified accused had a bar of soap in his hands and said "If you say anything about this, I'll do this," accompanying his words by squeezing a bar of soap.

The deceased's screams were heard by a Private Pinard who found the girl alive and gasping for breath. In his opinion she died almost immediately after his arrival. A physician who later visited the scene pronounced the victim dead apparently as the result of a neck wound from which she bled profusely. A report of an autopsy performed on the body of the deceased dated 27 August 1948 showed a deep penetrating wound of the lower left chest, a puncture wound of the right lower chest, and a perforating wound of the left side of the neck. The cause of death was stated to be hemorrhage resulting from these wounds.

A statement taken on 28 August 1948 by two CID agents who testified that they had advised the accused of his rights under Article of War 24 and employed no threats, promises, or duress of any kind was received in evidence over the objection by the defense on the ground that it had not been given voluntarily. After the statement was admitted in evidence but before it was read to the court the accused was permitted to testify as to the circumstances under which the confession was obtained. The substance of this testimony appears in Paragraph 5 below.

In his pretrial statement the accused admitted that on the night in question he went to the old officers' quarters where he saw a group of three soldiers and two girls and that he slashed and cut one of the girls two or three times with a knife and that he had thrown the knife away. When he realized what he had done he got scared and ran away. When asked what prompted him to stab the girl he replied that he did not know what he was doing when he got mad. The girl had said nothing to anger him but he was angry at the soldiers because they had neglected to let him know of the time of the date with the girls (Pros. Ex. G).

On 30 August 1948 two CID agents asked the accused if he would pose for some photographs at the scene of the crime. According to Agent Enston the accused replied in the affirmative and in fact posed for a series of photographs in which Enston took the part of the deceased. Enston testified that the accused arranged and reconstructed the scene in seven photographs (Pros. Exs H, I, J, K, L, M, N). These photographs were received in evidence over the objection by the defense on the ground that the accused had no independent recollection of the events depicted, and that he had merely posed as directed by the agent. The photographs purported to depict reenactments of the following: Accused coming over the hill (Pros. Ex. H); accused demonstrating how he grabbed the deceased (Pros. Ex. I); accused demonstrating how he held the deceased on the ground and beat her (Pros. Ex. J); accused pointing to the place where he thought vaguely that he stabbed the deceased (Pros. Ex. K); accused showing how he grabbed Brison by the right arm of the shirt thereby leaving bloodstains on Brison's right sleeve (Pros. Ex. L); accused and Brison as they were about to pass the other men when accused stated "Come on let's go; she's dead" (Pros. Ex. M); and the approximate area where accused stated he had thrown the weapon he used to assault the deceased (Pros. Ex. N).

5. Evidence for the Defense.

Before the accused's pretrial statement was read into evidence but after it had been received in evidence provisionally, the accused took the stand for the announced limited purpose of testifying to the circumstances surrounding the taking of the statement. He denied that the agent had read and explained Article of War 24 to him and stated that the agent told him only that Article of War 24 meant "I did talk or I didn't talk and that was brief way of putting it to me." He also testified that the agent had brought a blackjack into the room and threatened to get rough if he did not talk. He was also informed that the CID had the necessary witnesses to convict him regardless of any statement made by him. During the course of his testimony the accused stated that he had no independent recollection of the events surrounding the homicide and that he had been with Brison on that day. His knowledge of the events which occurred on the night of 26 August consisted solely of what he had heard Brison and another witness relate during their interrogation by the CID in the accused's presence. He did not remember killing or cutting anyone and had made his statement to that effect only because his memory failed him when he was drunk and he did not want to involve any other soldier in something that he could have done.

The law member interrupted the testimony and advised the defense that the testimony had gone beyond the limited purpose and that it might subject the accused to cross-examination on the merits.

On cross-examination the accused admitted that he dimly remembered leaving the company. He could not recall arriving at the scene but he had a vague recollection of "running from someone".

With respect to the photographic reenactment Fernandez testified as a witness for the defense that the accused "did not say a word" but merely followed instructions given him by Enston who reconstructed the events based on information received from Fernandez and other witnesses. Fernandez asserted, on cross examination, that the photographs were accurate representations of the events they purported to depict.

The accused again took the stand for the announced limited purpose of testifying as to the circumstances surrounding the taking of the pictures, and testified in substance that he merely assumed poses which he had been directed to assume by Enston and others.

On cross-examination the accused was asked whether the pictures were an accurate reenactment of the events in question. The defense objected on the ground that the question exceeded the limited purpose of the cross-examination in that it touched upon the merits rather than the circumstances under which the photographs were taken. The law member overruled the objection and the accused testified that he did not know whether or not the pictures were accurate.

6. Discussion

General.—In the 1928 Manual for Courts-Martial murder is defined as "The unlawful killing of a human being with malice aforethought" (MCM 1928, par 148a). That Lee Chun Ja was killed at the time, place and in the manner alleged in the specifications of the charge was clearly proven and was not contested by the defense. Also ample evidence was introduced from which the court could infer that the killing was committed by the accused without legal excuse or justification.

The accused was the last person seen with the deceased during her lifetime. He was seen running away from the scene of the homicide exclaiming to his fellow soldiers that she was dead and that he had killed her and later the same evening he threatened one of the soldiers against saying anything about the incident. He also admitted to Enston that on the evening in question he cut one of the girls several times with a knife. There is not a scintilla of evidence that the killing was legally excusable or justifiable. Among the meanings of malice aforethought is an intent to cause the death or grievous bodily harm to any person preceding or co-existing with the act by which death is caused, except when death is inflicted in the heat of sudden passion caused by adequate provocation (MCM 1928, par 148a, p. 163). Accused's act in stabbing the deceased several times with a knife without adequate provocation thereby causing her death is an act warranting the inference of the requisite malice aforethought.

Insanity of the accused.—The issue of the accused's mental responsibility and capacity was squarely presented to the court by the special plea in bar and by the evidence introduced in support thereof. After hearing evidence from both sides the court determined the issue adversely to the accused. The testimony of the lay witness called by the defense tended to show no more than that he resorted to impulsive

violent behavior while under the influence of liquor and in itself raised no serious question as to mental responsibility. On the other hand three medical officers called by the defense were of the opinion that he was suffering from schizophrenia catatonic type and that he lacked the requisite mental responsibility and capacity. Two of these medical officers were not psychiatrists. The only psychiatrist on the board had previously expressed the opinion that the accused was sane. His reasons for changing his diagnosis are not persuasive.

The prosecution called two psychiatrists with some experience in that field, who, after observing him, were of the opinion that the accused was not suffering from schizophrenia, that he was free from psychosis, that at the time of the offense he possessed the requisite mental responsibility and that at the time of their examination he possessed the requisite mental capacity. Their diagnosis was concurred in by, the Chief of the Neuropsychiatric Service at the hospital. After careful consideration of all the evidence introduced on the issue raised by the special plea in bar, the Judicial Council is of the opinion that the action of the court in overruling the plea was supported by the evidence and should not be disturbed (CM 332151, Missick; Holloway v. United States, 148 F. 2d 665, U.S. Ct of App., D.C. 1945). Moreover the evidence showing the accused's spontaneous admissions of guilt immediately after the homicide, his flight from the scene and his threat to a fellow soldier concerning any disclosure of the events clearly show an understanding on the part of the accused that the act was wrong. Thus the evidence on the merits lends further support to the implicit finding of the court with respect to the accused's mental responsibility.

In its consideration of the evidence on the issue of sanity the Council noted that the report of the second board of medical officers (Prox. Ex. B) adverted to the fact that Doctors Waggoner, and Aring, Civilian Consultants on Psychiatry and Neurology from The Surgeon General's Office were present during the examination of the accused by the board. The Board's report is capable of the construction that the two civilian consultants concurred in the finding that the accused was free from psychosis and that he was mentally responsible. Assuming that construction the Council is nevertheless of the opinion that it was not error to receive in evidence the entire report of the second board. The trial in the instant case took place prior to 1 February 1949, the effective date of the Manual for Courts-Martial 1949, which promulgated a special rule for admissibility of opinions contained in reports of boards of medical officers (MCM 1949, par. 112c). The 1928 Manual did not expressly provide any special rule as to the admissibility of opinions expressed in official reports, but by implication, at least it continued the rules stated in the 1921 Manual (MCM 1928, p. VII; par 63, p. 49).

In pertinent part the 1921 Manual required a board of medical officers convened for the purpose of inquiring into an accused person's sanity to "take into consideration any * * * available information bearing upon the purpose of the investigation * * * for the purpose of developing from any sources which it deems trustworthy any information that may aid it in the

investigation". The report required of the board included reference to and summaries of any information received by correspondence or interview with third persons. (MCM 1921, par 76c, pp 69-70.)

The 1921 Manual also provided that if the question of the accused's sanity becomes an issue at the trial "and, if there is in the case a report of a medical board under paragraph 76c, supra, such report will be read in evidence on behalf of the court, and * * * at least one of the members of such medical board will be called as a witness for the court to be thoroughly examined, as if on cross-examination, by counsel for the accused, and also by the trial judge advocate and by any member of the court, as to any feature of the report; and on request of the accused the remaining members of the board shall, if available, likewise be called as witnesses for the court, for such cross-examination." (MCM 1921, par 219, pp 174-175).

Drunkness: Several of the witnesses who observed the accused just prior to the homicide were of the opinion that he was drunk at that time. The accused while on the stand and in his statement to the CID also claimed intoxication at the time of the crime with an almost total loss of memory as to events then occurring. While intoxication is no defense to homicide, it has been held under the Article of War 92 in effect at the time this crime was committed, to reduce murder to manslaughter, if sufficiently extreme to render the accused incapable of entertaining the malice aforethought which is an element of murder (CM 305302, Mendoza, 20 BR (ETO) 341, 346 and authorities there cited). The question of the degree of accused's intoxication and its effect on his mental capacity are generally matters of fact for determination by the court (CM 294675, Minnick, 26 BR (ETO) 11; CM 325810, Martinez, 75 BR 75, 86-87; CM 334138, Bright): In this case there was ample evidence to support the court's implicit conclusion that accused's intoxication was not so extreme as to render him incapable of entertaining malice aforethought. Prior to the homicide the accused invited Brison to accompany him to the unoccupied officers' quarters where he said there would be some Korean girls. After the stabbing of the deceased he disposed of the knife, fled from the scene and spontaneously admitted to the other soldiers that the girl was dead. Later the same evening he sought by threats to compel one of his companions to remain silent concerning the incident. Also in his statement to the CID on the 27th and 28th of August he recalled cutting the girl several times. The Council, therefore, concludes as did the court and the Board of Review that accused's intoxication was not so extreme as to have impaired his mental capacity to entertain the requisite malice aforethought.

Accused's pretrial statement. After a sufficient foundation tending to show it to be voluntary, the prosecution offered into evidence a confession by the accused to CID Agent Enston. Over the objection of the defense on the ground that it was not voluntary, the law member admitted the confession into evidence as Prosecution Exhibit G without first giving the defense its requested opportunity to show the circumstances under which the confession had been obtained (R 81). The confession was not read to the court, however, until after the accused had taken the stand and testified for the purpose of showing it to be involuntary. Whereupon the law member reaffirmed his prior ruling (R 87).

In his testimony, which the defense announced to be for the limited purpose of attacking the voluntary nature of the confession, the accused testified that no adequate explanation of Article of War 24 was made to him by Enston and that he had been threatened with rough treatment by Enston who displayed a blackjack to him. He also stated that he was told that the CID had sufficient evidence to convict him regardless of any statement made by him. On direct examination the accused went beyond the announced limited purpose of his testimony and gave evidence directly bearing upon the general issue by testifying that his confession was not based on his independent recollection of the events therein related but rather upon statements made to him by Brison and others. He further testified that, because of his drunken condition his memory failed him and he did not remember beating or cutting anyone. Among the reasons he advanced for making the statement was that he did not want to implicate his fellow soldiers for a crime which he might have committed although he had no recollection of having committed it.

The law member's ruling admitting the accused's pretrial statement into evidence before hearing rebutting testimony as requested by the defense was error. The defense had an absolute right to rebut the prosecution's evidence of the voluntary nature of the confession prior to the court's acceptance of such confession (CM 328886, Worthy, 77 BR 287; CM 328924, Floyd et al, 77 BR 315; CM 330852, Crawford, 79 BR 177; CM 332697, Martinez, 81 BR 177). Under the circumstances of the case the law member's procedural error was not prejudicial since the confession was in fact withheld from the court until the defense had presented its rebutting evidence. Upon the controverted evidence respecting the issue of the voluntary nature of the confession the court was warranted in giving greater credence to Enston's testimony than to that of the accused.

Cross-examination of the accused: Although the accused took the stand on two occasions ostensibly for the limited purpose of attacking the voluntary nature of the confession and for the purpose of attacking the relevancy of his photographic reenactment of the crime, he in fact testified on the general issue under the examination of his own counsel. By testifying on the merits the accused waived his rights against self-incrimination (Brown v. Walker, 161 U.S. 591, 597 (1896); Burrell v. Montana, 194 U.S. 572 (1904); Sawyer v. United States, 202 U.S. 150, 165 (1906); Powers v. United States, 223 U.S. 303 (1912); Caminetti v. United States, 242 U.S. 470 (1917); CM 316558, Summers, 65 BR 341, 359-360; Cm 335586, Wilkins, 4 May 1949). Under the circumstances the cross-examination of the accused on matters relevant to the general issue but which transgressed the announced (but not adhered to) limited scope of the directed examination was not improper.

Photographic reenactment by the accused: Over the objection by the defense on the ground that the accused had merely posed for a pictorial reenactment of the crime as directed by CID Agent Enston and that the pictures were not based upon the accused's independent recollection, Prosecution Exhibits H to N inclusive were received in evidence. With

respect to this issue the accused testified that he merely posed as directed by Enston and others and that he had no recollection of the events which the photographs purported to portray. His version was corroborated by Fernandez who stated the accused "did not say a word", but merely followed instructions given him by Enston who in turn reconstructed the scene based on information received from Fernandez and other witnesses. On the other hand Enston testified that the accused himself reconstructed the scene pictured by the exhibits in question.

The photographs were obviously offered in evidence as a photographic confession by the accused. The objection by the defense was not based on the voluntary nature of the reenactment but rather on the contention the photographs represented the hearsay version of others as to the events pictured and that it was therefore incompetent evidence. Since there was some substantial evidence that the photographs were reenactments of the events voluntarily made by the accused on the basis of his own recollection, it cannot be said that there was error in the reception of the photographs. Although the cold record may tend to show that the accused's version as corroborated by the testimony of Fernandez is not improbable, the court heard and saw the witnesses and therefore was in a better position than the appellate agencies in this office to judge the credibility of the witnesses. There appears to be no cogent reason for disturbing the court's ruling in this matter notwithstanding the power vested in the appellate agencies by Article of War 50(g). Assuming, without deciding, that the photographs might properly have been excluded on the ground that they were an unverified version of the purported events (3 Wigmore on Evidence (3d Ed) Secs. 792, 793) it does not appear that they would have prejudicially affected the accused's substantial rights in the instant case in view of the overwhelming competent evidence of guilt.

Applicability of the 1948 Revision of the Articles of War.— This crime was committed and the resulting trial held prior to 1 February 1949, the effective date of the new Articles of War and the Manual for Courts-Martial 1949. Therefore, the 92nd Article of War then in effect and the Manual for Courts-Martial, 1928 are applicable. In this connection the Council has noted the argument of counsel for the defense contained in a post trial brief that the effective date of the new Article of War 92 was 1 August 1948. Suffice it to say here the Council considers that matter adequately disposed of by the Board of Review in its opinion of 29 July 1949.

7. Data as to the accused.

The accused is twenty-three years of age. He had prior service as an enlisted man from 31 January 1944 to 22 December 1945. He states that he served in the European Theater for eight months during that enlistment and was a prisoner of war for four months. He was discharged as a private first class from Company I, 422d Infantry, 106th Infantry Division. His current enlistment began on 14 October 1947, and at the time of the instant offense he was serving in Korea.

After the trial a further mental examination of the accused was made by a board of medical officers convened at the 361st Station Hospital, APO 1055, pursuant to the recommendation of The Judge Advocate General. In its report, dated 3 June 1949, the board stated that it could not make a definite statement as to the mental condition or responsibility of the accused at the time of the alleged offense due to the length of time which had elapsed. It expressed the opinion that the accused, at the time of trial, showed no evidence of mental disease and that he was able to conduct and cooperate in his own defense. The board also stated that observation in the hospital revealed no evidence of psychosis or severe psychoneurotic disorder.

Thereafter at the request of The Judge Advocate General, The Surgeon General obtained statements from Dr. Charles D. Aring and Dr. Raymond W. Waggoner who had been present during the examination of the accused on or about 22 October 1948. In a letter dated 11 July 1949, Dr. Aring stated in pertinent parts:

"Doctor Raymond Waggoner, Professor of Psychiatry at the University of Michigan Medical School, and I, together with Captain Phillips and Fitzgerald, examined all the records that had accumulated up to October 1948, then interviewed him along with other members of the Disposition Board. We could find no evidence of psychotic behavior during our interview, and the information that we found in the record did not, we believed, bear out a diagnosis of psychosis.

"The evidence at our disposal including a period of observation at the 361st Station Hospital in Tokyo by some members of the Neuropsychiatry Disposition Board, present during our examination, led all of us to the opinion that Pvt. Higgs was without psychosis."

In a letter, dated 8 July 1949, Dr. Waggoner stated in part:

"* * * The history, as far as can be determined, is one of rather marked acute alcoholism during which period he was at least partially amnesic, and it was during this period that the act was committed.

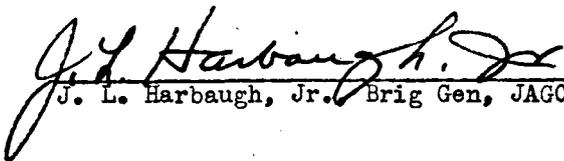
"At the time he was examined, at the 361st Station hospital in Tokyo, neither Captain Phillips, Captain Fitzgeralds nor myself could find any evidence of psychosis, and this was the basis for my opinion."

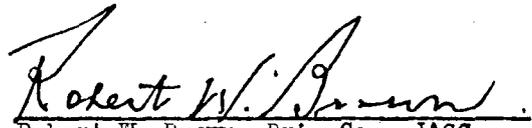
In forwarding these letters The Surgeon General's Office stated by indorsement:

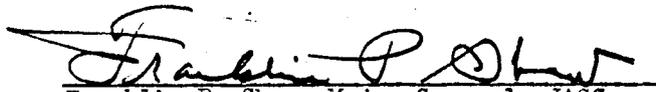
"* * * It is the opinion of these consultants in psychiatry Doctors Aring and Waggoner and also of this office that Private Higgs was, at the time of his trial, sufficiently sane intelligently to conduct or cooperate in his defense.

"* * * In the absence of mental disorder at the time of his examination and the lack of any evidence to the contrary, it is further the opinion of this office that the accused at the time of the alleged offense was so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to distinguish right from wrong and to adhere to the right."

8. The court was legally constituted and had jurisdiction of the accused and the crime alleged. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty and to support the sentence and to warrant its confirmation. In view of the intoxication of the accused at the time the crime was committed the Judicial Council recommends that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of the accused's natural life. A sentence to death or life imprisonment was mandatory upon a conviction of murder in violation of Article of War 92 at the time of the trial of this case.


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


Robert W. Brown, Brig Gen, JAGC


Franklin P. Shaw, Major General, JAGC
 Chairman

3 February 1950

CSJAGH CM 334745

1st Ind

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

TO: The Secretary of the Army

1. Herewith transmitted for the action of the President are the record of trial, the opinion of the Board of Review and the opinion of the Judicial Council in the case of Private Everett Higgs, RA 35813083, 7th Signal Company, 7th Infantry Division.

2. Upon trial by general court-martial this soldier was found guilty of the murder of Lee, Chun Ja, a Korean female, on or about 26 August 1948, in violation of Article of War 92. He was sentenced to be hanged by the neck until dead. All the members of the court present at the time the vote was taken concurred in the sentence. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

3. I concur in the opinion of the Board of Review and the Judicial Council that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. In view of all the circumstances including the accused's drunken condition at the time of the offense, the Judicial Council and I recommend that the sentence be confirmed but that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the natural life of the accused, and that the sentence as thus commuted be carried into execution. I further recommend that a United States penitentiary, be designated as the place of confinement.

4. Consideration has been given to a letter from Congressman Frank L. Chelf, House of Representatives, a memorandum from Major General Harry H. Vaughan, on behalf of the President, and briefs submitted by Mr. Rodes K. Myers, attorney for accused.

5. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such recommendation meet with your approval.

4-Incls

1. Record of trial
2. Op Judicial Council
3. Drft ltr sig S/A
4. Form of action

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

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

413

CSJAGN-SpCM 250

27 JUL 1949

UNITED STATES

v.

Recruit LINWOOD B. HOWE
(RA 11188572), Battery D,
501st Antiaircraft Artillery
Gun Battalion (120 mm), Fort
Bliss, Texas.

AAA AND GUIDED MISSILE CENTER

Trial by Sp.C.M., convened at
Fort Bliss, Texas, 9 June 1949.
Bad conduct discharge (suspended)
and confinement for six (6)
months. Post Stockade.

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

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

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

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

Specification 1: In that Recruit Linwood B. Howe, Battery "D", 501st Anti Aircraft Artillery Gun Battalion (120mm), Fort Bliss, Texas, did, without proper leave, absent himself from his organization at Fort Bliss, Texas, from about 1300 hours 4 March 1949, to about 1930 hours 27 March 1949.

Specification 2: In that Recruit Linwood B. Howe, Battery "D", 501st Anti Aircraft Artillery Gun Battalion (120mm), Fort Bliss, Texas, did, without proper leave, absent himself from his organization at Fort Bliss, Texas, from about 1600 hours 5 April 1949, to about 1200 hours 15 April 1949.

Specification 3: In that Recruit Linwood B. Howe, Battery "D", 501st Anti Aircraft Artillery Gun Battalion (120mm), Fort Bliss, Texas, did, without proper leave, absent himself from his organization at Fort Bliss, Texas, from about 0630 hours 20 April 1949 to about 13 May 1949.

CHARGE II: Violation of the 69th Article of War.

Specification: In that Recruit Linwood B. Howe, Battery "D", 501st Anti Aircraft Artillery Gun Battalion (120mm), Fort Bliss, Texas, having been duly placed in arrest at Fort Bliss, Texas, on or about 0800 hours 18 April 1949, did, at Fort Bliss, Texas, on or about 0630 hours 20 April 1949, break said arrest before he was set at liberty by proper authority.

The accused pleaded not guilty to all Charges and Specifications and was found guilty of all Charges and Specifications except as to Specification 3, Charge I, of which he was by exception and substitution found guilty of absence without leave from 20 April 1949 until 10 May 1949. He was sentenced to be discharged from the service with a bad conduct discharge, to be confined at hard labor at such place as proper authority might direct for six months, and to forfeit fifty (\$50.00) dollars per month for six months. The convening authority having approved the sentence, the officer authorized to appoint a general court-martial for the command then approved the sentence, suspended execution of the bad conduct discharge until the soldier's release from confinement, and designated the Post Stockade, Fort Bliss, Texas, as the place of confinement. The result of trial was promulgated in Special Court-Martial Orders No. 58, Headquarters AAA And Guided Missile Center, Fort Bliss, Texas, 27 June 1949.

3. The only questions presented by the record of trial concern the legality of the punishment adjudged and the propriety of the finding that accused was absent without leave from about 1600 hours 5 April 1949 to about 1200 hours 15 April 1949 as alleged in Specification 2, Charge I.

With respect to this particular period of unauthorized absence, the uncontradicted evidence introduced by the prosecution shows that the accused initially departed from his organization at Fort Bliss, Texas, 1600 hours, 5 April 1949 (Pros. Ex. 3) and was subsequently "atchd & conf Post Guardhouse 1200 hrs AWOL fr 501st Gn Bn Ft Bliss Tex," 8 April 1949, at the Army and Navy General Hospital, Hot Springs National Park, Arkansas (Pros. Ex. 4). Pursuant to special orders issued by Headquarters, Antiaircraft Artillery and Guided Missile Center, Fort Bliss, Texas, accused departed from the general hospital at Hot Springs, under guard, 15 April 1949

(Pros. Ex. 4) enroute to his proper station, Fort Bliss, where he was picked up for duty 16 April 1949 (Pros. Ex. 3). Apparently on the assumption that accused's absent without leave status continued until he returned to his proper station, the court found him guilty of an unauthorized absence from 5 April 1949 until 15 April 1949, as alleged in Specification 2 of Charge I. The absence terminated, however, 8 April 1949 when the accused was confined in the Post Guardhouse, Army and Navy General Hospital, Hot Springs, Arkansas. It is a well settled principle of military law that a period of absence without leave ends when the offender, his status and identity being disclosed, returns to military control, whether or not to his own organization (CM 281498, Arthur, 54 BR 159, IV Bul JAG 277; CM 283703, Keele, 15 BR (ETO) 201; CM 291487, Lofton, 18 BR (ETO) 139; Cf SPJGA 1944/13317, IV Bul JAG 10).

The accused has been properly convicted of breach of arrest and of three absences without leave. The maximum period of confinement, without substitution, which may be adjudged for the former is three months (par. 117c, p. 136, MCM, 1949). Bearing in mind that in computing the time of absence without leave a period which does not exceed twenty-four hours is counted as one day, and the hour of return is assumed to be the same as the hour of departure only if not alleged and proved otherwise (par. 117c, p. 133, MCM, 1949), the period of absence proved under Specification 1 of Charge I was 24 days, that under Specification 2 was 3 days as determined above, and that under Specification 3 was 20 days. The total period of unauthorized absence, excluding the 20 days proved under Specification 3, was 27 days. The absence alleged in Specification 3 of Charge I commenced with the breach of arrest alleged under Charge II (R. 4, 7; Pros. Ex. 3). Consequently these two offenses are concurrent and punishable only in their most important aspect, that of the breach of arrest (par. 80a, p. 80, MCM, 1949; CM 313544, Carson, 63 BR 137; CM 323305, Raabe, 72 BR 205). For the 27 days absence without leave the court could adjudge, without substitution, not in excess of 81 days confinement, or 2 months and 21 days (par. 117c, p. 134, MCM, 1949). This and the 3 months authorized for the offense of breach of arrest make an aggregate of 5 months and 21 days as the maximum authorized confinement. Paragraph 117c, p. 143, MCM, 1949, provides in part as follows:

"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 offense 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."

Since the total confinement authorized in the case under consideration was less than six months, it follows that the bad conduct discharge was unauthorized.

4. 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 sufficient to support the findings of guilty of Charge I and Specifications 1 and 3 thereof, legally sufficient to support only so much of the findings of guilty of Specification 2 of Charge I as involves finding that the accused absented himself without proper leave from his station, as alleged, from about 1600 hours 5 April 1949 to about 1200 hours 8 April 1949, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for five months and twenty-one days and forfeiture of fifty dollars per month for a like period.

Chas. C. Young, J. A. G. C.
C. B. Bales Jr., J. A. G. C.
John J. Taylor, J. A. G. C.

CSJAGN-SpCM 250

1st Ind

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

TO: Commanding General, AAA And Guided Missile Center, Fort Bliss, Texas.

1. In the case of Recruit Linwood B. Howe (RA 11188572), Battery D, 501st Antiaircraft Artillery Gun Battalion (120mm), Fort Bliss, Texas, 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 the Specification thereof; legally sufficient to support the findings of guilty of Charge I and Specifications 1 and 3 thereof; legally sufficient to support only so much of the finding of guilty of Specification 2 of Charge I as involves a finding that the accused absented himself without proper leave from his station, as alleged, from about 1600 hours 5 April 1949 to about 1200 hours 8 April 1949, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for five months and 21 days and forfeiture of \$50 per month for a like period. Under Article of War 50g(3) this holding and my concurrence vacate so much of the finding of guilty of Specification 2 of Charge I as involves a finding other than that the accused absented himself without proper leave from his station, as alleged, from about 1600 hours 5 April 1949 to about 1200 hours 8 April 1949, and so much of the sentence as is in excess of confinement at hard labor for five months and 21 days and forfeiture of \$50 per month for a like period.

2. It is requested that you publish a special 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 that portion of the finding and sentence so vacated. A draft of a special 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:

(SpCM 250).

2 Incls

- 1 - Record of trial
- 2 - Draft of SpCMO



THOMAS H. GREEN
Major General
The Judge Advocate General

He pleaded not guilty to, and was found guilty of, the Charge and the Specifications. Evidence of one previous conviction by summary court-martial for absence without leave was considered. He was sentenced to be discharged the service with a bad conduct discharge, to forfeit thirty-five dollars pay per month for six months, and to be confined at hard labor at such place as the reviewing authority may direct for six months. The convening authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 47. The reviewing authority disapproved the finding of guilty of Specification 3 of the Charge, approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging the bad conduct discharge until the soldier's release from confinement, and designated the Eighth Army Stockade as the place of confinement.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Specification 1 of the Charge and the Charge, legally insufficient to support Specification 2 of the Charge, and legally sufficient to support only so much of the sentence as involves the confinement and forfeitures adjudged. In our view of the case it is not necessary to set forth in detail the evidence pertaining to Specification 2 of the Charge.

4. The accused has been found guilty of "wrongfully" possessing "Methylaminopropane-hydrochloride, an habituating substance." In order to sustain this finding of guilty it must be shown that the possession of the substance alleged was wrongful.

Paragraph 4, General Order 25, War Department, March 11, 1918, prescribes the following:

"The possession by any person subject to military law of any habit forming drug not ordered by a medical officer of the Army shall be taken and considered as a disorder to the prejudice of good order and military discipline and as conduct of a nature to bring discredit upon the military service, and any such person so offending shall be brought to trial under the 96th Article of War."

The order cited is extant, and Specification 173, Appendix 4, Page 331, Manual for Courts-Martial, 1949, the form followed by the Specification in the instant case, substantially alleges a violation thereof. The prohibition contained in the foregoing order has been uniformly applied to narcotic drugs and in CM 265317, Barreto, 3 BR (ETO) 137, 143, it is inferred that unless the substance possessed is a narcotic drug its possession is not violative of General Order 25, supra. This inference is supported by later cases dealing with marijuana wherein the conclusion

that marijuana is a narcotic drug was not accepted and offenses based upon its possession were held wrongful not because they violated General Order 25, supra, but because the known "deleterious effect upon human conduct and behavior" caused by its use renders its possession prejudicial to good order and military discipline (CM 250475, Ellington, 32 BR 391,393; CM 332216, Cuevas, 81 BR 47,50).

Thus, the possession of a substance as such may be wrongful because it is a habit-forming narcotic drug, or because the substance possessed, if used, would have a deleterious effect upon the conduct and behavior of the user. We might also add that were the possession of a particular substance the subject of an express prohibition by competent authority, possession in such case would be wrongful.

Informal communication with the Army Surgeon General's Office and with Governmental agencies dealing with pharmaceuticals leads us to the conclusion that methylaminopropane-hydrochloride is relatively unknown in this country and hence we are unable to determine the properties of the substance. A Japanese pharmacist testified at the trial that the substance is not a narcotic, is habit-forming, and is a stimulant causing wakefulness in its users. A medical officer of the Army testified that he was unfamiliar with the substance and its properties but that its formula would indicate that it was somewhat akin to benzedrine. He could not, however, state that methylaminopropane-hydrochloride produces the same reactions as benzedrine.

It may thus be seen that there is no evidence that methylaminopropane-hydrochloride is a narcotic, or that its use has a deleterious effect upon human behavior and conduct as does the use of marijuana. Furthermore, there is no evidence that its possession has been specifically denounced by competent authority. In the absence of a showing of any one of the three prerequisites enumerated, we find that the allegation of wrongful possession is not sustained by the evidence.

It has been suggested that since the use of methylaminopropane-hydrochloride is habit-forming and/or may produce a deleterious effect upon the health of the user, its possession could be considered prejudicial to good order and military discipline. Parenthetically, we note that the record of trial does not show that the substance under consideration has a deleterious effect upon human health, but assuming that it does we do not agree with the suggested contention. There are so many substances which even in their natural or intended use may be habit-forming and/or may produce a deleterious effect upon human health, that if the suggested view were accepted, it would be a most unique person, indeed, who would not be rendered liable to trial by court-martial for a violation of Article of War 96 upon the theory advanced.

5. Specification 1 of the Charge, the finding of guilty of which we hold to be sustained by the record of trial, alleges a violation of a standing order for which the maximum sentence which may be imposed is confinement at hard labor for six months and forfeiture of two thirds pay per month for a like period. Since the finding of guilty of Specification 1 of the Charge is the only finding upon which a sentence may be based it follows that so much of the sentence as exceeds confinement at hard labor for six months and forfeiture of two thirds pay per month for a like period should be disapproved.

6. For the reasons stated the Board of Review holds that the record of trial is legally insufficient to support the finding of guilty of Specification 2 of the Charge and legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months and forfeiture of thirty-five dollars pay per month for a like period.

Robert J. [unclear], J.A.G.C.

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

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

CSJAGH SP CM 350

1st Ind

SEP 30 1946

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

18 OCT

TO: Commanding General, 25th Infantry Division, APO 25, c/o Postmaster, San Francisco, California.

1. In the case of Recruit Milton Coleman, RA 16260808, Company E, 24th Infantry, APO 25, Unit 2, 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 Specification 1 of the Charge and the Charge, legally insufficient to support the finding of guilty of Specification 2 of the Charge, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months and forfeiture of \$35.00 pay per month for six months. Under Article of War 50e this holding and my concurrence vacate the finding of guilty of Specification 2 of the Charge and so much of the sentence as is in excess of confinement at hard labor for six months and forfeiture of \$35.00 pay per month for six months.

2. It is requested that you publish a special 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 findings of guilty and of the sentence so vacated. A draft of a special 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:

(Sp CM 350)

2 Incls
1 R/t
2 Dft ⁵PCMO



THOMAS H. GREEN
Major General
The Judge Advocate General

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

SEP 20 1949

CSJAGV Sp CM 353

UNITED STATES)

v.)

Recruit CLARENCE R. HILL)
(RA 38692898), Company "B",)
6th Armored Cavalry (US Con),)
Straubing, Germany.)

UNITED STATES CONSTABULARY

Trial by Sp CM, convened at
Muensingen, Germany, 9 June
1949. Bad conduct discharge
(suspended), forfeiture of
\$45 pay per month for six (6)
months and confinement for
six (6) months. Disciplinary
Barracks.

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

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

2. Upon trial by a special court-martial convened by the Commanding Officer, 6th Armored Cavalry (US Constabulary), on 9 June 1949, the accused was found guilty of being drunk and disorderly in command on or about 30 November 1948, in violation of Article of War 96 (Charge I and its Specification); breach of arrest at Straubing Air Base, Germany, on or about 30 November 1948 and on or about 1 December 1948, in violation of Article of War 69 (Charge II and its Specification, and Additional Charge II and its Specification); and absence without proper leave from about 28 November 1948 to about 30 November 1948 and from about 1 December 1948 to 14 December 1948, in violation of Article of War 61 (Charge III and its Specification and Additional Charge I and its Specification). He was sentenced to be discharged the service with a bad conduct discharge, to forfeit forty-five 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 47b (sic). The officer exercising general court-martial jurisdiction, the Commanding General, United States Constabulary, approved the sentence and ordered it duly executed, but suspended that portion thereof adjudging a bad conduct 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 might direct, as the place of confinement, but pending evacuation directed that the

CSJAGV Sp CM 353

soldier be confined at the European Command Military Prison, Mannheim, Germany. The result of the trial was promulgated by Special Court-Martial Orders Number 39, Headquarters United States Constabulary, APO 46, dated 25 July 1949.

3. The record of trial is legally sufficient to support the findings of guilty and so much of the sentence as provides for forfeiture of two-thirds pay per month for six months and confinement at hard labor for six months. The only questions presented by the record of trial are whether a special court-martial convened after 1 February 1949, the effective date of Title II, Selective Service Act of 1948 (62 Stat 627), had the power to adjudge a bad conduct discharge for an offense committed prior to 1 February 1949, and the legality of the forfeiture of forty-five dollars pay per month for six months in view of the accused's having in effect a Class F Allotment to dependents of \$22.00 per month.

4. In a recent case (Sp CM 9, McNeely), the Judicial Council held that a special court-martial did not have the power to adjudge a bad conduct discharge for an offense committed prior to 1 February 1949. In its opinion the Judicial Council stated:

"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 to 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).

"* * * 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

CSJAGV Sp CM 353

used to indicate that the Congress intended the application of the statute to depend upon the facts of particular cases.

"* * * 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."

5. With respect to the forfeitures adjudged in this case, the charge sheets disclose accused's base pay plus longevity to be \$90.00 per month. It is apparent from his station that this amount includes his foreign service pay. When his foreign service pay is deducted, accused's pay per month is \$75.00. An accused in confinement does not draw foreign service pay (SPJGJ 1944/12996, 25 Nov 1944; IV Bull, JAG 7).

The charge sheets further disclose that the accused has in effect a Class "F" Allotment to his dependents in the amount of \$22.00 per month. Paragraph 117c, Manual for Courts-Martial, 1949, provides at page 133 in pertinent part:

"Unless dishonorable or bad conduct discharge is adjudged the monthly contribution of a soldier to family allowance will be excluded in computing the amount of pay subject to forfeiture."

In the case under consideration, since the court-martial was without authority to adjudge a punitive discharge it was therefore bound to exclude the \$22.00 per month from the pay of the accused in computing the amount of pay subject to forfeiture. Since the pay of the accused after deducting the contribution to the family allowance was \$53.00 per month the maximum forfeiture which the court-martial could adjudge was two-thirds pay per month (A.W. 13; par. 15, 116b, MCM, 1949) or \$35.33 per month.

CSJAGV Sp CM 353 .

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of thirty-five dollars and thirty-three cents (\$35.33) pay per month for six months.

J. H. Gumm J.A.G.C.
Chas. M. Bryant J.A.G.C.
Carl R. Lauritzen J.A.G.C.

CSJAGV Sp CM 353

1st Ind.

OCT 10 1949

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

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

1. In the case of Recruit Clarence R. Hill (RA 38692898), Company "B", 6th Armored Cavalry (US Constabulary), I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of thirty-five dollars and thirty-three cents (\$35.33) pay per month for six months.

2. It is requested that you publish a Special 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 that part of the sentence so vacated. A draft of a special 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 they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(Sp CM 353).



THOMAS H. GREEN
Major General
The Judge Advocate General

2 Incls

Record of trial
Draft of Sp CMO

Accused pleaded guilty to the Charge and its Specifications and was found guilty thereof. No evidence of previous convictions was introduced. He was sentenced to be discharged with a bad conduct discharge, forfeiture of fifty dollars (\$50.00) of his pay for a period of six months, and confinement at hard labor for six months. On 27 April 1949 the convening authority approved the sentence and forwarded the record of trial for action under the provisions of Article of War 47d. On 13 June 1949 the convening authority revoked the former action, disapproved the sentence and ordered a rehearing before another court.

3. At the rehearing on 19 July 1949, accused was tried upon the same Charge and Specifications thereunder. He pleaded not guilty to the Charge and specifications and was found guilty thereof. No evidence of previous convictions was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to be reduced in grade to Recruit, to forfeit fifty dollars (\$50.00) pay per month for six (6) months, and to be confined at hard labor for six months. On 25 July 1949 the convening authority approved the sentence and forwarded the record of trial for action under the provisions of Article of War 47d. On 5 August 1947 the officer exercising general court-martial jurisdiction, the Commanding General, First Army, approved the sentence, remitted four months of the confinement adjudged, designated the Post Guardhouse, Fort Jay, New York, as the place of confinement, and forwarded the record of trial for action under the provisions of Article of War 50e.

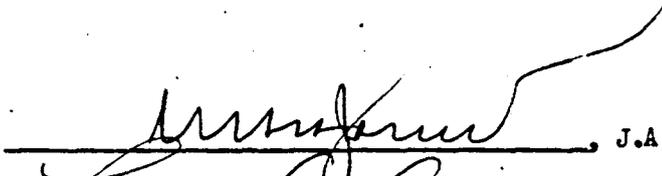
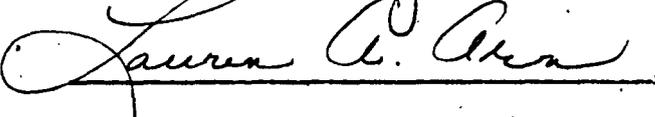
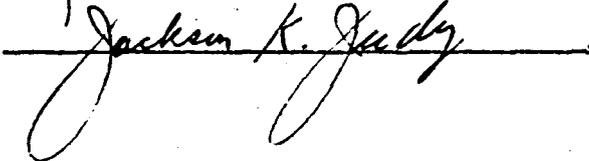
4. The record of trial is legally sufficient to support the findings of guilty. The only question presented is the legality of the sentence as pertains to forfeitures adjudged at the rehearing.

5. Article of War 52 provides that upon a rehearing "no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding."

The sentence adjudged by the court in the original proceeding as to forfeitures was to forfeit fifty dollars (\$50.00) pay for a period of six months. The forfeiture of pay was not expressed in dollars and cents per month as required by the forms of sentences prescribed in Appendix 9, page 364, Manual for Courts-Martial, 1949. It is well settled that pay cannot be forfeited by implication - by reading something into the sentence which the court did not put there. A sentence to forfeit \$50.00 pay for a period of six months cannot be interpreted as imposing a forfeiture of fifty dollars pay per month for six months (250.479, Jan 11, 1924; Dig. Op. JAG 1912-40, sec. 402 (9)). Accordingly, the original sentence imposed a forfeiture of no more than a total of \$50.00 pay. The sentence adjudged on the rehearing as to forfeitures was to forfeit fifty dollars (\$50.00) pay per month for six months, or a total forfeiture of \$300.00. It is the opinion of the Board of Review that the portion of the sentence adjudged at the rehearing, imposing forfeiture of fifty dollars (\$50.00) per month for six months, constitutes a sentence in excess of the forfeitures as originally adjudged, is in violation of Article of War 52, and is therefore illegal to that extent (see CM 246503, Maeef, 30 BR 53, 56).

It is further noted that the sentence adjudged on rehearing included a reduction in grade to Recruit. Since a sentence which includes a bad conduct discharge and confinement at hard labor operates automatically to reduce an enlisted man to the lowest grade (par. 115d, MCM, 1949, p. 128), that portion of the sentence adjudging a reduction in grade to Recruit does not violate Article of War 52 (see CM 238138; BREWSTER, 24 BR 173, 176).

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as approved by the reviewing authority as provides for discharge from the service with a bad conduct discharge, reduction in grade to Recruit, forfeiture of fifty dollars (\$50.00) pay and confinement at hard labor for two months.


_____, J.A.G.C.

_____, J.A.G.C.

_____, J.A.G.C.

OCT 19 1949

CSJAGI SP CM 362

1st Ind

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

TO: Commanding General, First Army, Governors Island, New York 4, New York

1. In the case of Private William M. Wallace (RA 37892413), Company M, 7th Infantry Regiment, 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 and legally sufficient to support only so much of the sentence as provides for bad conduct discharge, reduction in grade to Recruit, forfeiture of fifty dollars (\$50.00) pay and confinement at hard labor for two months. Under Article of War 50g, this holding and my concurrence vacate so much of the sentence relating to forfeitures as is in excess of forfeiture of fifty dollars (\$50.00) pay. Under the provisions of Article of War 50 you now have authority to order the execution of the sentence as modified in accordance with the foregoing holding.

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

(SP CM 362).

1 Encl
Record of trial



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

OCT 6 1949

CSJAGI SP CM 380

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

v.

Recruit FRANK E. HUSTED (RA 12300340)
and Recruit GEORGE NEEDER (RA 18304343),
both of Headquarters Company, Third
Battalion, 187th Airborne Infantry,
11th Airborne Division.

CAMP CAMPBELL, KENTUCKY

Trial by SP. C.M., convened
at Camp Campbell, Kentucky,
19 July 1949. As to both:
Bad conduct discharge,
forfeiture of fifty (\$50.00)
dollars pay per month for
six (6) months and confinement
for six (6) months. Camp
Stockade, Camp Campbell, Kentucky.

HOLDING by the BOARD OF REVIEW
JONES, ARN 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 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 at common trial upon the following Charges and Specifications:

As to the accused Husted:

CHARGE I: Violation of the 61st Article of War. (Disapproved by reviewing authority)

Specification: Disapproved by reviewing authority.

CHARGE II: Violation of the 69th Article of War. (Disapproved by reviewing authority)

Specification: Disapproved by reviewing authority.

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

Specification: In that Recruit Frank E Husted, Headquarters Company, Third Battalion, 187th Airborne Infantry, did, at Camp Campbell, Kentucky, on or about 2 July 1949, with intent to do him bodily harm commit an assault upon Recruit Delbert J Atwood, Company "C", 185th Engineers, by feloniously and willfully striking the said Recruit Delbert J Atwood on the head with his fists.

As to the accused Needer:

Charge I: Violation of the 96st Article of War. (Disapproved by reviewing authority)

Specification: Disapproved by reviewing authority.

CHARGE II: Violation of the 69th Article of War. (Disapproved by reviewing authority)

Specification: Disapproved by reviewing authority.

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

Specification: In that Recruit George Needer, Headquarters Company, Third Battalion, 187th Airborne Infantry, did, at Camp Campbell, Kentucky, on or about 2 July 1949, with intent to do him bodily harm commit an assault upon Recruit Delbert J Atwood, Company "C", 185th Engineers, by feloniously and willfully striking the said Recruit Delbert J Atwood on the head with his fists.

Accused Husted pleaded not guilty to all Charges and Specifications and was found guilty of Charges I and II and the Specifications thereunder. As to Charge III and its specification he was found guilty thereof except the words "on the head with his fists", substituting therefor the words "a deadly weapon, to wit: a bayonet," of the excepted words, not guilty, of the substituted words, guilty. Accused Needer pleaded not guilty to and was found guilty of all Charges and the Specifications thereunder. No evidence of any previous convictions was introduced as to the accused Husted. Evidence of one previous conviction was introduced as to the accused Needer. Each accused was sentenced to be discharged from the service with a bad conduct discharge, to forfeit fifty dollars pay per month for six months and to be confined at hard labor for six (6) months. On 3 August 1949 the convening authority approved the sentence as to each accused and forwarded the record of trial for action under the provisions of Article of War 47d. The officer exercising general court-martial jurisdiction, the Commanding General, Camp Campbell, Kentucky, disapproved the findings of guilty as to each accused of Charges I and II and the specifications thereunder, approved the sentence, designated the Camp Stockade, Camp Campbell, Kentucky, as the place of confinement, and forwarded the record of trial for action under the provisions of Article of War 50e.

3. The record of trial is legally sufficient to support the findings and sentence as approved as to Needer. The only question presented is whether or not the record of trial is legally sufficient to support the findings of guilty, by exceptions and substitutions, of Charge III and its Specification and the sentence as to Husted.

4. With regard to the Specification of Charge III, the court, by exceptions and substitutions, found the accused not guilty of assault with intent to do bodily harm by striking the victim "on his head with his fists" as alleged but guilty of committing an assault with intent to do bodily harm with "a deadly weapon, to wit: a bayonet." The court thus found accused guilty of an assault with intent to do bodily harm with a dangerous weapon. The proof shows that only a single felonious assault both with fists and a bayonet by the accused upon the victim alleged was committed. In this respect the instant case is distinguished from that of the accused Reese in CM 330658, Brown (and Reese), 79 BR 111, 114, wherein the evidence disclosed that two separate assaults, one with a knife and one with a pistol, were committed by the accused Reese upon the victim at the time and place alleged.

It is provided in paragraph 78c, page 77, Manual for Courts-Martial, 1949, in pertinent part, that:

"Exceptions and Substitutions.—One or more words or figures may be excepted and, where necessary, others substituted, provided the facts as so found constitute an offense by an accused which is punishable by the court, and provided that such action does not change the nature or identity of any offense charged in the specification or increase the amount of punishment that might be imposed for any such offense. * * *."

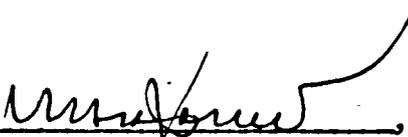
In CM 320028, Jones, 69 BR 227 at 229 the Board of Review stated in pertinent part:

"Except where a finding with exceptions and substitutions concern figures, dates or other minor details that do not operate to change the nature or identity of an offense alleged, a court may not, in its finding introduce any foreign element that would render the offense a separate or distinct offense from that charged. Findings by exception and substitution are only authorized where all the elements constituting the offense of which the accused is found guilty, are included in the offense charged." (Underscoring supplied).

An offense of assault with intent to do bodily harm with a dangerous instrument includes an added element to that originally charged, namely a dangerous instrument. Every element of the offense contained in the substituted specification of Charge III not contained in the original Specification must, therefore, be disregarded, since a court may not introduce any foreign element which renders the offense separate or distinct from that charged. When the words "a deadly weapon, to wit: a bayonet" are excluded from the substituted Specification, the original Specification remains except the words "on the head with his fists," which results in an allegation of assault with intent to do bodily harm by feloniously and willfully striking the victim (CM 246044, Copeland (and Ruggles), 2 BR (ETO)

291, 295). The offense of assault with intent to do bodily harm is necessarily included in an offense of assault with intent to do bodily harm with a "deadly weapon" (dangerous instrument) (CM 302854, Juhl, 59 BR 99, 105; CM 200047, Plants (and Gibeaut), IV BR 233, 236). It is the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty as to Husted of an offense of assault with intent to commit bodily harm by feloniously and willfully striking the victim. (See CM 191638, Giles, I BR 269; CM 316193, Holstein, 65 BR 271).

5. The Board of Review holds the record of trial legally sufficient to support the approved findings of guilty and the sentence as to the accused Needer. For the reasons stated, as to the accused Husted the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty under the Specification of Charge III as finds that the accused did at the time and place and with the intent alleged, commit an assault upon the person described, by feloniously and willfully striking him, and legally sufficient to support the finding of guilty of Charge III and the sentence.


 _____, J.A.G.C.
 ABSENT VOVO PENDING
 OVERSEAS MOVEMENT
 _____, J.A.G.C.

 _____, J.A.G.C.

CSJAGI SP CM 380

1st Ind

24 OCT 1949

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

TO: Commanding General, Camp Campbell, Kentucky

1. In the case of Recruit Frank E. Husted (PA 12300340) and Recruit George Needer (PA 12304343), both of Headquarters Company, 3d Battalion, 187th Airborne Infantry, 11th Airborne Division, I concur in the foregoing holding by the Board of Review that as to accused Needer the record of trial is legally sufficient to support the approved findings of guilty and the sentence in his case, and as to the accused Husted legally sufficient to support only so much of the finding of guilty under the Specification, Charge III, in his case as finds that the accused did at the time and place and with the intent alleged, commit an assault upon the person described, by feloniously and willfully striking him, and legally sufficient to support the finding of guilty of Charge III and the sentence. Under Article of War 50g, this holding and my concurrence therein vacate so much of the finding of guilty of the specification of Charge III as to the accused Husted as involves the words "a deadly weapon, to wit: a bayonet."

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

(SP CM 380)

1 Incl
Record of 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.

441

CSJAGN-SpCM 427

UNITED STATES)

v.)

Recruit LEO M. KALLENBERGER)
(RA 15418794), 5012 Area)
Service Unit, Station Com-)
plement, Headquarters Company,)
Detachment #3, Fort Sheridan,)
Illinois.)

29 June 1949

FIFTH ARMY

Trial by Sp.C.M., convened at
Fort Sheridan, Illinois, 27 June
1949. Bad conduct discharge
(suspended), forfeiture of \$50
per month for six (6) months
and confinement for six (6)
months. Post Guardhouse.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Recruit Leo M. Kallenberger, assigned, 5012 Area Service Unit, Station Complement, Headquarters Company, Detachment #3, then Recruit, 9213 Technical Service Unit, Transportation Corps, Replacement Center, Detachment #4, did, at Camp Kilmer, New Jersey, on or about 18 April 1949, desert the service of the United States by absenting himself without proper leave from his station at Camp Kilmer, New Jersey, with intent to shirk important service, to wit: duty beyond the continental limits of the United States, and did remain absent in desertion until he was apprehended at Lafayette, Indiana, on or about 19 May 1949.

Accused pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit \$50 per month for six months and to be confined at hard labor at such place as proper authority might direct for six months. The convening authority having approved the sentence, the officer authorized to appoint a general court-martial for the command then approved the sentence, suspended execution of the bad conduct discharge until the soldier's release from confinement, and designated the Post Guardhouse, Fort Sheridan, Illinois, as the place of confinement. The result of trial was promulgated in Special Court-Martial Orders No. 13, Headquarters Fifth Army, Chicago, Illinois, 26 July 1949.

3. That accused was absent without proper leave from his station at Camp Kilmer, New Jersey, during the period alleged was satisfactorily proved by the introduction of competent extract copies of morning reports (Pros. Exs. 3, 4). No evidence was introduced, however, to show that accused knew of or should have known of any orders directing the movement of him or his organization to "duty beyond the continental limits of the United States." Nor was any evidence introduced to show that any such orders had in fact been issued.

Under these circumstances the court could not properly find that accused deserted with intent to shirk important service.

"In proving a specification alleging that the accused quit his organization or place of duty with the intent to avoid hazardous duty or with the intent to shirk important service, there should be evidence of facts raising a reasonable inference that the accused knew with reasonable certainty that he would be required for such hazardous duty or important service. For example, it might be shown: (a) that the accused was personally warned of the imminence of the duty or service; or (b) that his organization, as a whole, was so warned at a formation at which the roll was called and the accused was present; or (c) that the period of his absence was of such duration and under such circumstances that the accused must have had reasonable cause to know that he would miss a certain hazardous duty or important service" (MCM, 1949, subpar. 146a, p. 200). (Underscoring supplied).

The court may have taken judicial notice of the common knowledge that at Camp Kilmer, New Jersey, preparations for the departure of overseas replacements are habitually made (CM 226374, Collins (1942), 49 BR 217; 1 Bull. JAG 323), but the fact that accused absented himself from that type of installation is not necessarily prima facie evidence of an intent to shirk important service; it depends on the attendant circumstances

(SPJGJ, 251.2, 17 June 1942; 1 Bull. JAG 14). No circumstances other than the fact of the unauthorized absence were shown in this case. There being no proof of the issuance of any movement orders, no proof that accused knew of his pending movement if in fact such was the prospect, and there being no circumstances from which it could be inferred that he knew or should have known of such movement, a finding that he intended to shirk important service is untenable, and only a finding that he absented himself without proper leave, for thirty-one days in the instant case, can be sustained (CM 222861, Fragassi (1942), 13 BR 329, 1 Bull. JAG 103-105; CM Collins, supra; CM 227459, Wicklund (1942), 15 BR 299; Cf CM 274498, Green (1945), 47 BR 191).

Whether or not the court may have disregarded the allegation of intent to shirk important service and rested its finding of guilty on the tenuous assumption that an unexplained absence of thirty-one days was sufficient to justify an intent to desert (See CM 213817, Fairchild (1940), 10 BR 287; MCM, 1949, subpar. 146a, p. 199) need not be considered. Where the allegation charges an intent to shirk important service, the court cannot find the accused guilty of the entirely different intent to remain absent permanently (CM 224765, Butler (1942), 14 BR 179; CM 224932, Jenkins (1942), 14 BR 207, 1 Bull. JAG 323; CM 232342, Walkup (1943), 19 BR 49; CM 265447, Hodge (1944) 43 BR 41).

4. For the foregoing reasons, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involves finding that the accused did, at the place and time alleged, absent himself without proper leave from his station and did remain absent without proper leave until he was apprehended at the place and time alleged, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for three months and three days and forfeiture of \$50 per month for a like period.

Chas. C. Young, J. A. G. C.
C. H. Jones, Jr., J. A. G. C.
 On leave _____, J. A. G. C.

CSJAGN-SpCM 427

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C.
 To: Commanding General, Fifth Army, Chicago 15, Illinois

1. In the case of Recruit Leo M. Kallenberger (RA 15418794), 5012 Area Service Unit, Station Complement, Headquarters Company, Detachment #3, Fort Sheridan, Illinois, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involve a finding that the accused did, at the place and time alleged, absent himself without proper leave from his station and did remain absent without proper leave until he was apprehended at the place and time alleged, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for three months and three days and forfeiture of \$50 per month for a like period. Under Article of War 50e(3) this holding and my concurrence vacate so much of the findings of guilty of the Charge and its Specification as involve a finding other than that the accused did, at the place and time alleged, absent himself without proper leave from his station and did remain absent without proper leave until he was apprehended at the place and time alleged, in violation of Article of War 61; and so much of the sentence as is in excess of confinement at hard labor for three months and three days and forfeiture of \$50 per month for a like period.

2. It is requested that you publish a special 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 that portion of the findings and sentence so vacated. A draft of a special 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:

(SpCM 427).



HUBERT D. HOOVER
 Major General, U. S. Army
 Acting The Judge Advocate General

2 Incls

- 1 - Draft of SpCMO
- 2 - Record of trial

CSJAGZ SP CM 519

UNITED STATES

v.

Private First Class
STEVE R. GARZA
(RA 38372961) Fourth
Detachment, 4050th Area
Service Unit, The Artillery
Center, Fort Sill, Oklahoma.

THE ARTILLERY CENTER

Trial by SP CM, convened at
Fort Sill, Oklahoma, 16 August
1949. Bad Conduct discharge,
(suspended), forfeiture of
\$37 pay per month for three (3)
months and confinement for three
(3) months. Post Guardhouse.

HOLDING by the BOARD OF REVIEW
WHIPPLE, ALFRED and BYRNE
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. Upon trial by special court-martial convened by the Commanding Officer, 4050th Area Service Unit Detachments, the Artillery Center, Fort Sill, Oklahoma, at Fort Sill, Oklahoma, on 16 August 1949, the accused pleaded not guilty to and was found guilty of the offense of absence without leave from about 18 December 1948 to about 23 May 1949 in violation of Article of War 61. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit \$63.00 pay per month for a period of three months and to be confined at hard labor for three months. The convening authority approved only so much of the sentence as provides for a bad conduct discharge, confinement at hard labor for three months and forfeiture of \$37.00 of his pay per month for a period of three months, and forwarded the record of trial for action under Article of War 47(d). The officer exercising general court martial jurisdiction, the Commanding General, The Artillery Center, Fort Sill, Oklahoma, approved and ordered executed only so much of the sentence as provides for a bad conduct discharge, forfeiture of \$37.00 of his pay per month for three months and confinement at hard labor for three months, but suspended the execution

of the bad conduct discharge until the soldier's release from confinement. The Post Guardhouse, Fort Sill, Oklahoma, was designated as the place of confinement. The result of trial was published in General Court-Martial Orders Number 125, Headquarters The Artillery Center, Fort Sill, Oklahoma, 1 September 1949.

3. The record of trial is legally sufficient to support the findings of guilty and so much of the sentence as approved as provides for forfeiture of \$37.00 pay per month for three months and confinement at hard labor for three months. The only question presented by the record is whether a special court-martial convened after 1 February 1949, the effective date of Title II, Selective Service Act of 1948 (62 Stat. 627) had the power to adjudge a bad conduct discharge for an offense of absence without leave commencing prior to 1 February 1949 and terminating more than sixty days thereafter.

4. In a recent case (SP CM 9, McNeely), the Judicial Council held that a special court-martial did not have the power to adjudge a bad conduct discharge for an offense committed prior to 1 February 1949. In its opinion the Judicial Council stated:

"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 Mason's 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 to 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).

"* * * 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.

"* * * 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."

5. In the instant case it is noted that the unauthorized absence of accused commenced prior to 1 February 1949 and continued more than sixty days subsequent thereto. It must therefore be considered whether such absence without leave constitutes a continuing offense. If so, the unauthorized absence having extended more than sixty days after 1 February 1949, the special court-martial before which accused was tried could properly adjudge a bad conduct discharge (MCM, 1949 para. 117c; AW 13).

The Board of Review in its discussion of this question in a recent case (SP CM 102, Dillenbeck, July 1949) referred to the Manual for Courts-Martial 1928, paragraph 67, page 52 which provides: "Absence without leave (AW 61); desertion (AW 58); and fraudulent enlistment (AW 54) are not continuing offenses and are committed, respectively, on the date the person so absents himself * * *." The Board cited as the probable basis for this statement in the 1928 Manual extracts from an opinion of the then Judge Advocate General, Major General E. H. Crowder, O14.4, August 27, 1920, as follows:

"It remains to be considered whether the offense of 'absenting himself' without leave made punishable by the present 61st Article of War is a continuing offense as assumed by the authority above quoted.

"The offense of a soldier, who, without authority, leaves his organization or station, is commonly spoken of as 'absence without leave'. The 61st Article of War, however, which punishes the offense, does not describe it in those words. The language used in the article with respect to the three acts made punishable thereby is significant and indicates that the offense under discussion is therein considered as a single completed act and not a continuing one. Thus it is provided that any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty or goes from the same without proper leave or absents himself from his command, etc., without proper leave, shall be punished. The moment the soldier does any one of these three acts he violates the 61st Article. It does not follow from the mere fact that, after having absented himself without proper leave, - that is to say, after having entered into the state of being away without authority, - he remains absent without authority, that he affirmatively 'absents himself' anew each day that he remains absent, any more than that a deserter commits desertion anew each day he remains absent with the intent not to return. If the words 'absents himself without proper leave', used in the article are construed to mean leaves, or goes away from, or otherwise enters into the state of being away without authority, the offense is complete when the soldier does that thing. After that he does not leave or go away or otherwise enter into the state of being away without authority; he merely remains in the status which he has already assumed. His act of absenting himself was complete the moment he assumed that status and the length of his absence after the offense has once been committed is immaterial in fixing guilt but becomes important in determining the amount of punishment to be administered; or it may be important as a fact from which the court might infer the existence of an intent not to return."

The Manual for Courts-Martial, 1949, disposes of the question of whether or not an offense may be considered a "continuing offense" for the purpose of applying the statute of limitations in part as follows:

"Certain offenses, as, for example, wrongful cohabitation, are continuing offenses, and the accused cannot avail himself of the statute of limitations for any part of continuing offenses not within the bar of the statute of limitations. Fraudulent enlistment (AW 54) is not a continuing offense. Absence without leave (AW 61) and desertion (AW 58) are not continuing offenses for the purpose of computing the time under the statute of limitations or for the purpose of determining whether the offenses are committed in time of war. For these purposes the offenses are committed, * * * on the date the person * * * so absents himself or deserts" (para. 67, pp 61, 62). (Under-scoring supplied).

The rule enunciated in the 1949 Manual pertains to the offenses named only as they are affected by the statute of limitations and for the purpose of determining whether they are committed in time of war, and an examination of the Opinions of The Judge Advocate General cited above discloses that it was intended to cover only the effect of the statute of limitations with respect to such offenses. We must consider, therefore, whether or not absence without leave is a continuing offense in determining the ex post facto question. Again referring to the McNeely case, supra, we find the following pertinent remarks of the Judicial Council:

"Any law which operates in any manner to the substantial disadvantage of an accused in respect to 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, of the Constitution of the United States (Medley, Petitioner, 134 U.S. 160, 171; Thompson v. Utah, 170 U.S. 343, 351)."

After a thorough discussion of the legal excerpts quoted herein and other authorities, the Board of Review in the Dillenbeck case, supra, arrived at the following conclusion:

"To say that an offense is not continuing in so far as the statute of limitations is concerned, but is continuing in so far as authorizing the imposition of an additional penalty by a court not hitherto authorized to impose it, because it extends beyond the date of the law granting such authority, although in both instances commencing on the same date is sheer sophistry. It is, consequently, the opinion of the Board of Review that absence without leave is not a continuing offense in so far as to legalize a bad conduct discharge adjudged by a special court martial where the offense had its inception prior to 1 February 1949 and continuing for more than sixty days after that date."

We concur in this conclusion. Accordingly, in view of the authorities cited above and the opinion of the Judicial Council in the McNeely case, we are constrained to hold in the case here under consideration that the court could not legally include a bad conduct discharge in the sentence adjudged.

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for three months and forfeiture of \$37.00 of his pay per month for three months.

Howard P. Whipple, J.A.G.C.
Frank C. Alfred, J.A.G.C.
Robert E. Byrne, J.A.G.C.

19 OCT 1949

CSJAGZ SP CM 519

1st Ind.

JAGO, Dep't. of the Army, Washington 25, D. C.

To: Commanding General, The Artillery Center, Fort Sill, Oklahoma.

1. In the case of Private First Class Steve R. Garza (RA 38372961), Fourth Detachment, 4050th Area Service Unit, The Artillery Center, 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 and legally sufficient to support only so much of the modified sentence as provides for confinement at hard labor for three months and forfeiture of \$37.00 pay per month for three months. Under Article of War 50e this holding and my concurrence vacate so much of the sentence as is in excess of confinement at hard labor for three months and forfeiture of \$37.00 pay per month for three months.

2. It is requested that you publish a special 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 that portion of the sentence so vacated. A draft of a special 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:

(SP CM 519)

2 Incl.

1. Record of trial
2. Draft of EGCMO



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.

453

CSJAGI SP CM 552

OCT 5 1949

UNITED STATES)

v.)

Private DEWAYNE HOUGHTLEN
(RA 15281471), Company C,
36th Armored Infantry
Battalion, Combat Command B,
3d Armored Division,
Fort Knox, Kentucky.)

FORT KNOX, KENTUCKY

Trial by SP. C. M., convened at
Fort Knox, Kentucky, 24 August 1949.
Bad conduct discharge, forfeiture of
fifty dollars (\$50.00) pay per month
for six (6) months and confinement
for six (6) months. Post Stockade.

HOLDING by the BOARD OF REVIEW
JONES, ARN 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. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Private DeWayne Houghtlen, Company C 36th Armored Infantry Battalion Combat Command B, Third Armored Division, did, at Fort Knox, Kentucky, absent himself from his command at Fort Knox, Kentucky, from about 0600 hours 4 April 1949 to about unknown hours 26 May 1949.

Specification 2: In that Private Dewayne Houghtlen, Company C 36th Armored Infantry Battalion Combat Command B, Third Armored Division, did, at Fort Knox, Kentucky, absent himself from his command at Fort Knox, Kentucky from about 0600 hours 4 June 49 to about 1600 hours 10 August 1949.

He pleaded not guilty to, and was found guilty of, the specifications and the Charge, and was sentenced to be discharged the service with a bad conduct discharge, to forfeit fifty dollars pay per month for six months, and to be confined at hard labor for six months. No evidence of previous convictions was introduced. 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, Fort Knox, Kentucky, approved the sentence, designated the Post Stockade, Fort Knox, Kentucky, as the place of confinement, and forwarded the record of trial for action under Article of War 50g.

3. By competent evidence introduced at the trial it was proved that accused absented himself without proper leave from his command during the periods alleged in the specifications. The only question presented for consideration by the Board is whether the specifications allege an offense.

4. Article of War 61 provides as follows:

"Absence Without Leave.—Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct."

Specification one alleges that the accused "did, * * * absent himself from his command * * *, from about 0600 hours 4 April 1949, to about unknown hours 26 May 1949." Specification two alleges that the accused "did, * * * absent himself from his command * * * from about 0600 hours 4 June 49 to about 1600 hours 10 August 1949." Both specifications are devoid of any word or words alleging that the absence was "without proper leave" or otherwise unauthorized.

In a line of cases cited in Section 419 (1) Digest Opinions, JAG 1912-40, where the accused pleaded guilty to Specifications laid under the 61st Article of War but which did not allege that the absence was "without proper leave," it was held:

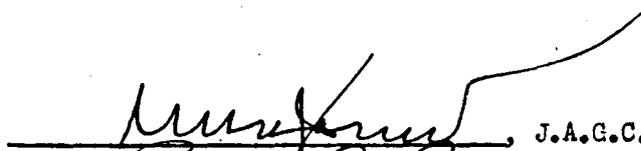
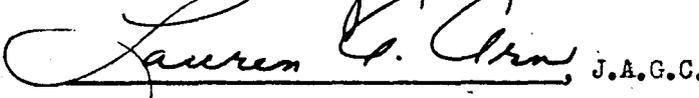
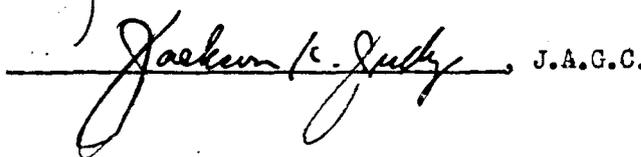
"The gist of the offense is not * * * the absence, but the absence without proper leave. An examination of the Specification under Charge I discloses that the words 'without proper leave' are omitted therefrom. To constitute a valid charge not only should the charge designate the real offense committed but the specification should set forth the legal constituents of such offense, as defined by the statute or by the usages and precedents of the service. The plea of 'guilty' was void where the specification failed to set forth the elements constituting the offense."

In CM 319573, O'BRIEN, 68 BR 381, 382, the Board of Review stated:

"It is a fundamental principle of law that the Government's pleading in a criminal case, be it an indictment, complaint or a specification in court-martial proceedings, must charge a violation of law. If it does not do so a finding of guilty under such defective pleading will be of no legal effect whatsoever no matter what crime or crimes the evidence may show accused has committed (CM 316886, Chaffin; CM 318983, Chapman)."

The specifications upon which the accused was arraigned contain nothing but the statement that he absented himself from his command from about 4 April 1949 to about 26 May 1949 (Specification 1 of the Charge) and from about 4 June 1949 to about 10 August 1949 (Specification 2 of the Charge). In the absence of some word or words alleging that his absence was without proper authority, the Specification sets forth no offense either in violation of Article of War 61 or any other Articles of War. Consequently, no offense having been alleged, the finding of guilty is of no legal effect whatsoever.

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


 _____ J.A.G.C.

 _____ J.A.G.C.

 _____ J.A.G.C.

CSJAGI SP CM 552

1st Ind'

OCT 28 1949

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

TO: Commanding General, Fort Knox, Kentucky

1. In the case of Private Dewayne Houghtlen (RA 15281471), Company C, 36th Armored Infantry Battalion, Combat Command B, 3d Armored Division, 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 Article of War 50g(3), this holding, together with my concurrence, vacates the findings of guilty and the sentence. A rehearing upon a proper charge and specifications is authorized.

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

(SP CM 552)

1 Incl
Record of trial



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

MAEN 00 85



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

457

CSJAGZ SP CM 686

OCT 26 1949

UNITED STATES)

FORT LEWIS, WASHINGTON

v.)

Trial by SP CM, convened at Fort Lewis, Washington, 17, 18 August and 14 September 1949. Bad conduct discharge, forfeiture \$35.00 pay per month for three (3) months and confinement for three (3) months. Post Stockade.

Private WILLIE J. PORTER
(RA 14278327), Company I,
Ninth Infantry.)

HOLDING by the BOARD OF REVIEW
WHIPPLE, ALFRED and BYRNE

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. Upon trial by special court-martial convened by the Commanding Officer, Ninth Infantry, Fort Lewis, Washington, at Fort Lewis, Washington, on 17, 18 August 1949, the accused was tried upon the following charge and specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Willie J. Porter, Company I, 9th Infantry, did, at Fort Lewis, Washington, on or about 11 June 1949, commit an assault upon Corporal Herbert Thomas, Jr., Company I, 9th Infantry by cutting him on the right side with a dangerous weapon, to wit: a knife.

The accused pleaded not guilty to and was found guilty of the charge and specification and was sentenced to be confined at hard labor for six (6) months, to forfeit two-thirds of his pay for a like period and to be given a bad conduct discharge. On 14 September 1949, by order of the convening authority, the court reconvened for revision of its action as pertained to

the sentence adjudged. The court thereupon revoked its former sentence and sentenced the accused to be discharged from the service with a bad conduct discharge, to forfeit \$35.00 of his pay per month for three (3) months and to be confined at hard labor for three (3) months. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47d. The officer exercising general court martial jurisdiction, the Commanding General, Fort Lewis, Washington, approved the sentence, designated the Post Stockade, Fort Lewis, Washington, 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 and that portion of the sentence which provides for a bad conduct discharge and confinement at hard labor for three months. The only question presented for consideration is whether the approved forfeiture of pay in the amount of \$35.00 per month for three months is legal.

4. Appendix 9, Manual for Courts-Martial U. S. Army, 1949, and paragraph 1, AR 35-2460, direct that a sentence to forfeiture of pay be expressed in dollars or dollars and cents, or, if for a period longer than one month, in dollars or dollars and cents per month based upon the soldier's base pay for length of service. This amount, however, by limitation of law in case of trial by special court-martial may not exceed two-thirds of a soldier's pay per month (AW 13; MCM, 1949, par. 116b).

In the instant case the original sentence adjudged by the court fails to express the forfeiture in dollars and cents and further fails to specify "per month". Since forfeiture for a period of more than one month must be expressed in terms of forfeiture per month and pay may not be forfeited by implication, this constitutes a single lump sum forfeiture to be applied for collection against pay of the accused for one month (Dig. Op. JAG 1912-40, sec. 402 (10) p. 252; CM 315463, Hummel). Such a forfeiture would amount to \$300 for one month, two-thirds of the base pay for six months of the grade to which accused would automatically be reduced by the execution of that part of the sentence adjudging confinement and bad conduct discharge (MCM, 1949, par. 116d). The amount of such forfeiture in excess of two-thirds of one month's pay is excessive, and since the sentence of the court limited the amount of forfeiture per month to \$35.00, any amount in excess of \$35.00 is excessive.

This case is to be distinguished from the Gilbert case (CM 335-245, Gilbert) cited in the review of the Staff Judge Advocate. In the Gilbert case the court upon reconvening revoked the announcement of sentence originally made by the president for the reason that such announcement expressed incorrectly the sentence voted on at the time the vote was taken, and announced the sentence to be that "the accused be confined at

hard labor at such place as reviewing authority may direct for six months and to forfeit thirty-five dollars per month for a like period". These proceedings in revision were obviously for the purpose of making the record speak the truth. In the instant case, it was proper for the court to reconvene on direction of the convening authority for a revision of its sentence to make it comply with existing regulations or to make the record speak the truth (AW 40; MCM 1949, par. 87b, p. 94). It is significant that the court in its proceedings in revision did not revoke the announcement of the original sentence and re-state it to make the record speak the truth, but revoked the sentence. The proceedings in revision, as thereafter approved by the convening authority, were clearly for the purpose of adjudging a sentence as to forfeitures in terms of dollars or dollars and cents as required by regulations. Since the sentence as to forfeiture as first adjudged and later revoked constituted a legal forfeiture only in so far as it affected the pay of accused for one month, the action in revision was limited to that extent and the sentence adjudging forfeiture with respect to pay for more than one month is illegal.

5. For the reason stated, the Board of Review holds the record of trial to be legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for a discharge from the service with a bad conduct discharge, confinement at hard labor for three (3) months and forfeiture of \$35.00 of his pay.

Howard V. Whipple, J.A.G.C.
Frank C. Alfred, J.A.G.C.
Robert E. Byrnes, J.A.G.C.

CSJAGZ SP CM 686

1st Ind

10 NOV 1949

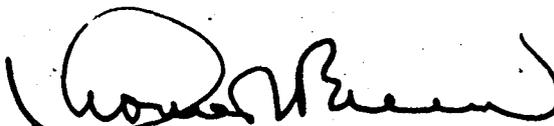
JAGO, Dept. of the Army, Washington 25, D. C.

TO: Commanding General, Fort Lewis, Washington

1. In the foregoing case of Private Willie J. Porter (RA 14278327), Company I, Ninth Infantry, Fort Lewis, Washington, I concur in the holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for discharge from the service with a bad conduct discharge, confinement at hard labor for three months, and forfeiture of \$35.00 of his pay. Under Article of War 50a(3), this holding and my concurrence vacate so much of the sentence as is in excess of discharge from the service with a bad conduct discharge, confinement at hard labor for three months, and forfeiture of \$35.00 of his pay. 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, 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:

(SP CM 686).



THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of trial

AMBJA 201 Porter, Willie J. (GP)

2d Ind

Hq, 2d Infantry Division, Fort Lewis, Washington, 18 November 1949

TO: The Judge Advocate General, Department of the Army, Washington D.C.

Forwarded herewith is record of trial in the case of Willie J. Porter, together with six (6) copies of SCMO #11, Headquarters, Fort Lewis, Washington, dated 17 November 1949, and promulgated in accordance with the holding of the Board of Review.

FOR THE COMMANDING GENERAL:



E. J. McLAUGHLIN
Capt. AGD
Asst. Adj. Gen.

1 Incl
1. Record of Trial

CSJAGZ SP CM 716

DEC 16 1949

UNITED STATES)
))
 v.)
Private JOHN T. AARON)
(RA 18209764), Headquarters)
Company, 796th Military)
Police Battalion.)

UNITED STATES FORCES IN AUSTRIA

Trial by Sp C M, convened at Vienna, Austria, 22 and 23 August 1949. Bad conduct discharge (suspended), forfeiture \$35 pay per month for four (4) months and confinement for four (4) months. EUCOM Military Prison, Germany.

HOLDING by the BOARD OF REVIEW
WHIPPLE, ALFRED and BYRNE
Officers of The Judge Advocate General's Corps

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

2. The accused was tried by special court-martial upon the following charge and specification:

CHARGE: Violation of the 93d Article of War.

Specification: In that Private John T. Aaron, Headquarters Company, 796th Military Police Battalion, did, at Vienna, Austria, on or about 1 August 1949, feloniously steal a Josmar 15 jewel wrist watch, of some value less than twenty dollars (\$20.00), property of Private Charles D. Lockhart.

The accused pleaded not guilty to, and was found guilty of, the charge and its specification. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit thirty-five dollars (\$35.00) pay per month for four months and to be confined at hard labor at such place as the proper authority might direct for four months. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47d. The officer exercising general court-martial jurisdiction approved the sentence and ordered it executed, but suspended the execution of the bad conduct discharge until the soldier's

release from confinement and designated the EUCOM Military Prison, Germany, or elsewhere as the Secretary of the Army might direct, as the place of confinement. The result of trial was promulgated in Special Court-Martial Orders No. 6, Headquarters United States Forces in Austria dated 27 September 1949.

3. Evidence: While working as a KP, Private Charles D. Lockhart had put his watch in the pocket of his jacket which was left "on the window" in the storeroom of the mess hall of the Stifts Kaserne. The accused worked in the mess hall as a cook. Lockhart noticed that his watch was missing between 8:15 and 9 A. M. after he had put on his jacket and had left the mess hall. Some time later that day it was found in the possession of an Austrian mess hall employee, Otto Rybiezka, who had bought the watch for one hundred shillings from another Austrian named Raimund Plaskura. Plaskura told Lockhart that he had bought the watch from a tall, dark soldier with a gold tipped tooth (R 6-11, 26-32, 36-39). Plaskura worked as a shoeshine man in the hallway of the second floor of the building in which the mess hall was located. The mess hall was on the first floor. At the trial, Plaskura stated that at about 9 A. M. he had bought the watch for one hundred shillings from a soldier dressed in a white uniform, that shortly thereafter on the same day he resold it for one hundred shillings to Rybiezka and that he was "one hundred percent" positive that the accused was the soldier from whom he had purchased the watch "because I know him by sight". Plaskura testified that he had never bought anything from or sold anything to any soldier before this event (R 11-13, 32-36).

The accused testified that he did not steal the watch. On the day of the theft, he returned to the mess hall from the firing range at approximately 8:30 A. M. wearing fatigue clothes. He immediately reported to the chief cook, Corporal Blankenship, "asked how things were coming" and said he "would be back as soon as possible". The cooks usually hang their fatigues "any place they can, sinkroom, back storeroom, any place". The accused was busy in the mess hall as a cook until 1:15 P. M. and did not leave the vicinity of the stoves until that time. The accused testified that he had witnesses to prove that he did not leave the mess hall, but that they were "all working today and couldn't come here [to the trial]". One of these witnesses was Corporal Blankenship and the other a man named "Push" Bailey. The court asked the accused whether he had discussed his case with the defense counsel, whereupon the accused replied that he did not know who his defense counsel was "until this morning" and had discussed the case with his counsel "right outside just before coming to this court, before beginning". The defense counsel confirmed this statement. With respect to Plaskura, the accused testified that Plaskura had once before erroneously identified him as a participant in an offense - sending out after cognac. The accused knew of no reason why Plaskura would "have it in for [him]". Plaskura "black markets too, he does just about everything, he sells shillings, I know he is not making all that money just shining shoes". The accused "had a lot of deals with him as a shoe shine man". Plaskura had been in the Battalion about a year and a half (R 16-21).

After the accused had testified and the court had taken a short recess at the request of the defense, Corporal Blankenship was called as a witness for the defense. "Push" Bailey did not appear and give testimony at the trial. Corporal Blankenship testified that the accused reported for duty at 8:30 A. M. and immediately left the kitchen saying that he was going "up" to change into his "whites". In less than twenty minutes, the accused returned through the dining room. The dining room was not near the "cloak room" where the KP's hang their clothes. The accused "Could have cut back" to the cloak room, but at the time he went to change his clothes he was "headed up the hallway". After the accused had changed his clothes, he worked in the kitchen until 1:30 P. M. (R 21-25).

During the course of the trial and at a time when the court was recalling and examining the witnesses who had previously testified, the court adjourned from 1720 hours to 1005 hours the next day. There were no other adjournments (R 29, 30).

4. Discussion: The question here presented is whether the substantial rights of the accused were prejudiced by reason of lack of preparation of his defense prior to trial. In a case such as this, where defense counsel meets the accused for the first time only a few moments before the commencement of the trial, it is not sufficient merely to review the record to see that the evidence there contained is persuasive of the guilt of the accused. The lack of pre-trial preparation here disclosed casts upon the authorities reviewing the conviction the moral and legal duty of determining whether the error may have had lasting effect throughout the trial, for a judicial pronouncement cannot be permitted to stand without injury both to society and the person directly affected when it is open to the criticism that it may have been the result, in whole or in part, of a flagrant departure from accepted standards. If the accused has not by any act of his waived the defect and, considering the entire record of trial, it is impossible to conclude beyond a reasonable doubt that the result could not have been different had the accused been afforded sufficient opportunity to consult with his counsel prior to trial and that the accused ultimately had the effective assistance of counsel, the findings and sentence should be set aside (CM 297170, Woods, 13 BR (ETO) 37, 42-54, and cases there cited; CM 252835, Willeison, 34 BR 203; CM 315523, Huntington, 76 BR 363, 377).

It is at once apparent that the question of the guilt or innocence of the accused in the instant case hinges upon the credibility of the witness Plaskura, for it is only through his testimony that the accused became involved in the transfer of the watch from the possession of the owner to that of Plaskura. At the trial Plaskura was certain that it was the accused who sold him the watch, and, if the force of this testimony could have been weakened or shaken by better preparation on the part of the defense, it could hardly be said that the result of the trial might not have been different.

During the examination of Plaskura by the trial judge advocate, the defense counsel and the court, certain interesting inconsistencies and improbabilities were developed (R 11-13, 32-36), some of which are

briefly set forth below:

- (1) Plaskura described himself as a "poor man" whose monthly earnings as a shoeshine man were only 400 to 500 shillings, yet he claimed that he would have let the accused have one hundred shillings anyway but since the watch was offered for that price he took the watch. According to his testimony, the watch was not worth what he paid for it (100 shillings), nevertheless he sold it to another civilian employee on the same day for one hundred shillings. When it was discovered that the watch had been stolen, he repaid the purchaser fifty shillings because the purchaser was "poorer than I am". Later, when the purchaser complained of lack of funds, Plaskura agreed to refund the rest of the purchase price. He made no attempt to collect one hundred shillings from the accused because he had learned from experience "that you will never have any success if you want your money back".
- (2) At the time the accused approached him with the watch, Plaskura was busy with a customer. He was very busy, that day, for "it was payday and business is going high on pay-days". The actual sale of the watch took not "more than one minute" and no one other than Plaskura and the accused was present at that time. Plaskura could not remember the name of the customer who was present when the accused first approached.
- (3) At the trial, Plaskura testified that he knew the accused was the soldier who sold him the watch "because I know him by sight" and that the accused was the only soldier in the Stifts Kaserne "that looks like that." He also testified that when first asked to identify the soldier who had sold him the watch, he had stated that the soldier was "tall and not too thin," whereupon a bystander had said, "why yes, that's the man with the gold tipped tooth". The man with the gold tipped tooth (the accused) was then "brought in" and Plaskura recognized him as the soldier who had sold the watch. Plaskura had not "remembered" the gold tooth.

Against this background, it should also be noticed that Plaskura had testified that previous to the sale of the watch he had never bought anything from or sold anything to any soldier, whereas the accused had testified that Plaskura was a black marketeer.

Although Plaskura was cross-examined to some extent by both the defense counsel and the court, no attempt was made at the trial to discredit Plaskura's testimony by evidence emanating from sources other than the accused and Plaskura himself. It is somewhat difficult to believe that there were no soldiers in the Stifts Kaserne who could testify as to whether Plaskura was or was not a "black marketeer," as

to Plaskura's wealth or poverty as indicated by external circumstances, as to the exact circumstances surrounding the rather suggestive identification of the accused as the thief by reference to his gold tipped tooth, and - most important of all - as to whether there were persons other than the accused and Plaskura in the neighborhood of the shoe-shine stand at the time the sale of the watch was allegedly consummated. Furthermore, the movements of the accused about the mess hall on the morning of the theft were most important to a proper understanding of the case. The accused testified that "Push" Bailey had some information with respect to these movements, yet Bailey was never called as a witness. It is possible, of course, that the absent witnesses would not have helped the accused's defense. Indeed, their testimony may have established the accused's guilt more strongly than it was established by the evidence of record. These considerations, however, are beside the point, for the absent witnesses may have won an acquittal for the accused. In any event a proper pre-trial preparation of the case would have disclosed the value of the missing evidence, and this record of trial contains more than a suggestion that there was no such preparation. It is not considered a matter of great significance that during the trial the court adjourned from the evening of one day until the morning of the next. It is too much to expect that the complexities of this case might have been solved during the hours when possible witnesses would normally be absent on pass or otherwise unavailable for interrogation. As in the case of C. M. Huntington, cited above, this case

"presents a juridical situation in which it would be impossible for those charged with the appellate review of this record * * * to conclude that accused was afforded a fair trial."

Nowhere in the record does it appear that the accused had waived his right to the effective assistance of counsel. Since it reasonably may be doubted that the prejudice to the accused's substantial rights inherent in the lack of pre-trial preparation had been cured during the course of the trial, the findings of guilty and the sentence should be set aside.

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

Edward P. Whipple, J.A.G.C.

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

Robert C. Payne, J.A.G.C.

CSJAGE SF CM 716

1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 30 January 1950

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

In the foregoing case of Private John T. Aaron (RA 18209764), Headquarters Company, 796th Military Police Battalion, 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 the record of trial are accordingly transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.

FOR THE JUDGE ADVOCATE GENERAL:

1 Incl
Record of trial



FRANKLIN P. SHAW

Major General, United States Army
The Assistant Judge Advocate General

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

467

CSJAGU SP CM 716

7 February 1950

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

UNITED STATES FORCES IN AUSTRIA

v

Private JOHN T. AARON
RA 18209764, Headquarters
Company, 796th Military
Police Battalion.

Trial by Sp CM, convened at Vienna,
Austria, 22 and 23 August 1949.
Bad conduct discharge (suspended),
forfeiture \$35 pay per month for
four (4) months and confinement
for four (4) months. EUCCOM
Military Prison, Germany.

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

1. Pursuant to Article of War 50e(4) the record of trial by special court-martial and the opinion of the Board of Review in the case of the soldier named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. The accused was tried by special court-martial upon the following charge and specification:

CHARGE: Violation of the 93d Article of War.

Specification: In that Private John T. Aaron, Headquarters Company, 796th Military Police Battalion, did, at Vienna, Austria, on or about 1 August 1949, feloniously steal a Josmar 15 jewel wrist watch, of some value less than twenty dollars (\$20.00), property of Private Charles D. Lockhart.

The accused pleaded not guilty to, and was found guilty of, the charge and its specification. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit thirty-five dollars (\$35.00) pay per month for four months and to be confined at hard labor at such place as the proper authority might direct for four months. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47d. The officer exercising general court-martial jurisdiction approved the sentence and ordered it executed, but suspended the execution of the bad conduct discharge until the soldier's release from confinement and designated the EUCCOM Military Prison, Germany, or elsewhere as the Secretary of the Army might direct, as the place of

confinement. The result of trial was promulgated in Special Court-Martial Orders No. 6, Headquarters United States Forces in Austria dated 27 September 1949. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence because the accused was not properly defended by defense counsel.

3. Evidence. While working as a KP, Private Charles D. Lockhart had put his watch in the pocket of his jacket which was left hanging up on a nail or peg in the storeroom of the mess hall of the Stifts Kaserne. The accused worked in the mess hall as a cook. Lockhart noticed that his watch was missing between 8:15 and 9 A.M. He had looked at his watch at least once to ascertain the time between the time he came on duty and the time he found the watch missing. At the time Lockhart looked at his watch an Austrian jacket was hanging over his jacket. Shortly after the discovery of the loss of his watch Private Lockhart reported the matter to Corporal Blankenship, who was in charge of the cooks and KPs in the kitchen. Corporal Blankenship searched the clothing of those working in the kitchen who had access to the closet where Private Lockhart's jacket had been hanging but found no watch. At that time another KP had his jacket hanging right over the top of the jacket of Private Lockhart. One of the Austrians had a watch on and Corporal Blankenship asked him if that was his watch, to which the Austrian replied in the negative. The jacket of this Austrian was hanging on the top of the one who had lost his watch. Corporal Blankenship had observed the accused a number of times between the time he reported for breakfast and the time he reported for duty, but he had not seen him near the entrance to the storeroom. The watch was found in the possession of an Austrian mess hall employee, Otto Rybiezka, who stated that he had bought the watch for one hundred shillings from another Austrian named Raimund Plaskura. Plaskura told Lockhart that he had bought the watch from a tall dark soldier at which time a bystander suggested that he had a gold tipped tooth (R 6-11, 26-32, 36-39). Plaskura worked as shoe shine man in the hallway of the second floor of the building in which the mess hall was located. The mess hall was on the first floor. At the trial Plaskura stated that about 9 A.M. he had bought the watch for one hundred shillings from a soldier dressed in a white uniform and shortly thereafter on the same day that he had resold it for one hundred shillings to Rybiezka. On being recalled by the court for further questioning, he stated that he was "one hundred percent" positive that the accused was the soldier from whom he had purchased the watch "because I know him by sight". Plaskura further testified that he had never bought anything from or sold anything to any soldier before this event. Plaskura stated that he was a poor man whose monthly earnings as a shoe shine man were only four to five hundred shillings. He would have let the accused have one hundred shillings anyway but since the watch was offered for that price he took the watch. The watch was not worth what he paid for it. He repaid the purchaser fifty shillings because the purchaser was "poorer than I am". Later on complaint of the purchaser Plaskura agreed to refund the rest of the purchase price. He made no

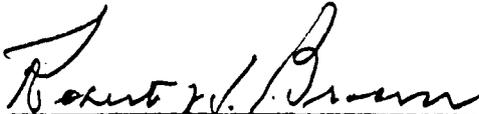
attempt to collect one hundred shillings from the accused because he had learned from experience "that you will never have any success if you want your money back". The actual sale of the watch took "not more than one minute".

Accused testified that he did not steal the watch. On the day of the theft he returned to the mess hall from the firing range at approximately 8:30 A.M. wearing fatigue clothing. He immediately reported to the chief cook. Corporal Blankenship "asked how things were coming" and said he "would be back as soon as possible". The cooks usually hang their fatigues "any place they can, sinkroom, back storeroom, any place". The accused was busy in the mess hall as a cook until 1:15 P.M. and did not leave the vicinity of the stoves until that time. The accused testified that he had witnesses to prove that he did not leave the mess hall, but that they were "all working today and couldn't come here [to the trial]". One of these witnesses was Corporal Blankenship and the other a man named "Push" Bailey. The court asked the accused whether he had discussed his case with the defense counsel, whereupon the accused replied that he did not know who his defense counsel was "until this morning" and had discussed the case with his counsel "right outside just before coming to this court, before beginning". The defense counsel confirmed this statement. With respect to Plaskura, the accused testified that Plaskura had once before erroneously identified him as a participant in an offense - sending out after cognac. The accused knew of no reason why Plaskura would "have it in for [him]". Plaskura "black markets too, he does just about everything, he sells shillings, I know he is not making all that money just shining shoes." The accused "had a lot of deals with him as a shoe shine man".

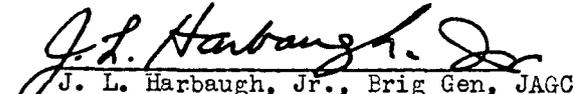
4. The Board of Review has ably analyzed and discussed the above inherent inconsistencies and improbabilities in the testimony of Plaskura in reaching the conclusion that the accused was not accorded proper pre-trial assistance of counsel. Without in anyway minimizing the importance of such assistance and the duty of the military authorities to insure that such assistance is furnished, the Judicial Council, under the circumstances disclosed in this case, does not adopt all the implications which the Board of Review found as flowing from this aspect of the case. It would seem that such error was cured in large measure by the commendable zeal and thoroughness of the inquiry conducted by the court. However, despite such commendable zeal and thoroughness it is the view of the Judicial Council that the court fell into still more grievous error in weighing the evidence for which its finding must be set aside.

The discussion of the Board of Review as to the inconsistencies and improbabilities in the testimony of Plaskura spontaneously generates a reasonable doubt as to the guilt of the accused. From the number of times witnesses were recalled and questioned by the court it is evident that the court itself had difficulty in resolving this issue. The Judicial Council realizes the difficulty inherent in the resolution of the issue in this case.

An Austrian KP is found wearing the watch of Private Lockhart. The watch of Private Lockhart was taken from his jacket which had been hanging under the jacket of another Austrian KP. It is not clear whether the Austrian's jacket belonged to the man on whom the watch was found. The Austrian on whom the watch was found stated that he obtained the watch from witness, Plaskura. Plaskura states that he obtained the watch from the accused. The accused denies that this is so and states that Plaskura is a black marketeer. The circumstances reflected in the evidence raises reasonable doubt as to whether the Austrian KP on whom the watch was found did not himself take the watch; that it was his jacket which was hanging over the jacket of the owner of the watch, that he had an arrangement with Plaskura, the black marketeer to shield him in case he was caught with the watch. Furthermore the record does not exclude the reasonable hypothesis that Plaskura might have himself stolen the watch. These reasonable probabilities are not negatived persuasively by the evidence. In other words the Council concludes that the guilt of the accused is not established beyond a reasonable doubt. Accordingly, the Judicial Council is of the opinion that the record of trial is legally insufficient to support the findings and the sentence.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

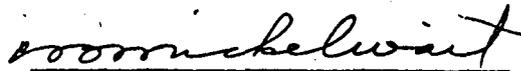
471

THE JUDICIAL COUNCIL

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

In the foregoing case of Private John T. Aaron, RA
18209764, Headquarters Company, 796th Military Police
Battalion, APO 777, U.S. Army, upon the concurrence of
The Judge Advocate General the findings of guilty and the
sentence are vacated. All rights, privileges and property
of which Private Aaron has been deprived by virtue of the
findings of guilty and the sentence so vacated will be
restored.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

7 February 1950

I concur in the foregoing action.


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

7 February 1950

(GCMO 1, 17 Feb. 1950)

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

473

CSJAGZ SP CM 751

NOV 17 1948

UNITED STATES)

FORT JACKSON

v.)

Private GROVER C. ELLIS, JR.)
(RA 44085145), Battery B, 50th)
Field Artillery Battalion.)

) Trial by Sp Cm, convened at Fort
) Jackson, South Carolina, 27 September
) 1949. Bad conduct discharge, for-
) feiture \$50 pay per month for six
) (6) months, reduced to lowest en-
) listed grade and confinement for
) six (6) months. Post Stockade.

HOLDING by the BOARD OF REVIEW
WHIPPLE, ALFRED and BYRNE
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 50a.

2. The accused was tried by special court-martial convened by the Commanding Officer, Division Artillery, Fifth Infantry Division, Fort Jackson, South Carolina, on 27 September 1949, upon the following charge and specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Grover C. Ellis, Battery B, 50th Field Artillery Battalion, then of 9213 TSU-TC Replacement Center, Detachment #4, Camp Kilmer, New Jersey, did, at Camp Kilmer, New Jersey, on or about 7 January 1949, desert the service of the United States, and did remain absent in desertion until he was apprehended at West Jefferson, North Carolina, on or about 14 August 1949.

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 violation of the 61st Article of War. He was found guilty of the charge and specification and sentenced to be reduced to the lowest enlisted grade, to be discharged from the service with a bad conduct discharge, to forfeit \$50 pay per month for six months and to be confined at hard labor for six months. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47d. The officer exercising general court-martial jurisdiction, the Commanding General, Fort Jackson, South Carolina, approved the sentence and forwarded the record of trial for action under Article of War 50e. The Post Stockade, Fort Jackson, South Carolina, was designated as the place of confinement.

3. The record of trial is legally sufficient to support the findings of guilty and so much of the sentence as provides for forfeiture of \$50 pay per month for six months and confinement at hard labor for six months. The only question presented by the record is whether a special court-martial convened after 1 February 1949, the effective date of Title II, Selective Service Act of 1948 (62 Stat. 627), had the power to adjudge a bad conduct discharge for the offense of desertion commencing prior to 1 February 1949 and terminating more than sixty days thereafter.

4. In a recent case (SP CM 9, McNeely, 8 Bull. JAG 115), the Judicial Council held that a special court-martial did not have the power to adjudge a bad conduct discharge for an offense committed prior to 1 February 1949. In its opinion the Judicial Council stated:

"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 Mason's 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 to 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).

"* * * 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.

*** 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."

5. In the instant case it is noted that the unauthorized absence of accused commenced prior to 1 February 1949 and continued more than sixty days subsequent thereto. It must therefore be considered whether such absence without leave constitutes a continuing offense. If so, the unauthorized absence having extended more than sixty days after 1 February 1949, the special court-martial before which accused was tried could properly adjudge a bad conduct discharge (MCM, 1949 par. 117c; AW 13).

The Board of Review in its discussion of this question in a recent case (SP CM 102, Dillenbeck, 8 Bull. JAG 115) referred to the Manual for Courts-Martial 1928, paragraph 67, page 52 which provides: "Absence without leave (AW 61); desertion (AW 58); and fraudulent enlistment (AW 54) are not continuing offenses and are committed, respectively, on the date the person so absents himself * * *." The Board cited as the probable basis for this statement in the 1928 Manual extracts from an opinion of the then Judge Advocate General, Major General E. H. Crowder, O14.4, August 27, 1920, as follows:

"It remains to be considered whether the offense of 'absenting himself' without leave made punishable by the

present 61st Article of War is a continuing offense as assumed by the authority above quoted.

"The offense of a soldier, who, without authority, leaves his organization or station, is commonly spoken of as 'absence without leave'. The 61st Article of War, however, which punishes the offense, does not describe it in those words. The language used in the article with respect to the three acts made punishable thereby is significant and indicates that the offense under discussion is therein considered as a single completed act and not a continuing one. Thus it is provided that any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty or goes from the same without proper leave or absents himself from his command, etc., without proper leave, shall be punished. The moment the soldier does any one of these three acts he violates the 61st Article. It does not follow from the mere fact that, after having absented himself without proper leave, - that is to say, after having entered into the state of being away without authority, - he remains absent without authority, that he affirmatively 'absents himself' anew each day that he remains absent, any more than that a deserter commits desertion anew each day he remains absent with the intent not to return. If the words 'absents himself without proper leave', used in the article are construed to mean leaves, or goes away from, or otherwise enters into the state of being away without authority, the offense is complete when the soldier does that thing. After that he does not leave or go away or otherwise enter into the state of being away without authority; he merely remains in the status which he has already assumed. His act of absenting himself was complete the moment he assumed that status and the length of his absence after the offense has once been committed is immaterial in fixing guilt but becomes important in determining the amount of punishment to be administered; or it may be important as a fact from which the court might infer the existence of an intent not to return."

The Manual for Courts-Martial, 1949, disposes of the question of whether or not an offense may be considered a "continuing offense" for the purpose of applying the statute of limitations in part as follows:

"Certain offenses, as, for example, wrongful cohabitation, are continuing offenses, and the accused cannot avail himself of the statute of limitations for any part of continuing offenses not within the bar of the statute of limitations. Fraudulent enlistment (AW 54) is not a continuing offense. Absence without leave (AW 61) and desertion (AW 58) are not continuing offenses for the purpose of computing the time under the statute of limitations or for the purpose of determining whether the offenses are committed in time of war. For these purposes

the offenses are committed, * * * on the date the person * * * so absents himself or deserts" (para. 67, pp 61, 62). (Under-scoring supplied).

The rule enunciated in the 1949 Manual pertains to the offenses named only as they are affected by the statute of limitations and for the purpose of determining whether they are committed in time of war, and an examination of the Opinions of The Judge Advocate General cited above discloses that it was intended to cover only the effect of the statute of limitations with respect to such offenses. We must consider, therefore, whether or not absence without leave is a continuing offense in determining the ex post facto question. Again referring to the McNeely case, supra, we find the following pertinent remarks of the Judicial Council:

"Any law which operates in any manner to the substantial disadvantage of an accused in respect to 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, of the Constitution of the United States (Medley, Petitioner, 134 U.S. 160, 171; Thompson v. Utah, 170 U.S. 343, 351)."

After a thorough discussion of the legal excerpts quoted herein and other authorities, the Board of Review in the Dillenbeck case, supra, arrived at the following conclusion:

"To say that an offense is not continuing in so far as the statute of limitations is concerned, but is continuing in so far as authorizing the imposition of an additional penalty by a court not hitherto authorized to impose it, because it extends beyond the date of the law granting such authority, although in both instances commencing on the same date is sheer sophistry. It is, consequently, the opinion of the Board of Review that absence without leave is not a continuing offense in so far as to legalize a bad conduct discharge adjudged by a special court martial where the offense had its inception prior to 1 February 1949 and continuing for more than sixty days after that date."

The authorities cited above were considered and followed by the Board of Review in the recent case of Sp CM 519, Garza, October 1949, and in view thereof and of the opinion of the Judicial Council in the McNeely case, we are constrained to hold in the case here under consideration that the court could not legally include a bad conduct discharge in the sentence adjudged.

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of \$50.00 of his pay per month for six months.

Edward C. Whipple, J.A.C.G.
Frank C. Alfred, J.A.C.G.
Robert E. Byrd, J.A.C.G.

REC'D JA 5' DIV.

479 DEC 2 A.M.

NOV 28 1949

CSJAGZ SP CM 751

1st Ind.

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

To: Commanding General, Fort Jackson, South Carolina.



1. In the foregoing case of Private Grover C. Ellis, Jr. (RA 4408-5145), Battery B, 50th Field Artillery Battalion, I concur in the holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of fifty dollars pay per month for six months. Under Article of War 50a(3), this holding and my concurrence vacate so much of the sentence as is in excess of confinement at hard labor for six months and forfeiture of fifty dollars pay per month for six months. 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, 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:

(SP CM 751)

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.

481

CSJAGZ SP CM 801

NOV 25 1949

UNITED STATES)

v.)

Recruit JOSEPH W. LEWIS)
(RA 18300020) Company "E",)
505th Airborne Infantry)
Regiment.)

82D AIRBORNE DIVISION

Trial by Sp C M, convened at Fort
Bragg, North Carolina, 7 October
1949. Bad conduct discharge, for-
feiture of \$50 pay per month for
six (6) months and confinement for
six (6) months. Post Guardhouse.

HOLDING by the BOARD OF REVIEW
WHIPPLE, ALFRED and BYRNE
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. Upon trial by special court-martial convened by the Commanding Officer, 505th Airborne Infantry Regiment, Fort Bragg, North Carolina, on 7 October 1949, the accused pleaded not guilty to and was found guilty of the offense of absence without leave from about 0600 hours, 9 December 1948, to about 8 September 1949, in violation of Article of War 61. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit fifty dollars 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, 82d Airborne Division, Fort Bragg, North Carolina, approved the sentence and forwarded the record of trial for action under Article of War 50e. The Post Guardhouse, Fort Bragg, North Carolina, was designated as the place of confinement.

3. The record of trial is legally sufficient to support the findings of guilty and so much of the sentence as provides for forfeiture of fifty dollars pay per month for six months and confinement at hard labor for six months. The only question presented by the record is whether a special court-martial convened after 1 February 1949, the effective date of Title II, Selective Service Act of 1948 (62 Stat. 627), had the power to adjudge a bad conduct discharge for the offense of absence without leave commencing prior to 1 February 1949 and terminating more than sixty days thereafter.

4. In a recent case (SP CM 9, McNeely, 8 Bull. JAG 115), the Judicial Council held that a special court-martial did not have the power to adjudge a bad conduct discharge for an offense committed prior to 1 February 1949. In its opinion the Judicial Council stated;

"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 Mason's 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 to 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).

"* * * 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.

"* * * 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."

5. In the instant case it is noted that the unauthorized absence of accused commenced prior to 1 February 1949 and continued more than sixty days subsequent thereto. It must therefore be considered whether such absence without leave constitutes a continuing offense. If so, the unauthorized absence having extended more than sixty days after 1 February 1949, the special court-martial before which accused was tried could properly adjudge a bad conduct discharge (MCM, 1949 par. 117c; AW 13).

The Board of Review in its discussion of this question in a recent case (SP CM 102, Dillenbeck, 8 Bull. JAG 115) referred to the Manual for Courts-Martial 1928, paragraph 67, page 52 which provides: "Absence without leave (AW 61); desertion (AW 58); and fraudulent enlistment (AW 54) are not continuing offenses and are committed, respectively, on the date the person so absents himself * * *." The Board cited as the probable basis for this statement in the 1928 Manual extracts from an opinion of the then Judge Advocate General, Major General E. H. Crowder, O14.4, August 27, 1920, as follows:

"It remains to be considered whether the offense of 'absenting himself' without leave made punishable by the present 61st Article of War is a continuing offense as assumed by the authority above quoted.

"The offense of a soldier, who, without authority, leaves his organization or station, is commonly spoken of as 'absence without leave'. The 61st Article of War, however, which punishes the offense, does not describe it in those words. The language used in the article with respect to the three acts made punishable thereby is significant and indicates that the offense under discussion is therein considered as a single completed act and not a continuing one. Thus it is provided that any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty or goes from the same without proper leave or absents himself from his command, etc., without proper leave, shall be punished. The moment the soldier does any one of these three acts he violates the 61st Article. It does not follow from the mere fact that, after having absented himself without proper leave, - that is to say, after having entered into the state of being away without authority, - he remains absent without authority, that he affirmatively 'absents himself' anew each day that he remains absent, any more than that a deserter commits desertion anew each day he remains absent with the intent not to return. If the words 'absents himself without proper leave', used in the article are construed to mean leaves, or goes away from, or otherwise enters into the state of being away without authority, the offense is complete when the soldier does that thing. After that he does not leave or go away or otherwise enter into the state of being away without authority; he merely remains in the status which he has already assumed. His act of absenting himself was complete the moment he assumed that status and the length of his absence after the offense has once been committed is immaterial in fixing guilt

but becomes important in determining the amount of punishment to be administered; or it may be important as a fact from which the court might infer the existence of an intent not to return."

The Manual for Courts-Martial, 1949, disposes of the question of whether or not an offense may be considered a "continuing offense" for the purpose of applying the statute of limitations in part as follows:

"Certain offenses, as, for example, wrongful cohabitation, are continuing offenses, and the accused cannot avail himself of the statute of limitations for any part of continuing offenses not within the bar of the statute of limitations. Fraudulent enlistment (AW 54) is not a continuing offense. Absence without leave (AW 61) and desertion (AW 58) are not continuing offenses for the purpose of computing the time under the statute of limitations or for the purpose of determining whether the offenses are committed in time of war. For these purposes the offenses are committed, * * * on the date the person * * * so absents himself or deserts" (par. 67, pp 61, 62). (Underscoring supplied).

The rule enunciated in the 1949 Manual pertains to the offenses named only as they are affected by the statute of limitations and for the purpose of determining whether they are committed in time of war; and an examination of the Opinions of The Judge Advocate General cited above discloses that it was intended to cover only the effect of the statute of limitations with respect to such offenses. We must consider, therefore, whether or not absence without leave is a continuing offense in determining the ex post facto question. Again referring to the McNeely case, supra, we find the following pertinent remarks of the Judicial Council:

"Any law which operates in any manner to the substantial disadvantage of an accused in respect to 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, of the Constitution of the United States (Medley, Petitioner, 134 U.S. 160, 171; Thompson v. Utah, 170 U.S. 343, 351)."

After a thorough discussion of the legal excerpts quoted herein and other authorities, the Board of Review in the Dillenbeck case, supra, arrived at the following conclusion:

"To say that an offense is not continuing in so far as the statute of limitations is concerned, but is continuing in so far as authorizing the imposition of an additional penalty by a court not hitherto authorized to impose it, because it extends beyond the date of the law granting such authority, although in both instances commencing on the same

date is sheer sophistry. It is, consequently, the opinion of the Board of Review that absence without leave is not a continuing offense in so far as to legalize a bad conduct discharge adjudged by a special court martial where the offense had its inception prior to 1 February 1949 and continuing for more than sixty days after that date."

The authorities cited above were considered and followed by the Board of Review in the recent case of Sp CM 519, Garza, October 1949, and in view thereof and of the opinion of the Judicial Council in the McNeely case, we are constrained to hold in the case here under consideration that the court could not legally include a bad conduct discharge in the sentence adjudged.

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of \$50.00 of his pay per month for six months.

Donald V. Phipps J.A.G.C.
Frank C. Alfred J.A.G.C.
Robert E. Byrne J.A.G.C.

CSJAGZ SP CM 801

1st Ind.

FEB 1 1950

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

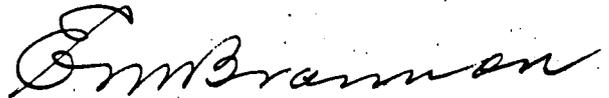
To: Commanding General, 82d Airborne Division, Fort Bragg, North Carolina.

1. In the foregoing case of Recruit Joseph W. Lewis (RA 18300020), Company "E", 505th Airborne Infantry Regiment, I concur in the holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of fifty dollars pay per month for six months. Under Article of War 50e(3), this holding and my concurrence vacate so much of the sentence as is in excess of confinement at hard labor for six months and forfeiture of fifty dollars pay per month for six months. 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, 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:

(SP CM 801)

1 Incl:
Record of Trial



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



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TITLE

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