

OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD OF REVIEW
AND
JUDICIAL COUNCIL

HOLDINGS
OPINIONS
REVIEWS

VOL. 6

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LAW DIV
JAG BR

JUDGE ADVOCATE GENERAL'S CORPS

BOARD OF REVIEW AND JUDICIAL COUNCIL

HOLDINGS, OPINIONS AND REVIEWS



VOLUME 6

Including

CM 340026 — CM 340989

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CM 338303

CM 338668

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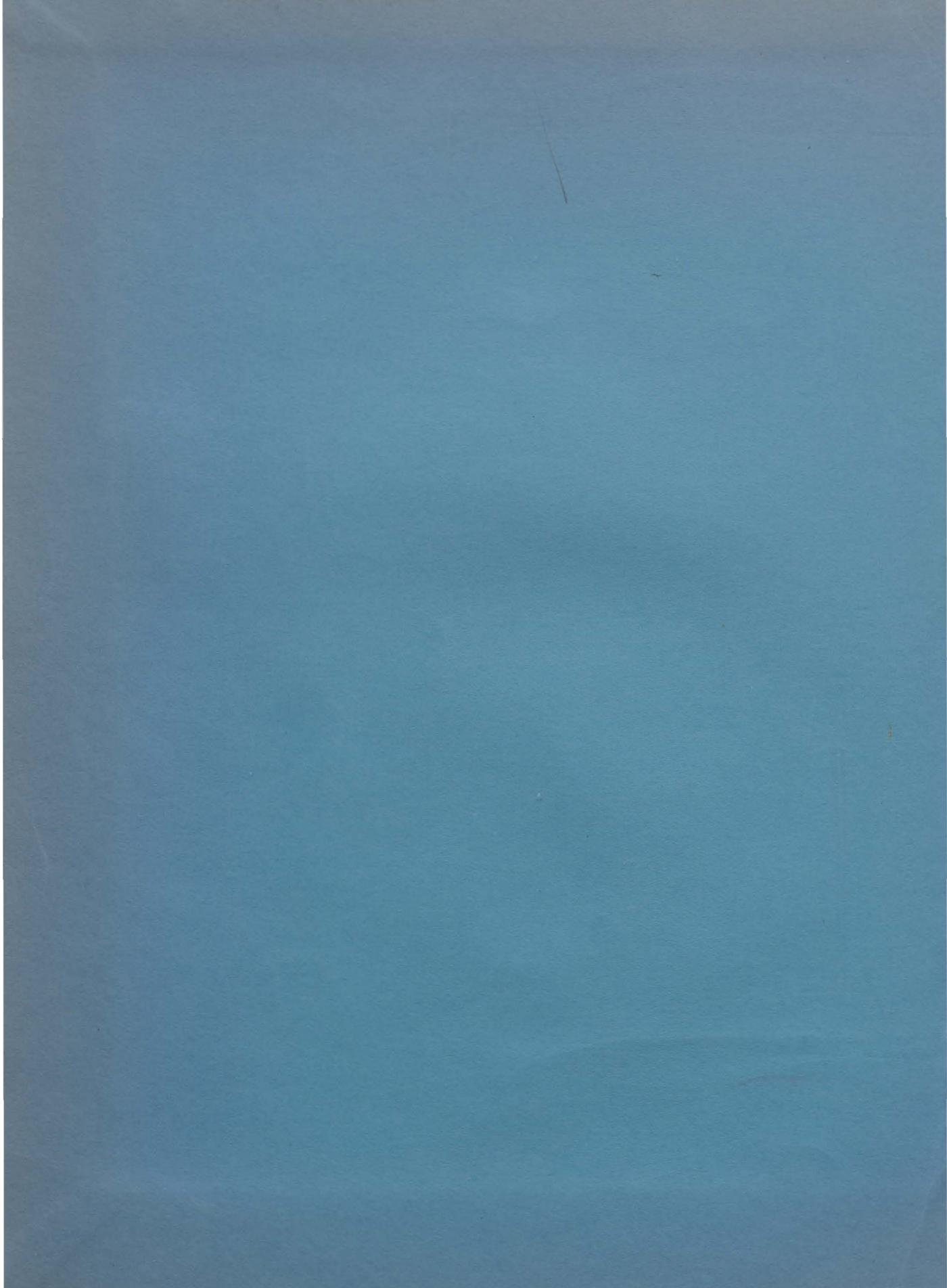
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OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C.

LAW DIV
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EXPLANATORY NOTES

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

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340335	Coleman	35			
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340598	Sulecki	97			
340605	Johnson	103			
340608	Brutout, Turner, Gonnelli, Tyree Meehan	119			
340618	Wilson	151			
340628	Diamond	161			
340733	Heindorf	179			
340886	Dominguez	197			
340943	Ruick, Jolicoeur	215			
340989	Banks	225			
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338303	Pierce	237			
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Coleman	340335	35			
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Little	340100	25			
Lucas	338736	259			
Martin	338668	243			
Mathis	340087	11			
Meehan	340608	119			
Mongiardo	340026	1			
Morton	340473	49			
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153 <u>a</u>	356
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231727	376(a), 378(a)	296066	89(a)
233766	138(a)	298814	141(a)
234711	221(a)	300644	378(b)
234964	146(a)	301840	71(a)
235258	255(a)	302125	265(b)
236359	264(a)	302854	209(a)
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243048	174(a)	312356	146(a)
243818	300(a)	312657	137(a), 140(a)
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246548	174(a)	313545	141(a)
248379	41(a)	313709	348(a)
249165	387(a)	314876	204(a)
252628	205(a)	315165	264(a)
255335	255(a)	315578	91(a)
255436	157(a)	315736	194(a)
258020	138(a)	316193	26(a)
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322487	254(a)	1201	378(a)
322546	91(a)	1690	287(a)
322548	89(a)	2644	377(a)
323022	221(a)	3213	377(a)
323728	265(a)	4071	387(a)
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X

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

CSJAGV CM 340026

24 MAR 1950

UNITED STATES)	9TH INFANTRY DIVISION
v.)	Trial by G.C.M., convened at
Sergeant BENJAMIN ROBINSON)	Fort Dix, New Jersey, 8, 9 and 13
(RA 36684839), Sergeant)	December 1949. ROBINSON - Dishonorable
MONFORD L. SMITH (RA 69)	discharge, total forfeitures after
44021), and Private ANGELO)	promulgation and confinement for
MONGIARDO (RA 42210766),)	eighteen (18) months. SMITH - MONGIARDO -
all of Battery C, 84th)	Dishonorable discharge, total forfeitures
Field Artillery Battalion)	after promulgation and confinement for
	one (1) year. Disciplinary Barracks
	for all three.

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

1. The Board of Review has examined the record of trial in the case of the 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 in a common trial upon the following Charges and Specifications:

CHARGE I Violation of the 66 Article of War.

Specification: In that Sergeant Benjamin F. Robinson, Battery "C", 84th Field Artillery Battalion, did, at Fort Dix, New Jersey on or about 17 September 1949, cause a mutiny in Battery "C", 84th Field Artillery Battalion, by urging the members of said Battery "C", 84th Field Artillery Battalion, concertedly to absent themselves without proper leave from their command and station with the intent to override, for the time being, lawful military authority.

Specification: In that Sergeant Monford L. Smith, Battery "C", 84th Field Artillery Battalion, did, at Fort Dix, New Jersey on or about 17 September 1949, cause a mutiny in Battery "C", 84th Field Artillery Battalion, by urging the members of said Battery "C", 84th Field Artillery Battalion, concertedly to absent themselves without proper leave from their command and station with the intent to override, for the time being, lawful military authority.

(2)

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Specification: In that Private Angelo Mongiardo, Battery "C", 84th Field Artillery Battalion did, at Fort Dix, New Jersey on or about 17 September 1949, cause a mutiny in Battery "C", 84th Field Artillery Battalion, by urging the Members of said Battery "C", 84th Field Artillery Battalion, concertedly to absent themselves without proper leave from their command and station with the intent to override, for the time being, lawful military authority.

As to Sergeant Benjamin F. Robinson:

CHARGE II: Violation of the 96th Article of War. (Withdrawn prior to trial by direction of the appointing authority).

As to Sergeant Monford L. Smith:

CHARGE II: Violation of the 96th Article of War. (Withdrawn prior to trial by direction of the appointing authority).

Each accused pleaded not guilty to and was found guilty of the Charge and Specification relating to him. The three accused were each sentenced to be dishonorably discharged the service and to forfeit all pay and allowances to become due after the date of the order directing execution of the sentences. Sergeant Smith and Private Mongiardo were sentenced to be confined at hard labor for two years and Sergeant Robinson was sentenced to be confined at hard labor for three years. The reviewing authority in the case of each accused approved "only so much of the findings of guilty of the Specification of the Charge and the Charge as involves a finding that the accused, did, at the time and place alleged, engage in mutinous conduct by urging the members of Battery C, 84th Field Artillery Battalion, concertedly to absent themselves without proper leave from their command and station, with intent to override, for the time being, lawful military authority, in violation of Article of War 96." As to each accused the reviewing authority approved the sentence, but as to Sergeant Smith and Private Mongiardo reduced the period of confinement to one year, and as to Sergeant Robinson reduced the period of confinement to eighteen months, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement for each accused and, pursuant to Article of War 50e, withheld the order directing execution of the sentences.

3. The prosecution in the course of the trial introduced in evidence the depositions of six witnesses without prior direction from the appointing authority that the case be treated as not capital. Had the offenses for which the accused were tried been not capital, the record of trial would have been legally sufficient to support the modified findings and sentences.

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However, without the deposition testimony, it is the opinion of the Board of Review that the record of trial would be legally insufficient to support the modified findings and sentences. It is true, that as to the accused Robinson, there is some admissible evidence bearing on the offense found, but even as to him, this evidence, without the deposition testimony, is deemed insufficient. Consequently, the deposition testimony was material to the issues in this case and this view is in accord with that expressed by the Staff Judge Advocate in his review. Since the offense denounced in Article of War 66 is capital at all times (par 14, MCM, 1949), the question is presented as to the effect of receiving in evidence deposition testimony for the prosecution in a capital case, where, as in this case, the findings as ultimately approved are of an offense not capital. While Rule 15 of the Federal Rules of Criminal Procedure makes no provision for the taking of depositions on behalf of the prosecution in federal criminal cases, the use of deposition testimony in court-martial proceedings, on behalf of the prosecution in cases involving offenses not capital, has been authorized by the Articles of War since the earliest American Articles (CM 329496, Deligero, 78 BR 43, 47-49).

4. Any case referred for trial to a special court-martial under the first proviso of Article of War 13 is not capital within the meaning of Article of War 25; nor is a case capital, although the death penalty is authorized by law but is not mandatory, when the appointing authority has directed the case be treated as not capital. Upon a rehearing or a new trial a case is no longer capital, although the death penalty be authorized by law but is not mandatory, if the sentence adjudged on the original hearing or trial was other than death, provided that no new capital offense be included in the Charges and Specifications at the rehearing or new trial. An offense is not capital, even though punishable by death under the Articles of War, if the applicable limit of punishment prescribed by the President under Article of War 45 be less than death (par 131a, MCM, 1949). The present case does not fall within any of the above mentioned exceptions and was clearly a capital case, at the time of trial, within the meaning of Article of War 25.

In each instance when the questioned depositions were presented to the court the defense counsel stated: "No objection." (R43, 54, 76, 77). With the express consent of the defense made or presented in open court, but not otherwise, a court may admit deposition testimony not for the defense in a capital case (par 131a, supra). In considering a similar situation in CM 294895, Hatfield, 58 BR 9 at pages 10 and 11 (wartime desertion) the Board of Review stated:

"When the depositions were here offered and admitted in evidence it does not appear that the defense expressly waived its objection under Article of War 25 and consented to their admission. Defense counsel merely stated that the 'defense has no objection as such, but I reserve the right to object to any particular question' contained in the depositions (R9). Subsequently defense counsel objected to a portion of one of the depositions but his objection

(4)

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was overruled (R9). The failure of defense counsel to object to the introduction of a deposition against an accused in a capital case does not constitute express consent to its use and a waiver of accused's rights under Article of War 25 (MTO 6543, Thacker; MCM, 1928, par 119a). Even if a statement by defense counsel that he has no objection to the introduction of a proffered deposition should constitute something more than a failure to object, nevertheless it falls far short of constituting the express consent here requisite. In our opinion the defense can be said to have expressly consented to the introduction of a deposition against an accused in a capital case only if the defense in clear and unequivocal terms expressly agrees to waive the accused's rights under Article of War 25. Not only does the brief statement of defense counsel here fail expressly to state that accused's rights under Article of War 25 were waived but furthermore it is not even clear that defense counsel realized that accused possessed particular rights under that Article of War.***"

It thus appears that there was no express consent by the defense regarding the admission of the depositions into evidence in the present case.

There is for consideration the propriety of the reviewing authority's action in approving only so much of the findings of guilty as involved a finding that the accused, did, at the time and place alleged, 'engage in mutinous conduct,' a lesser included not capital offense under Article of War 96, and the effect of such action with respect to permitting the consideration of deposition testimony for the prosecution. Both Winthrop, Military Law and Precedents, 2nd Edition, Reprint, 1920, page 578, and Simmons cited note 45, page 579, tend to support the view that mutinous conduct in violation of Article of War 96 is a lesser included offense of the crime of mutiny under Article of War 66. There is likewise supporting precedent that the improper admission of incompetent testimony does not necessarily prejudice the rights of an accused where there exists other compelling evidence supporting the findings and sentence. Thus, in a capital case, where there is sufficient evidence appearing in the record, exclusive of deposition testimony, to support a finding of guilty of a lesser included offense not capital, the erroneous admission of deposition testimony would not constitute prejudicial error with respect to the findings as to the lesser included offense. (See CM 210612, Maddox, 9 BR 277; CM 242082, Reid, 26 BR 391; 3 Bull. JAG 54-55; CM 280875, Bechard, 53 BR 385). In this connection it must be observed that Article of War 25, prior to the 1948 amendments read as follows:

"Art. 25. Depositions - When admissible. - A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or

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District in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: Provided, That testimony by deposition may be adduced for the defense in capital cases."

The present Article of War 25, enacted in 1948 and effective 1 February 1949, is more definitive and reads as follows:

"Art. 25. Depositions - When Admissible. - A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to, or, in foreign places, because of nonamenability to process, refuses to, appear and testify in person at the place of trial or hearing: Provided, That testimony by deposition may be adduced for the defense in capital cases: Provided further, That a deposition may be read in evidence in any case in which the death penalty is authorized by law but is not mandatory, whenever the appointing authority shall have directed that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial: And provided further, That at any time after charges have been signed as provided in Article 46, and before the charges have been referred for trial, any authority competent to appoint a court-martial for the trial of such charges may designate officers to represent the prosecution and the defense and may authorize such officers, upon due notice, to take the deposition of any witness, and such deposition may subsequently be received in evidence as in other cases." (underscoring supplied)

Prior to the 1948 amendments there was no provision in law for the treatment of a capital case as not capital by reason of the appointing authority directing, before trial by general court-martial, that it be so treated. The Board of Review is of the opinion that the present language of Article of War 25, presents a clear and unambiguous statement of a condition precedent that must now be complied with, before original trial by general court-martial, if a capital case is to be treated as not capital. The Board recognizes that failure to comply with this condition precedent would not necessarily result in prejudicial error where the depositions for the prosecution were used only in proof of an offense not capital, tried with a capital offense. (SPJGJ 1942/4821; 15 Oct 1942; 1 Bull. JAG 269; CM 242082, Reid, supra). Nor where the testimony exclusive of the depositions was so clear and compelling, as to a lesser included offense not capital, that the findings of guilty thereof could be supported if the deposition testimony was completely disregarded. Neither of the latter situations were present in this case.

It is also noted that when the proposed legislation amending the Articles of War was transmitted to the Congress on 12 March 1947, the Secretary of War stated with respect to the amendment to Article of War 25:

"Section 15 amends Article 25 to authorize the use of depositions in capital cases where a sentence of death is not to be adjudged and to authorize the taking of depositions after charges have been preferred but prior to reference for trial." (underscoring supplied) (H. of Rep., 80th Cong., 1st Sess., Report No. 1034, to accompany H.R. 2575, 22 Jul 1947, pp. 11, 12).

By letter dated 4 August 1947, the Secretary of War further recommended that the words "for the prosecution" be inserted after the word "deposition" in the second proviso of the proposed Article of War 25, as the Secretary felt, that without this addition, there was a possibility that the language of the Article might be construed to limit the use of depositions by the defense. (Senate Com. Print, 80th Cong., 2nd Sess., Courts Martial Legislation, 20 Jan 1948, p. 13).

With respect to the requirement that the action by the appointing authority directing that a case be treated as not capital be taken prior to trial, it is observed that in response to inquiries as to the legality of trials by special court-martial for offenses within the purview of the second proviso of the 12th Article of War (as then worded, 1942, 1943), where through oversight, the permission of the officer competent to appoint a general court-martial had not been obtained, this office stated in pertinent part:

"***In the cases in question, the officer with general court-martial jurisdiction did not 'cause' the cases to be tried by special courts-

CSJAGV CM 340026

martial, as required by Article of War 12, and, as the provisions of that article have not been complied with, the trials are manifestly illegal. It is also to be noted that a ratification cannot change past events or alter the facts of history (Dig. Op. JAG 1912, p. 836) or, as in the present cases, convert a factual non-compliance with law into a compliance thereof (Dig. Op. JAG 1912, p. 277).

* * *

"*the power to cause cases of wartime desertion to be tried by special courts-martial is vested in the officer competent to appoint general courts-martial, and this power must be exercised by that officer prior to trial. If such cases are illegally referred to special courts-martial for trial, the trials are null and void and cannot be ratified by the authority competent to appoint special courts-martial or superior competent authority, even though the accused pleaded guilty to and were convicted of the lesser included offenses of absence without leave which are within the jurisdiction of special courts-martial." (SPJGJ 250.413, 20 Jul 1942; id. 250.451, 21 Aug 1942; id. 1942/365, 14 Jun 1942).

Although the foregoing opinion rested upon jurisdictional grounds, it is believed that an analogy may be drawn between the views expressed therein and the case now under consideration.

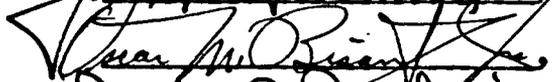
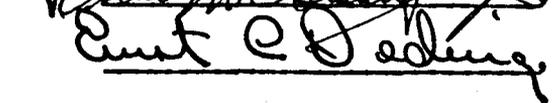
The Board of Review is of the opinion that the present Article of War 25 contains an express statutory direction as to the action to be taken prior to trial, in order that the prosecution's deposition testimony be made admissible at an original trial by general court-martial, when such testimony relates directly to a capital offense and furnishes the basis upon which the findings of guilty of the capital offense, or a lesser included offense not capital, must rest. Failure to take such pre-trial action may not be cured by a sentence not capital being imposed by the court, nor by post-trial action of the reviewing authority approving findings of guilty of a lesser included offense not capital. Since in the present case the record of trial would be legally insufficient to support the modified findings and sentences without the deposition testimony, the admission of the prosecution's depositions in evidence constituted prejudicial error.

5. For the reasons stated the Board of Review holds the record of

(8)

CSJAGV CM 340026

trial legally insufficient to support the findings of guilty and the sentences.

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

(9)

27 APR 1950

JAGV CM 340026

1st Ind.

JAGO, Department of the Army, Washington 25, D. C.
TO: Commanding General, 9th Infantry Division, Fort Dix, New Jersey

1. In the case of Sergeant Benjamin Robinson (RA 36684839), Sergeant Monford L. Smith (RA 6944021), and Private Angelo Mongiardo (RA 42210766), all of Battery C, 84th Field Artillery Battalion, Fort Dix, 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 sentences. Under Article of War 50e(3) this holding and my concurrence vacate the findings of guilty and the sentences. You are authorized to direct a rehearing as to the lesser included offenses which you approved.

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 340026).



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

1 Incl:
Record of trial



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

(11)

FEB 17 1950

CSJAGH CM 340087

U N I T E D S T A T E S	)	1ST CAVALRY DIVISION (INFANTRY)
)	
v.	)	Trial by G.C.M., convened at
	)	Camp Drake, Tokyo, Japan, 23
Major JOHN M. MATHIS, III,	)	December 1949. Dismissal.
0357798, Headquarters, 7th)	
Cavalry Regiment (Infantry).)	

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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that Major JOHN M. MATHIS, Headquarters 7th Cavalry (Infantry) did, at Tokyo, Japan sometime between 12 and 23 October 1949, wrongfully acquire about 50,000 Japanese Yen by the sale of certain clothing to one SUGA a Japanese National, in violation of Paragraph 16a, Circular 23, General Headquarters, Supreme Commander for the Allied Powers, dated 13 September 1949.

Specification 3: In that Major JOHN M MATHIS, Headquarters 7th Cavalry (Infantry), did, at Tokyo, Japan, during the month of October 1949 have in his private possession one Luger pistol which he wrongfully failed during October 1949 or at any previous time to register with either the Tokyo or 1st Cavalry Division Provost Marshal, in violation of Paragraph 7b, Circular 23, General Headquarters, Supreme Commander for the Allied Powers, dated 13 September 1949.

Specification 4: In that Major JOHN M MATHIS, Headquarters, 7th Cavalry (Infantry), did, at Tokyo, Japan, sometime during the

month of September 1949, wrongfully acquire 10,000 Japanese Yen by causing to be traded therefor to a person not a United States Army Finance Officer, or otherwise authorized to convert dollars into Yen, one \$20.00 bill, legal tender of the United States, in violation of Paragraph 8A, Circular 19, General Headquarters, Far East Command, dated 15 March 1949.

Specification 5: In that Major JOHN M MATHIS, Headquarters 7th Cavalry (Infantry), did, at Tokyo, Japan, sometime during the month of October 1949, wrongfully solicit and urge one Private Charles F Wille Jr, United States Army to commit a criminal offense in his behalf, to wit: the acquisition of Japanese Yen by the sale of clothing to a Japanese National in violation of Paragraph 16a, Circular 23, General Headquarters, Supreme Commander for the Allied Powers, dated 13 September 1949.

The accused pleaded not guilty to the Charge and its Specifications, and was found not guilty of Specification 1, but guilty of the remaining Specifications and the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

The accused arrived in the Far East Command and was assigned to the 7th Cavalry Regiment during the latter part of August 1949 (R 50). From sometime in September 1949, he lived in a small house, number 39, within the compound of the regimental headquarters (R 29,44,45). He was "S-2" and also the Provost Marshal of the 7th Cavalry (R 13,15,20, 58-59).

About 25 September 1949, Private Charles F. Wille of Headquarters and Headquarters Company, 7th Cavalry Division, acting at the request of a "Lieutenant Waggoner," went to see the accused at his house. The accused showed Wille some clothing and a pistol and asked him if he could sell the items for him because he needed one hundred thousand yen (R 29,30,31,38). Wille identified Prosecution Exhibit 2, a pistol, Prosecution Exhibit 3a, a suit, and some ties (part of Pros Ex 3) as items displayed by accused at that time (R 30,34). The accused indicated to Wille the place where he kept the pistol and told him that he could pick it up there at any time. Accused stated that the pistol was not registered. Wille obtained the pistol on 5 October, at a time when the house maid and two Japanese boys were present (R 31,32). That night

accused told him to return it as he had "just got it registered." Wille put the pistol "back on the shelf" in the accused's house the following day (R 33). Military authorities seized the pistol about 13 December (R 19,20). Tests made on the pistol disclosed that it was in operating condition (R 26).

The accused placed the suit (Pros Ex 3a) in Wille's jeep about 5 October, telling him that a Japanese tailor had offered him 35,000 yen for it but that he (Wille) should be able to get more for it. The accused asked Wille to sell it for him (R 35). Wille did not try to sell any of the accused's clothing although the accused told him he wanted yen for the clothes and Wille "guessed" the accused "meant to sell them to Japanese" (R 37-38).

Near the end of September, Wille was sent to see the accused (R 36). On this occasion, the accused gave Wille a \$20.00 bill, asked him what he could get for it, but added that he should be able to get 12,000 yen (R 36,42). Wille exchanged the \$20.00 at an army post office for two \$10.00 military payment certificates and exchanged the military payment certificates with an unknown soldier in part payment for 10,000 yen (R 36,40,49). In addition to the two \$10.00 military payment certificates, Wille paid over to the soldier \$5.00 of his own money (R 40,42). Wille brought the yen to the accused's house, put it in a drawer, and said "Mathis" to Tame Yamada, the accused's house maid (R 37,46,47).

On cross-examination, Wille was asked if he, upon visiting the accused for the first time, stated to him, "I understand you need some yen." Wille answered "No, sir" but when asked if he could have said it, answered, "I don't know, sir." (R 39). Further questions and answers on cross-examination were as follows:

"Q Had you taken the clothes and sold them to an American for dollars, or military payment certificates, or purchased them yourself, you could have given the money to Major Mathis, and he could have purchased yen with the money, is that right?

A I don't know.

* * *

Q You were not told to sell the clothes to Japanese, were you?

A They was just put in my jeep, and I was told to get yen for them. He even put them in the jeep. I didn't ask for them.

Q. Is your business getting yen for people who want it?

A No, sir; I only been in Japan two months before this mess with the Major." (R 40)

Tame Yamada identified Prosecution Exhibit 2 as a pistol which was in the accused's house (R 43-44). She saw Wille at accused's house

when the accused was present. Yamada also identified Prosecution Exhibit 3a1 (a coat), 3a2 (trousers), 3b1 (a coat), and 3b2 (trousers) as two suits of clothes she had seen in a chest of drawers in the accused's home (R 47-48).

Saburo Suga, a Japanese National, employed in the 7th Cavalry repair shop, identified Prosecution Exhibit 3 as items of civilian clothing which he purchased from the accused (R 50,51). Early in October 1949, he went to the accused's house "for some jacket to a shirt and pants" and the accused showed him the clothing and offered to sell it to him (R 51,52). The accused first quoted a price of 65 or 75,000 yen and they finally agreed on the sum of 50,000. Suga was interested in only one of the suits (Pros Ex 3a1, 3a2), which he purchased for himself. He resold the other items (R 53). He paid the accused 47,000 yen at one time and 3,000 yen later. The items he purchased included five white shirts, three blue shirts, one beige sport shirt, eleven assorted neckties, one pair of blue slacks, a suit of clothes previously identified as Prosecution Exhibit 3a1 and 3a2 and a suit of clothes previously identified as Prosecution Exhibit 3b1 and 3b2. All the items of male clothing apparel were introduced in evidence as Prosecution Exhibit 3 without objection (R 54-55).

On 15 November 1949, Corporal Daniel E. DePoalo, 545th MP Company, an investigator for the 1st Cavalry Division, interviewed the accused (R 68). After being advised of his rights under the 24th Article of War, the accused gave a statement which DePoalo typed. The accused read, corrected and signed the statement. The statement was admitted in evidence without objection as Prosecution Exhibit 5 (R 68,69,70,71). In pertinent part it reads as follows:

"On September 11th 1949 I discovered at the shop of Asahi Shoten, Imperail Hotel Arcade, Tokyo, a star ruby priced at one hundred thousand (100,000) Yen. Feeling that said ruby would be an appropriate Christmas gift for my wife I made a down payment of thirty six hundred (3600) Yen and agreed to pay the balance as quickly as possible.

"On or about the 1st October 1949 I purchased from the Bank of Chosen, some forty two thousand (42,000) Yen and paid forty thousand (40,000) Yen to the aforementioned shop.

"Realizing it would be difficult to pay out this stallment in properly purchased Yen I sought to provide myself with yen from other sources. * * * During this time I was approached by a Japanese known to me as 'Jimmy' the manager of the post tailor shop who asked me whether or not I had some clothing that I would sell, I answered in the affirmative and displayed

to him two suits, two wool sport shirts, a pair of blue worsted slacks, and a number of neckties. He then asked me how much I wanted for the clothing to which I replied 'You set the price.' He then offered me thirty thousand (30,000) Yen and I agreed to except that amount. He then took the clothes and the next day returned (or the day after) bringing with him twelve thousand (12,000) Yen and the older of the two (2) suits, telling me he could not at that time pay the full thirty thousand (30,000) Yen. Inasmuch as the suit he retained was the most valuable suit in my possession I told him that I could not sell any of the clothes for the amount he had brought and he subsequently returned all that he had taken. Some week or so later he returned to my quarters with some tailoring he had completed for me and at that time I told him that I would sell the clothes he had looked at previously, another sport suit which was less than one (1) year old, some seven (7) or nine (9) civilian shirts, at approximately twenty (20) neckties, and a straw hat, which I estimated to be worth approximately three hundred and thirty five (335) dollars, to him for sixty thousand (60,000) Yen. This amount would have materially assisted me in completing the payment on the star ruby and was approximately forty (40) to forty-five (45) percent of the value of the clothing concerned. As a consequence, the transaction found me losing money insofar as the value of the merchandise was concerned and only served to enable me to complete the purchase by Christmas, which otherwise I might not have been able to accomplish. Jimmy offered me fifty thousand (50,000) Yen for the above clothing and I agreed to accept. He paid me on or about 17 October 1949.

"Some time around the last week in September or the first week in October Pvt Wille came to my quarters and told me that he had heard I needed some Yen and ask me what I had to sell. I showed him everything in my quarters that might have some monetary value included therein was the clothing which I previously described **, some off color officer's shirts, **. ** on the shelf in my bed room was a 7.65 mm chrome plated luger pistol which he immediately saw and asked could he sell that, I told him at that time that I did not propose to sell that pistol or part with it as it was a wedding present given by me to my wife when we were married. Pvt Wille then told me he thought he could sell the clothing and took with him this sport coat described above. A day or so thereafter he returned the coat and told me he could not get enough Yen for the clothing to do me any good. He then asked me if I had any US currency and I told him I had a twenty (20) dollar bill, he then asked me for it and I gave it to him. Several days thereafter upon entering my quarters my maid handed me ten thousand (10,000) Yen which she said a soldier had brought. On the following day I attempted

to contact Pvt Wille and when he came to my quarters I gave back to him the ten thousand (10,000) Yen and told him to get back for me the twenty (20) dollar bill I had previously given him. At this time I told Pvt Wille that although I appreciated his efforts for me in the past I had no desire for him to continue to try to help me. Several nights thereafter I returned to my quarters and my maid, staying way past her usual quitting time, handed me a note signed by Wille stating that he had taken ('You know what' and that he could or would get ten thousand (10,000) Yen. I immediately went to my office and asked the Headquarters Company Charge of Quarters to locate Pvt Wille. It was found that he was on pass and I left instructions with the Charge of Quarters to have Pvt Wille report to me upon his return from pass. Wille came to my quarters that night sometime between 2300 and 2400 hrs. He told me he could get back the twenty (20) dollar bill but gave me therefore two (2) ten (10) dollar MPC notes, at this time I upbraided Wille very severely and told him that unless the pistol was back in my quarters by the following night that I would report it as stolen to the Provost Marshal and that at no time ever again was he to come to my quarters in my absence and remove any property belonging to me. The following afternoon when I returned to my quarters my pistol was back in its accustomed place although it had obviously been dis-assembled inasmuch as it was put together incorrectly.

"On the 31 October I bought one hundred and twenty (120) dollars worth of Yen from the bank of Chosen and paid thirty eight thousand (38,000) Yen to the Asahi jewelry store in complete payment for the stone and the mounting."

It was stipulated "that at no time during the month of October 1949, nor previously, did the accused register any fire arms with the Tokyo Provost Marshal, Tokyo, Japan, or with the 1st Cavalry Division Provost Marshal, Camp Drake, Japan; but that a fire arm of Luger type was registered with the S-2 section, sometimes colloquially known as the Provost Marshal, of the 7th Cavalry Regiment, at Tokyo, Japan, some time during the month of November 1949." (R 25)

The court took judicial notice that the official exchange rate was 360 yen to \$1.00 during the months of September and October 1949 (R 10).

The court also took judicial notice of the provisions of Circular 19, General Headquarters Far East Command, dated 15 March 1949, entitled "Military Payment Certificates;" and Circular 23, General Headquarters, Supreme Commander for the Allied Powers, APO 500, dated 13 September 1949, entitled "General Personnel Regulations" (R 10).

Circular 19, supra, provides in pertinent part as follows:

"8. Purchase, Acquisition, and Disbursement of Indigenous Currency. a. Purchase of indigenous currency by United States authorized personnel will be made only from United States disbursing officers or their official agents. They will not acquire these currencies by exchange of military payment certificates, dollar instruments, foreign currency or by barter, or exchange of gifts with indigenous personnel or with other Allied or United States personnel."

Circular 23, supra, provides in pertinent part as follows:

"7. * * *

a. * * *

b. Occupation personnel who are authorized separate quarters may retain pistols and revolvers and necessary ammunition in their quarters for personal protection or protection of dependents and personal property or in such special cases as may be authorized by a commander of the grade of general officer. Weapons in the private possession of individuals will be registered with the appropriate area provost marshal, and are not authorized to be carried on the person.

* * *

"15. Illegal Commercial Activities. a. Persons subject to this circular except as otherwise authorized herein or elsewhere (e.g., pursuant to other circulars and directives issued by, or under import or export licenses granted by the Supreme Commander for the Allied Powers or authorized agencies thereof) are prohibited from:

(1) * * *

(2) * * *

(3) Acquiring yen by the sale, or barter, or exchange of goods or gifts with indigenous personnel or with other Allied or United States personnel.

(4) Giving to any person whomsoever any article of personal property, goods, or merchandise with knowledge or reasonable cause to believe that the same will become the subject of unauthorized sale or barter or commercial transaction."

b. Evidence for the defense.

The accused, advised of his rights as a witness, elected to remain silent (R 84,85).

It was stipulated that if Lieutenant Colonel Herbert B. Heyer were called as a witness for the defense he would testify that he was acquainted with the accused, that he knew the reputation and character of the accused

in his community, that his reputation and character were excellent and that he, Heyer, would recommend accused's retention in the service. Sworn testimony to the same effect was given by the Assistant Executive Officer, 7th Cavalry Regiment, Lieutenant Colonel Joseph E. Monhollan, and by the S-3, Major Freeland A. Daubin, Jr. (R 75-76). First Lieutenant John L. Helms, Adjutant of the 7th Cavalry, stated that the accused's reputation, with respect to character, was excellent and that he performed his work as S-2 "excellently and professionally" (R 79).

Sergeant First Class Roy R. Pruitt, Headquarters and Headquarters Company, 2nd Battalion, 5th Cavalry Regiment, stated he was Private Wille's platoon sergeant and knew his reputation for truth and veracity was not "very good." Sergeant Pruitt would not believe Wille under oath (R 82,83). Stipulated testimony of "Captain Molloy," and "Sergeant Shepherd," Wille's company commander and first sergeant, respectively, to the effect that Wille's reputation for truth and veracity in his organization was not good, was also received (R 83).

4. Discussion.

Specification 2 of the Charge alleges that the accused wrongfully acquired about 50,000 Japanese yen by the sale of clothing to a Japanese National, in violation of Circular 23, General Headquarters, Supreme Commander for the Allied Powers, dated 13 September 1949. Paragraph 16a (3) of the circular prohibits:

"(3) Acquiring yen by the sale, or barter, or exchange of goods or gifts with indigenous personnel or with other Allied or United States personnel."

In proof thereof the uncontradicted evidence, including the pretrial statement of accused, shows that in the early part of October 1949, Saburo Suga, a Japanese National employed in the 7th Cavalry repair shop, went to the accused's house in regard to some tailoring he was doing for him. Suga observed some clothing and the accused offered to sell it to him. A price of 50,000 yen was finally agreed upon and Suga paid that amount to the accused on or about 17 October 1949. The record of trial establishes the violation by accused of the directive alleged.

Specification 3 of the Charge alleges that the accused wrongfully failed during October 1949 or any previous time to register a Luger pistol in his private possession, in violation of Circular 23, General Headquarters, Supreme Commander for the Allied Powers, dated 13 September 1949. Paragraph 7b of the circular reads as follows:

"b. Occupation personnel who are authorized separate quarters may retain pistols and revolvers and necessary ammunition

in their quarters for personal protection or protection of dependents and personal property or in such special cases as may be authorized by a commander of the grade of general officer. Weapons in the private possession of individuals will be registered with the appropriate area provost marshal, and are not authorized to be carried on the person."

About 26 September 1949, Private Charles F. Wille went to the quarters of the accused who showed him a Luger pistol, told him it was not registered and asked Wille if he could sell it for him. On or about 5 October 1949 in the accused's absence Wille took the pistol from his quarters. That night the accused told him he had "got it registered" and wanted it back. Wille returned the pistol the next day.

It was stipulated that during October 1949 or prior thereto, the accused did not register any firearms with the Tokyo Provost Marshal, or the 1st Cavalry Provost Marshal, Camp Drake, Japan, but that a Luger type firearm was registered with the "S-2 Section sometimes colloquially known as the Provost Marshal of the 7th Cavalry Regiment, at Tokyo, Japan, some time during the month of November 1949."

Although Private Wille's testimony indicates that the pistol was registered about 5 October, the stipulation clearly establishes the contrary. Under the circumstances it would appear that either Wille erred as to the date of the incident or that accused's assertion that the pistol had been registered was made merely to effect a quick return of the gun by Wille. Implicit in the stipulation that accused had not registered the pistol with the Tokyo Provost Marshal or the 1st Cavalry Division Provost Marshal, in or prior to October and that it was registered with the 7th Cavalry Regiment Provost Marshal in November, is the conclusion that prior to November the weapon was not registered with the "appropriate area provost marshal" as required by SCAP GHQ Circular 23. A violation of the provision of the circular in question is clearly shown.

Specification 4 of the Charge alleges that the accused wrongfully acquired 10,000 Japanese yen by causing a \$20.00 bill to be traded therefor in violation of Circular 19, General Headquarters, Far East Command, 15 March 1949. The evidence adduced by the prosecution shows that near the end of September or early in October the accused gave Wille a \$20.00 bill and told him he "ought to be able to get about twelve thousand yen" for it. At the legal rate of exchange a twenty dollar bill would bring 7200 yen. Wille exchanged the bill for two \$10.00 military payment certificates and, in turn, exchanged the certificates for 10,000 yen which he placed in a drawer in accused's house. This evidence is also corroborated by accused's statement.

According to accused, a few days after Wille left the yen at his house, he returned it to Wille and Wille gave him two \$10.00 military payment certificates. Paragraph 8a of Circular 19, General Headquarters, Far East Command, prohibits the acquiring of Japanese currency by the exchange of dollar instruments or military payment certificates with "indigenous personnel or with other Allied or United States personnel."

It must be concluded that since accused expected to obtain more yen than the legal rate of exchange would provide, he contemplated that Wille would acquire the yen through an unauthorized source in violation of the above cited directive. He thereby effectively counseled the commission of a criminal act by Wille and hence is liable as a principal in Wille's criminal act (MCM, 1949, par. 23, p.21).

Specification 5 of the Charge alleges that accused wrongfully solicited and urged Private Wille to commit a criminal offense, to wit: the acquisition of Japanese yen by the sale of clothing to a Japanese National in violation of paragraph 16a, Circular 23, General Headquarters, SCAP, dated 13 September 1949. Subparagraphs (3) and (4) of paragraph 16a, supra, contain the following prohibitions:

- "(3) Acquiring yen by the sale, or barter, or exchange of goods or gifts with indigenous personnel or with other Allied or United States personnel.
- "(4) Giving to any person whomsoever any article of personal property, goods, or merchandise with knowledge or reasonable cause to believe that the same will become the subject of unauthorized sale or barter or commercial transaction."

The directive alleged to have been violated is in implementation of Circular 247, War Department, 7 September 1947; paragraph 7d of the latter directive states:

"d. Finance facilities are provided for the exchange of military payment certificates or authorized dollar instruments into the local currencies used in the occupied areas at a military rate of exchange. United States authorized personnel will purchase all of their local currency needs, for expenditures in the local economies of these occupied areas, from United States Army finance officers or their official agents. They will not acquire these currencies by exchange of military payment certificates, dollars, dollar instruments, foreign currency, or by barter or exchange of gifts from local indigenous personnel or from other allied or United States personnel."

It is apparent, therefore, that at the time of the offense alleged, Japanese yen could be procured legally in Japan only from a United States Finance Officer. The evidence shows that accused sought to obtain yen by having Wille sell clothing for him and it is thus apparent that he sought to acquire yen from other than an authorized source. Although the context of accused's instructions to Wille does not show that Wille was instructed to sell the clothing to a Japanese National as alleged, the circumstances surrounding the giving of the instruction permit such interpretation. There is, therefore, no variance between the allegations of the Specification under consideration and the proof and the latter sustains the findings of guilty of Specification 5.

The directive, violations of which were charged to accused in the several specifications of which he has been found guilty, was promulgated by order of the Supreme Commander of the Allied Powers in Japan, and as such were binding upon United States Army personnel, without proof of knowledge upon the effective date thereof (CM 325541, Morgan, 75 BR 409,417; CM 291176, Besdine, 18 BR (ETO) 181,185).

5. Department of the Army records show that accused is 35 years of age, married and has two children, ages 10 and 5. He was graduated from the Texas Military Institute, San Antonio, Texas, and attended Texas University and Southwestern University for three years. He served in the Enlisted Reserve Corps and was commissioned a Second Lieutenant Infantry Reserve 8 June 1937. In addition to short periods of active duty he served from 1 October 1938 to 19 August 1939 and from 8 November 1940 to 31 December 1945. During the war he served as supply officer at Camp Stoneman Reception Center, as a company commander, and as a troop transport commander on various transports. He is authorized to wear the Bronze Service Star on the Asiatic-Pacific Theater Ribbon for service in combat zone. He received a terminal leave promotion to Lieutenant Colonel, Officer Reserve Corps, 25 July 1946. He was recalled on extended active duty as a Major in September 1948. His efficiency ratings include three ratings of very satisfactory, ten ratings of excellent, and two of superior. His last three ratings of over-all efficiency were 127, 071 and 061, respectively. On 7 June 1944 he received punishment under Article of War 104 for neglect of duty while quartermaster, Camp Stoneman, California.

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

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

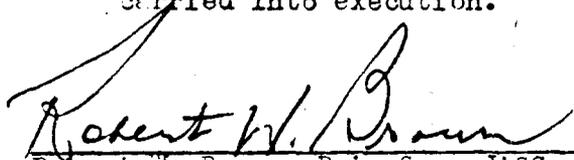
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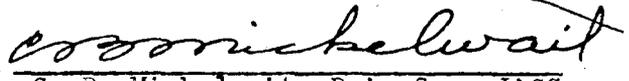
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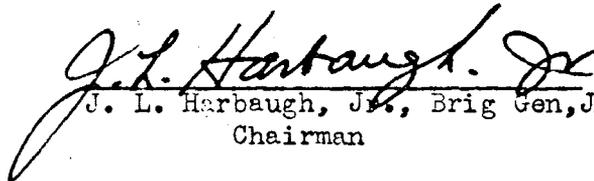
THE JUDICIAL COUNCIL

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

In the foregoing case of Major John M. Mathis, III,
O357798, Headquarters, 7th Cavalry Regiment (Infantry),
upon the concurrence of The Judge Advocate General the
sentence is confirmed but commuted to a reprimand and
forfeiture of Fifty Dollars (\$50.00) pay per month for
six months. As thus commuted the sentence will be
carried into execution.

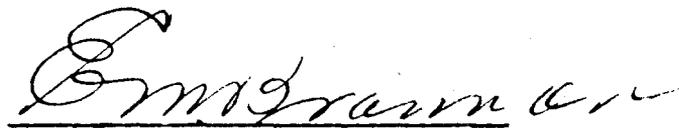

Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

3 March 1950

I concur in the foregoing action.


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

(GCMO 19, March 22, 1950).

8 March 1950

(GCMO 19. 22 March 1950).

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

MAR 3 1950

CSJAGH CM 340100

U N I T E D S T A T E S	)	1ST CAVALRY DIVISION (INFANTRY)
)	
v.	)	Trial by G.C.M., convened at
	)	Headquarters 1st Cavalry Division
Private JAMES E. LITTLE, (RA	)	Artillery, 8 December 1949. Both:
12116412), and Private CHARLES	)	Bad conduct discharge, total for-
L. SMITH), (RA 15276574), both	)	feitures after promulgation, and
of B Battery, 82nd Field Artillery	)	confinement for one (1) year.
Battalion, APO 201, Unit 3.	)	Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HILL, CHURCHWELL 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 at common trial upon identical charges and specifications, and the Board of Review holds the record of trial legally sufficient to sustain the findings of guilty of Charge II and its Specification, and the sentence as to each accused. The only question requiring consideration is the validity of the findings as to the Specifications of Charge I, and Charge I, as to each accused.
3. Specification 1 of Charge I, as to each accused, alleges that he "did * * * feloniously steal a carbine M 2, value about \$35.20, the property of the United States," in violation of Article of War 93. Each accused was found guilty of the Specification with the additional words "Government, furnished and intended for the military service thereof," not guilty of a violation of Article of War 93, but guilty of a violation of Article of War 94. The evidence adduced at the trial was legally sufficient to establish the offense as alleged in the original Specification as to each accused. Specification 2 of Charge I, as to each accused, alleges that he "did * * * feloniously steal 800 rounds ammunition for carbine 30 caliber, value approximately \$19.00, the property of the United States," in violation of Article of War 93. Each accused was found guilty of the Specification with the additional words "Government, furnished and intended for the military service thereof," not guilty of a violation of Article of War 93, but guilty of a violation of Article of War 94. The evidence adduced at the trial was legally sufficient to establish the offense as alleged in the original Specification as to each accused.

A substantially identical situation was considered in CM 334917, McIntosh, 1 BR-JC 365, in which the Board of Review stated:

"The evidence introduced by the prosecution sufficiently established the offense charged in the specification. However, the court erred in adding to its findings the words 'furnished and intended for the military service thereof' and substituting a finding of guilty of a violation of Article of War 94 for the alleged violation of Article of War 93. It is obvious that larceny of government property, in violation of Article of War 94, is not necessarily included in a charge of larceny of the same government property, in violation of Article of War 93, because the larceny denounced under Article of War 94 includes an added element, namely that the stolen property is 'furnished or intended for the military service' of the United States. It is, however, still larceny and necessarily includes such element of larceny under Article of War 93 (CM 316193, Holstein, 65 BR 271). Since the offense charged is necessarily included in that found, the record is legally sufficient to support the findings of guilty of the offense charged (CM 191638, Giles, 1 BR 269; CM 316193, Holstein, supra)."

4. For the reasons stated the Board of Review finds the record of trial legally sufficient to sustain only so much of the finding of guilty of Specification 1, Charge I, as to each accused, as finds each accused guilty of the Specification as alleged, without the additional words, "Government, furnished and intended for the military service thereof," legally sufficient to sustain only so much of the finding of guilty of Specification 2, Charge I, as to each accused as finds each accused guilty of the Specification as alleged without the additional words, "Government, furnished and intended for the military service thereof," legally sufficient to sustain the finding of guilty of only so much of Charge I as to each accused as finds each of the accused guilty of a violation of Article of War 93, and legally sufficient to sustain the other findings of guilty and the sentence as to each accused.

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

William H. Lambert, J.A.G.C.

J. W. Ryan, J.A.G.C.

CSJAGH CM 340100

1st Ind

MAR 16 1950

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

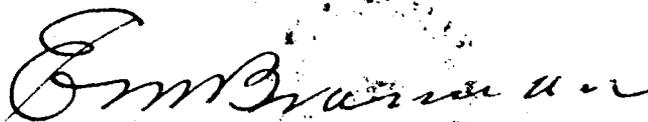
TO: Commanding General, 1st Cavalry Division (Infantry), APO 201, c/o
Postmaster, San Francisco, California

1. In the case of Private James E. Little (RA 12116412), and Private Charles L. Smith (RA 15276574), both of B Battery, 82d Field Artillery Battalion, APO 201, Unit 3, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to sustain only so much of the finding of guilty of Specification 1 of Charge I as to each accused as finds that each accused did, at the time and place alleged, feloniously steal a carbine M 2, value about \$35.20, the property of the United States; legally sufficient to support only so much of the findings of guilty of Specification 2 of Charge I as to each accused as finds that each accused did, at the time and place alleged, feloniously steal 800 rounds ammunition for carbine 30 caliber, value approximately \$19.00, the property of the United States; legally sufficient to support the findings of guilty of only so much of Charge I as to each accused as finds each accused guilty of a violation of Article of War 93; legally sufficient to support the findings of guilty of the Specification of Charge II and Charge II as to each accused, and legally sufficient to support the sentence as to each accused. Under Article of War 50e, this holding and my concurrence therein vacate so much of the finding of guilty of Specification 1 of Charge I, as to each accused, as involves the words "Government, furnished and intended for the military service thereof," so much of the finding of guilty of Specification 2 of Charge I as to each accused as involves the words "Government, furnished and intended for the military service thereof," and so much of the finding of guilty of Charge I as involves a finding other than a finding of guilty in violation of Article of War 93.

2. When copies of the published orders 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 orders 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 340100).

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.

MAY 3 1950

JAGH CM 340162

U N I T E D S T A T E S	)	FORT EUSTIS, VIRGINIA
)	
v.	)	Trial by G.C.M., convened at
	)	Fort Eustis, Virginia, 9 January
Corporal WILLIAM BONVENTRE	)	1950. Reduction to grade of
(RA 32414079), Headquarters	)	recruit, confinement at hard
Detachment, 2164th Area Service	)	labor for four (4) months, and
Unit, Fort Eustis, Virginia.	)	forfeiture of forty-eight (\$48.00)
	)	dollars pay per month for four (4)
	)	months. Stockade.

HOLDING by the BOARD OF REVIEW
HILL, BARKIN, and CHURCHWELL.
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 93rd Article of War.

Specification: In that Corporal William Bonventre, Headquarters Detachment, 2164th Area Service Unit, Fort Eustis, Virginia, did, at Fort Eustis, Virginia, on or about 11 December 1949, with intent to do him bodily harm, commit an assault upon, Private First Class Gerald Lamarre by wrongfully holding a dangerous weapon, to wit: a pistol pointed toward the body of the said Private First Class Gerald Lamarre and thereby placing him in fear.

The accused pleaded not guilty to the Charge and Specification. He was found "of the Specification: Not guilty. Of the Specification, In that Corporal William Bonventre, Headquarters Detachment 2164 Area Service

Unit, Fort Eustis, Virginia, did, on or about 11 December 1949, wrongfully strike Private First Class Gerald Lamarre in the face with his fist, Guilty." "Of the Charge: Not guilty, but guilty of a violation of the 96th Article of War." No evidence of previous convictions was introduced. He was sentenced to be reduced to the grade of recruit, to be confined at hard labor at such place as proper authority may direct for four months, and to forfeit forty-eight dollars of his pay per month for a like period. The reviewing authority approved the sentence, ordered it executed, and designated the Post Stockade, Fort Eustis, Virginia, as the place of confinement. The results of trial were promulgated in General Court-Martial Orders No. 1, Headquarters Fort Eustis, Virginia, dated 19 January 1950.

3. It was established by the evidence that the accused did, at the time and place alleged, point a loaded pistol at Private First Class Lamarre and, while doing so, struck Lamarre in the face with his fist. The finding as to the battery, not alleged in the specification, cannot be sustained (CM 201377, Overdier, 5 BR 103,104). Since every criminal battery necessarily includes an assault (Par. 180k, MCM 1949, p.246), the question is presented whether the assault included in the offense of striking the victim with his fist, as found by the court, can be sustained under the specification alleging an assault by pointing a pistol and putting in fear.

4. In CM 330658, Brown and Reese, 79 BR 111, the accused, Reese, was charged with an assault to do bodily harm by assaulting the victim with a dangerous weapon, to wit, a knife. The evidence was conflicting as to whether the accused used a knife or a pistol and the court found the accused guilty, except the words "to wit a knife." In holding the record of trial legally insufficient to support the finding as to this specification the Board of Review said:

"It is an accepted rule of judicial practice and procedure that a court-martial may make findings by exceptions and substitutions where such findings do not change the nature or the identity of the offense charged in the specification. In other words, a court-martial may convict an accused only of the offense of which he is charged or of a lesser offense necessarily included therein, it cannot convict an accused of an offense separate and distinct from that alleged. (par 78c, MCM 1928)

* * *

"Under the above rule and in accordance with the evidence here presented, the court could have found accused guilty either of the offense charged or of a lesser offense necessarily included therein. The court, however, by its findings changed the identity of the offense, as the assault of which accused now stands convicted is separate and distinct from the assault alleged and therefore not a lesser offense necessarily included therein. Such action on the

part of the court is illegal (CM 293414, Yacavone, 2 BR (CBI-IBT) 275; CM 325620, Paul, 74 BR 363). It necessarily follows that the findings as to the accused Reese cannot be sustained." (CM 330658, Brown and Reese, supra).

In SP CM 380, Husted, (6 Oct 1949), the specification charged an assault with intent to do bodily harm "by feloniously and willfully striking * * on the head with his fists." The court by exception and substitutions found the accused not guilty of the words "on the head with his fists" but guilty of an assault with intent to do bodily harm by feloniously and willfully striking the victim (with) "a deadly weapon, to wit: a bayonet." In holding the record legally sufficient to support the offense charged in the specification the Board of Review said:

"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)."

In the Husted case the Board of Review distinguished the Brown and Reese case, supra, on the ground that in the Brown and Reese case two separate assaults occurred at the time and place alleged. The Husted case and the case under discussion are distinguishable for the same reason. Although the two assaults in the instant case occurred at the same time they were entirely different in that the one alleged was the pointing of a pistol while the one of which accused was found guilty was included in striking with his fist. Accused was found not guilty of the offense alleged in the specification, but guilty of another, and different, offense. The fact that they both included an element, assault, which is required in the proof of either, does not permit the assault found by the court to be substituted for the one alleged in the specification in order to hold the record legally sufficient to sustain the offense charged.

Paragraph 180k, MCM 1949, p. 244 provides: "An assault is an attempt or offer with unlawful force or violence to do a corporal hurt to another. It may be either an actual attempt to commit a battery upon the person of another or a putting of the other in reasonable fear of immediate bodily harm." In the instant case the assault included in the finding was an attempt to commit a battery. That the assault found arose out of different acts is clearly demonstrated by the fact that it is of a different type, i.e., an attempt to strike, as distinguished from a threat and putting in fear. The court, by its finding, changed the identity of the offense. The finding, therefore, is illegal for any purpose (CM 330658, Brown and Reese, supra; CM 218667, Johns, 12 BR 133).

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

C. F. Hill, J.A.G.C.

Robert S. ..., J.A.G.C.

William H. ..., J.A.G.C.

JAGH CM 340162

1st Ind

MAY 16 1950

JAGO, Department of the Army, Washington 25, D.C. ^{5/16}

TO: Commanding Officer, Fort Eustis, Virginia

1. In the case of Corporal William Bonventre (RA 32414079), Headquarters Detachment, 2164th Area Service Unit, Fort Eustis, Virginia, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under Article of War 50e(3) this holding and my concurrence therein vacate the findings of guilty and the sentence. You are authorized to direct further trial as to the offense of which the accused was improperly convicted.

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 findings and the sentence so vacated. A draft of a general court-martial order designed to carry into effect the foregoing recommendation is attached. Should a further trial be directed, a statement to that effect should be added to the draft of order.

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

(CM 340162).

2 Incls

1. Record of trial
2. Draft GCMO



FRANKLIN P. SHAW

Major General, USA

Acting The Judge Advocate General



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

(35)

CSJAGK - CM 340335

13 MAR 1950

UNITED STATES)

v.)

First Lieutenant JAMES E.)
COLEMAN (O-2019852), 7798th)
Transportation Service Company.)

BERLIN MILITARY POST

Trial by G.C.M., convened at Berlin,
Germany, 26 and 27 January 1950.
Dismissal.

OPINION of the BOARD OF REVIEW.

McAFFEE, 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 and Specification: (Finding of not guilty).

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

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

Specification: In that First Lieutenant James E. Coleman, 7798 Transportation Service Company, did, at Berlin, Germany, on or about 21 December 1949, dishonorably fail to cooperate with Sergeant First Class Joseph Schultz, a law enforcement agent then in the execution of his office, knowing that said Sergeant First Class Joseph Schultz had a warrant of arrest for one Christel Gerber, by refusing him entrance to his billet, knowing full well that the said Christel Gerber was then in said billet, to the prejudice of good order and military discipline.

He pleaded not guilty to all charges and specifications. He was found guilty of Charge III and the specification thereunder and not guilty to all other charges and specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial under Article of War 48.

3. Evidence for the Prosecution

It was stipulated that on 7 May 1949 the accused was assigned Bachelor Officers Quarters, Apartment C-3, at 5 Zuericherstrasse, Berlin-Lichterfelde West, and that this assignment of quarters was effective from that date until the time of trial (R 17).

About 6:30 p.m. on 21 December 1949, First Lieutenant Willie E. Carlsen, Christel Gerber, a German national, and the accused were in accused's apartment at 5 Zuericherstrasse, Berlin, Germany. Elly Aring, the accused's housekeeper, was also present. Someone knocked at the door, at which time the housekeeper answered the door and informed the accused that there was someone to see him. The accused went to the door and talked to someone. During this conversation Christel Gerber's name was mentioned. The accused returned from the door and told Christel Gerber that there was someone outside who wanted to arrest her. He also told her that she "should go home" (R 28,29,50,51). Christel Gerber went to her home at 39 Drakestrasse, Lichterfelde West. She was arrested by the German police that evening while at home (R 29,31).

Sergeant First Class Joseph A. Schultz, Headquarters Company, 759th Military Police Service Battalion, Berlin, Germany, was "Chief of Desk Section" of the Battalion. His duties included serving warrants of arrest. On 21 December 1949 he was ordered to serve a warrant of arrest on Christel Gerber, a German national. He went to the address shown on the warrant, 39 Drakestrasse, but could not find Miss Gerber. When ordered to serve the warrant he was informed that if Miss Gerber was not at 39 Drakestrasse she might be found at 5 Zuericherstrasse. Sometime between 6 and 7 p.m. he went to the accused's apartment and rang the bell. A German girl answered the bell and he asked if "Fraulein Gerber was there." He was told to wait a minute. The accused then came to the door and asked him what he wanted. He -

"*** asked the lieutenant if Christel Gerber was there, and the lieutenant said, 'What do you want her for?' I told the lieutenant I had a warrant for her arrest, and he asked me who I was, and I told him who I was and where I was from. Then the lieutenant asked to see the warrant. I in turn handed it to the lieutenant and he read it. Then the lieutenant asked me if I had a search warrant, or he said, 'Do you have a warrant to search my apartment?' I said, 'No, sir, I am not in your apartment.' He said, 'No, and you cannot come in without a search warrant either.'" (R 43)

Sergeant Schultz left the accused's apartment after stating that he would return. He returned to the apartment in about three-quarters of an hour with the officer of the day. The officer of the day asked the accused for and received permission to enter the apartment. The officer of the

At the request of the trial judge advocate the court took judicial notice of "Standard Operating Procedure No. 96, Headquarters European Command, entitled 'Arrest Search and Seizure', dated 16 March 1948" (R 51). The court's attention was called particularly to paragraph 11 thereof which reads as follows:

"11. Forcible Entry. After explanation of his errand and demand for admittance (or without such explanation and demand if he reasonably believes such to be impractical or useless) a US Army or Air Force law enforcement agent may break and enter a dwelling only:

a. For the purpose of making an arrest or a search under a warrant;

b. To prevent a serious offense; or

c. To effect a recapture on fresh pursuit of one who has been lawfully arrested or who is a convicted prisoner."

4. For the Defense

The accused was advised of his rights as a witness and elected to testify as a witness in his own behalf. In reference to the events of 21 December 1949, he testified:

"Q. Will you tell the court what happened when the sergeant came to your door?

"A. We were sitting in the living room and listening to the radio, and just talking-- the four of us; the maid, Lieutenant Carlsen, Miss Gerber, and I. There was a knock at the door and the maid got up and went to the door, and came back and called me and said it was someone to see me. I went to the door, and Sergeant Schultz, whom I did not know at that time, was at the door. He asked me could I help him. He said he was looking for a Fraulein Gerber. I asked him what did he want with Miss Gerber. He said he had a document to serve on Miss Gerber. I asked him what type of document and he told me it was a warrant of arrest. He did hand me the document. I did not read all the contents of the document. I looked at a signature on it of this judge. I don't know the Judge. I believe it was Sabo. Didn't know him and had no contact with him before, and didn't recognize his signature. Then I asked the sergeant if he had a search warrant to search my apartment. He said, no. I said, 'Sergeant, would you be so kind as to get one and come back.' He turned and walked down the first landing, down the steps, and then turned around and said, 'I'll be right back, lieutenant', and that's the last time I saw the sergeant, until later when he returned with

the Captain. A Captain Smith, I believe.

"Q. Did he make any attempt to get into your apartment?

"A. No, sir; he did not.

"Q. Did you read any address on the search warrant-- arrest warrant?

"A. Yes, sir. It was the address, 39 Drakestrasse.

"Q. Why did you not permit him to come in and serve that warrant on Christel Gerber at that time? What went through your mind?

"A. Well, sir, for approximately the last two months on another incident of another officer I had been before practically every office in Berlin, being questioned on this matter. I had been before Colonel Foote, as I said before, four or five times. I had been before the Inspector General Office, had been before the CID, and had been interrogated by military police, and I knew that Miss Gerber had been through the same, and I thought it was best, since the warrant was for Miss Gerber at 39 Drakestrasse, and was not addressed to my apartment, it would be best for everyone concerned for her to be found at home; for her to go home and let them serve the warrant of arrest there.

"Q. Did you in any way intend to prevent that warrant being served on her?

"A. No, sir, I did not. I told Miss Gerber to go home.

"Q. And that it could be served on her at her home?

"A. That's right.

"Q. Did anyone later come to your apartment that same night?

"A. Yes. The sergeant and Captain Smith returned later.

"Q. Did you prevent their coming into your apartment?

"A. No, sir, I did not.

"Q. They made a search?

"A. Yes, sir. They came in and Captain Smith asked me if I would show him around, and I said, 'Yes, sir,' and I did. He searched every room in the apartment.

"Q. Were you advised by the person who had the warrant that her presence in your apartment might be used against you?

"A. No, sir.

*

*

*

"Q. Since Miss Gerber was in your home when you were accompanied by another officer and the maid, how did you think there could be any damage to your reputation by her being found there? This was not late at night or during the middle of the night, was it?

"A. The only reason was because I had been questioned and interrogated before by the Inspector General on Miss Gerber being visiting my apartment, and they said I had violated a standing order.

"Q. In other words, your reason for not allowing Sergeant Schultz to enter was to protect yourself?

"A. Just better for everybody concerned. Figured it was better, since the arrest was at 39 Drakestrasse, and it would be better for her to be found at home." (R 63,64,65)

On cross-examination he stated that Miss Gerber was in the apartment when Sergeant Schultz first came to the door, but that she was not there when he returned with Captain Smith. When questioned as to the reasons why he refused to allow Sergeant Schultz to enter the apartment he stated:

"A. I did not refuse to let him enter. Merely asked the sergeant if he had a search warrant. He stated, no, and I asked him would he get one.

"Q. Were you of the opinion, sincerely, that he had to have a search warrant with that address to make that arrest in your apartment?

"A. Yes, sir. I thought that to search my apartment that he had to have a search warrant.

"Q. Are you familiar with SOP 96?

"A. No, sir; I am not." (R 65-66)

5. Discussion

The evidence shows that Sergeant First Class Joseph A. Schultz, Headquarters Company, 759th Military Police Service Battalion, Berlin, Germany, was assigned the duty of arresting Christel Gerber, a German national. This arrest was to be made pursuant to a warrant issued by the presiding Judge of the Second Judicial District, United States Courts for Germany. This warrant for the arrest of Christel Gerber was directed to "All Law Enforcement Agencies." It is clearly shown that Sergeant Schultz was a law enforcement agent and that in attempting to serve this warrant he was in the execution of his office.

The accused was occupying Bachelor Officer Quarters at 5 Zuerecherstrasse, Berlin, Germany. These quarters had been duly allotted to the

accused by the Army.

In an effort to effect the arrest of Christel Gerber, Sergeant Schultz, acting upon information given to him by his military superior, went to accused's assigned quarters and inquired of the accused if Christel Gerber was present in the quarters. The accused asked Sergeant Schultz, "What do you want her for?" Sergeant Schultz stated that he had a warrant for her arrest and gave the accused the warrant to read. The accused asked Sergeant Schultz if he had a search warrant for his quarters and upon receiving a negative reply told Sergeant Schultz that he could not enter the quarters without a search warrant. Christel Gerber was in fact within the quarters at this time.

Under Standard Operating Procedure No. 96, Headquarters European Command, Sergeant Schultz as a law enforcement agent was, under the facts outlined above, authorized to break and enter any dwelling in order to effect the arrest of Christel Gerber upon the warrant then in his possession.

The billet occupied by the accused had been assigned to him by the occupying forces of Germany and law enforcement agents of the Army were not required to obtain a search warrant for the premises before making a search therein. In CM 328248, Richardson, 77 BR 1, 20, the Board of Review said:

"The legality of the search of accused's office in the building known as the Ministry of Public Works is called in question. It appears that the Allied Military Government exercised control over the building as the occupying power. The fact that the Town Major could not find a requisition for the building is of no importance. The military power had control of the building and the formality of a written requisition was entirely unnecessary. We quote from CM 248379, Wilson, 31 BR 235-236:

'Authority to make, or order, an inspection or search of a member of the military establishment, or of a public building in a place under military control, even though occupied as an office or as living quarters by a member of the military establishment, always has been regarded as indispensable to the maintenance of good order and discipline in any military command. *** such a search is not unreasonable and therefore not unlawful' (citing authorities).

"In Grewe v. France, 75 F. Supp. 433, a habeas corpus proceeding in the District Court of the United States for the

Eastern District of Wisconsin, the petitioner contended that evidence against him had been illegally obtained by unlawful search of his quarters by military police in a military compound established by the United States Army Occupation Forces in Germany. The learned court held that the search of the military controlled quarters occupied by petitioner, and the seizure of articles found therein, was not unreasonable or in violation of the Fourth Amendment to the Constitution. We therefore conclude that the search of accused's office and the wash room appurtenant thereto was fully authorized in law ***."

Courts established by the United States occupation forces in Germany necessarily rely upon the military forces to enforce their warrants, judgments and decrees. There is no evidence to show that the duties of the accused included law enforcement as such and therefore there was no duty upon him to personally serve the warrant issued by the presiding Judge of the United States Courts for Germany. In the opinion of the Board of Review however there is a duty upon all members of the occupation forces, regardless of rank, to refrain from placing obstacles in the path of other members of the occupation forces who are performing their assigned duties. The accused was not justified in demanding that Sergeant Schultz secure a search warrant before entering his quarters. The accused's refusal to permit Sergeant Schultz to enter his quarters for the purpose of serving the warrant of arrest upon Christel Gerber, the accused knowing that she was within the quarters, was a hindrance to Sergeant Schultz in the performance of his duties and constituted conduct prejudicial to good order and military discipline.

At common law it was an indictable offense for the occupant or owner of a dwelling house to refuse admission to an officer, who was attempting to make a lawful arrest, after the officer had made known his purpose and authority. Under such circumstances the law would consider the occupant or owner as having conspired with the party pursued in order to screen him from arrest and to make his house a place of refuge (*Oystead v. Shed*, 13 Mass. 520; 7 American Decisions 172; 2 RCL 478, 61 American Decisions 155, Note; 46 C.J. 868).

The accused testified that he was not familiar with Standard Operating Procedure No. 96 and that he thought that Sergeant Schultz had to have a search warrant in order to search his apartment. Standard Operating Procedure No. 96 issued by Headquarters European Command is dated 16 March 1948. It became a part of the written military law of the occupation forces in Germany and the accused is chargeable with knowledge of its provisions (CM 307097, Millinger, 60 BR 199,216). Accused's ignorance of the law, assuming it to be a fact, respecting the necessity of search warrants, is no defense to the offense of which he was found guilty. He is presumed to have knowledge of the law (CM 322052, Shamel, 71 BR 19, 26; CM 328133, Konno, 76 BR 313,328).

6. Department of the Army records show the accused to be 28-5/12 years of age and married. He is a high school graduate. He enlisted in the Regular Army on 31 October 1939 for three years. On 15 June 1945 he was discharged as a first sergeant to accept a commission as a second lieutenant, AUS. He served overseas for 19 months and has been awarded the Bronze Star, Combat Infantry Badge and Good Conduct Medal. On 12 November 1946 he was separated from the Army. He was recalled to active duty on 25 October 1948. On 26 May 1949 he was promoted to first lieutenant. His overall efficiency ratings are 067 for the period 19 April 1948 to 17 July 1948 (Reserve Short Tour Active Duty); 118 for the period 1 February 1949 to 15 May 1949; 091 for the period 16 May 1949 to 31 August 1949.

7. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused occurred during the trial. 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. Dismissal is authorized upon conviction of a violation of Article of War 96.

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

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

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

(44)

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

JAGU CM 340335

26 April 1950

UNITED STATES

BERLIN MILITARY POST

v.

Trial by G. C. M., convened
at Berlin, Germany, 26 and
27 January 1950. Dismissal.

First Lieutenant JAMES E.
COLEMAN, O-2019852, 7798th
Transportation Service Company

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

1. Pursuant to Article of War 50d(2) the record of trial in the case of the officer named above and the opinion of the Board of Review have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to, and was found guilty of, a specification alleging that he did at Berlin, Germany, on or about 21 December 1949, dishonorably fail to cooperate with Sergeant First Class Joseph Schultz, a law enforcement agent then in the execution of his office, by refusing him entrance to his billet, knowing that Schultz had a warrant for the arrest of Christel Gerber and that Gerber was then in said billet, to the prejudice of good order and military discipline. 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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

3. The evidence shows in summary that Fraulein Christel Gerber, a German national, of 39 Drakestrasse, Lichterfelde West, Berlin, Germany, visited the accused in his bachelor officers' quarters apartment at 5 Zuericher Strasse, in the same section of the city, approximately three times a week from about July to December 1949 (R 17-18, 24, 26). Although her visits were not regular (R 30), she kept a few items of clothing there and occasionally stayed overnight in the guest room (R 18, 27). On 21 December 1949, a warrant was issued by order of the United States Courts

for Germany for the arrest of Christel Gerber for failure to give information in a case under investigation by the Inspector General, Berlin Military Post (R 43-44; Pros Ex 2).

The evidence relating to the events of the evening of 21 December is substantially as stated by the Board of Review in its opinion. Briefly, it shows that Sergeant First Class Joseph A. Schultz, a military policeman in the execution of his duty, went to the address shown on the mentioned warrant for the purpose of arresting Fraulein Gerber. Not finding her there, he proceeded to the accused's apartment, asked the accused if she was there and stated he had a warrant for her arrest. He handed the warrant to the accused, who informed Schultz that he could not enter the apartment without a search warrant, whereupon Schultz departed.

Present in the apartment with the accused at this time were First Lieutenant Willis E. Carlson, Fraulein Gerber, and the accused's housekeeper. Following the mentioned conversation with Schultz, Fraulein Gerber, at the accused's direction, proceeded to her home, where she was subsequently arrested by the German police. Schultz returned to the accused's apartment later with the officer of the day, and the accused permitted a search of the premises.

The court took judicial notice of Standard Operating Procedure No. 96, Headquarters European Command, 16 March 1948, providing in pertinent part that after explanation of his errand and demand for admittance, a United States Army law enforcement agent may break and enter a dwelling for the purpose of making an arrest under a warrant (Sec II, par 11).

The accused testified in substance that the reason he refused Sergeant Schultz admittance to his apartment without a search warrant, was that he and Fraulein Gerber had been subjected to numerous interrogations with reference to an incident involving another officer. Also he had been interrogated by the Inspector General concerning her visits and had been accused of violating a standing order. Consequently, since the warrant was addressed to her at 39 Drakestrasse, he thought it would be best for everyone concerned for her to be arrested at that address. The accused claimed he was not familiar with "SOP 96."

4. It is fully established that the accused, with full knowledge of the facts, failed to cooperate with Sergeant Schultz, a United States Army law enforcement agent, in his legitimate effort to serve a legal warrant of arrest upon Christel Gerber, who was in the accused's apartment.

The first question for determination is whether the evidence supports the court's finding that the accused dishonorably failed to cooperate as alleged. The word "dishonorable" is defined as "bringing or deserving dishonor; shameful; disgraceful," and the noun "dishonor" as "disgrace;

shame; ignominy" (Webster's New International Dictionary, 2d Ed, 1949, p 748). Dishonor or disgrace connotes moral dereliction "indicated by acts of dishonesty or unfair dealing, or indecency or indecorum, or of lawlessness, injustice, or cruelty" (MCM 1949, par 182, p 254). In connection with failing to pay debts "dishonorably" means deceit, evasion, false promises, or denial of indebtedness, plus unconscionable delay (CM 270400, Lawson, 45 BR 257, 263-264, quoting from Winthrop, Military Law and Precedents, 2d Ed, 1920 reprint, p 715, footnote 42).

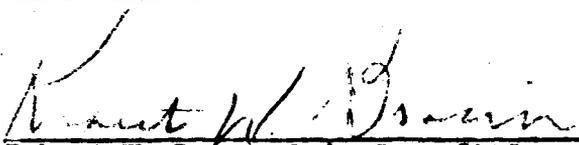
The mere failure by an officer to cooperate with an Army law enforcement agent in arresting a person in the officer's billet, would not be dishonorable per se under the foregoing definitions. The only basis for concluding that the accused's failure to cooperate in the instant case was disgraceful, shameful, or ignominious and thus dishonorable, arises from the evidence of Fraulein Gerber's previous visits to his apartment, the official interrogation of the accused and accusation against him of the violation of a standing order, and the reasons for Gerber's arrest as stated on the warrant. From this evidence it may be inferred that the accused was motivated at least in part by a desire to protect himself from the consequences of the further entertainment of the German woman in his quarters. The evidence, however, reveals no dishonesty or unfair dealing on the accused's part. He made no misrepresentation to the sergeant, nor did he attempt to conceal his guest. He was guilty of no indecency, indecorum, or injustice. His conduct was not lawless in the ordinary sense nor was it by any reasonable interpretation disgraceful, shameful, or ignominious.

The accused immediately informed Fraulein Gerber, who was not wanted for a serious offense and who apparently had no intention of trying to escape, that someone wished to arrest her and directed her to go home, where she was in fact later arrested. In the opinion of the Judicial Council, the evidence fails to establish that the accused's failure to cooperate was dishonorable.

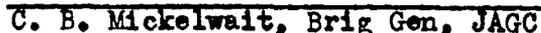
The next inquiry is whether the accused's failure to cooperate involved any lesser degree of culpability. As an officer in the Army he was under a duty not to obstruct a military law enforcement agent in the proper execution of his duty to arrest a person in the accused's quarters under a warrant of arrest valid on its face. Whether or not the accused actually had knowledge that a search warrant was not a prerequisite under the circumstances, he was chargeable in law with knowledge of the provision of Standard Operating Procedure No. 96 to that effect, as well as its direction that its provisions "shall be observed by * * * all members of the U S occupation forces in all matters of maintenance of law and order" (Sec I, par 4a). His duty not to obstruct the law enforcement agent, under the circumstances, necessarily entailed the duty to cooperate in permitting the arrest. In the Judicial Council's opinion, this failure was wrongful and prejudicial to good order and military discipline.

The remaining question is whether the wrongful failure to cooperate shown by the evidence constituted an offense necessarily included within the dishonorable failure charged. The word "dishonorably" imports criminality or culpability (MCM 1949, par 29a, p 22). The word "wrongfully" has the same legal effect (Ibid.), but in a lesser degree. It has been held that the offense of wrongfully neglecting and failing to pay a debt, in violation of Article of War 96, established by conduct demonstrating indifference to the obligation, is included in the offense of dishonorably neglecting and failing to pay the debt (CM 270641, Smith, 45 BR 329, 337, 343). It is well nigh impossible to conceive of dishonorable conduct which does not necessarily involve and include conduct wrongful in the sense of being prejudicial to good order and military discipline. In the opinion of the Judicial Council, the offense proven is necessarily included in that charged.

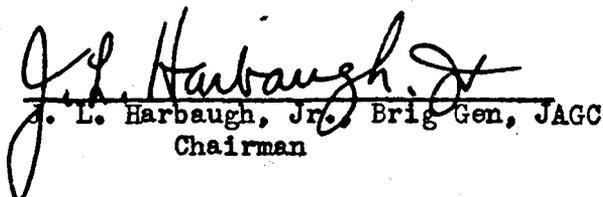
5. For the foregoing reasons the Judicial Council is of the opinion that the record of trial is legally sufficient to support the finding of guilty of Charge III and legally sufficient to support only so much of the finding of guilty of the specification thereunder as involves a finding that the accused did at the place and time alleged wrongfully fail to cooperate with the person alleged by refusing him entrance to his billet, with the knowledge and under the circumstances alleged. The Judicial Council is further of the opinion that the record of trial is legally sufficient to support the sentence but because of the failure of the proof to show that the accused's conduct was dishonorable as alleged, it is the view of the Judicial Council that the sentence should be commuted to a reprimand and forfeiture of seventy-five dollars pay per month for three months.



Robert W. Brown, Brig Gen, JAGC



C. B. Mickelwait, Brig Gen, JAGC



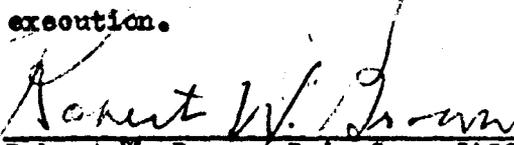
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

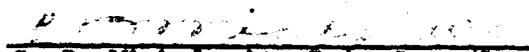
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

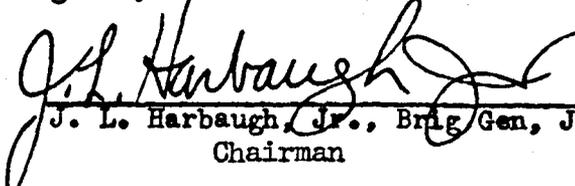
THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant James E. Coleman, O-2019852, 7798th Transportation Service Company, upon the concurrence of The Judge Advocate General, only so much of the finding of guilty of the specification of Charge III is approved as involves a finding that the accused did at the place and time alleged wrongfully fail to cooperate with the person alleged by refusing him entrance to his billet, with the knowledge and under the circumstances alleged. The sentence is confirmed but commuted to a reprimand and forfeiture of seventy-five dollars pay per month for three months. As thus commuted, the sentence will be carried into execution.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

26 April 1950

I concur in the foregoing action.

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

and by means thereof did fraudulently obtain from the Fort Randolph Post Exchange \$30.00, lawful money of the United States, he, the said First Lieutenant Robert P. Morton, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston for payment of said check.

Specification 2: (Identical to Specification 1, except the place of the offense, "Fort Gulick, Canal Zone", the payee of the check, "Fort Gulick Officers Club," and the amount of the check "\$20.00").

Specification 3: (Identical to Specification 2, except the date of the check and the offense "23 August 1949" and the amount of the check "\$15.00").

Specification 4: (Identical to Specification 2, except the date of the check and the offense "26 August 1949").

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

Specifications 1, 2, 3, and 4 are identical to the correspondingly numbered Specifications of Charge I.

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

Specification 1: (Identical to Specification 1, Charge I, except the date of the check "3 August 1949," the date of the offense "3 September 1949," and the amount of the check "\$35.00").

Specification 2: (Identical to Specification 2, Charge I, except the date of the check and the date of the offense "6 September 1949").

Specification 3: (Identical to Specification 1, Charge I, except the date of the check and the date of the offense, "9 September 1949," and the amount of the check "\$50.00").

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

Specifications 1, 2, and 3 are identical to the correspondingly numbered Specifications of Additional Charge I.

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

Specification 1: In that First Lieutenant Robert P. Morton, 37th Engineer Combat Company, did, at Atlantic Sector,

Canal Zone, between on or about 24 January 1949 and on or about 3 March 1949, feloniously steal about \$115.00, lawful money of the United States, the property of Private Jack O. Field.

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

	<u>Date</u>	<u>Amount</u>	<u>Person</u>
Spec 2	between 3 February and 5 July 1949	about \$200.00	Private First Class Billy B. Sands
Spec 3	between 3 February and 5 July 1949	about \$380.00	Private First Class Morris Covert
Spec 4	between 11 February and 3 March 1949	about \$90.00	Private First Class Thomas W. Dugan
Spec 5	between 3 March and 5 July 1949	about \$190.00	Corporal Edward Bringas
Spec 6	about 3 February 1949	about \$50.00	Private First Class Norvin W. Roessing
Spec 7	about 3 March 1949	about \$100.00	Private William Charbonneau, Jr.
Spec 8	about 2 May 1949	about \$60.00	Corporal Malcolm Radisic
Spec 9	about 5 July 1949	about \$25.00	Private Richard M. Zimmerman

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

3. Evidence.

a. For the prosecution.

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

Accused prior to, and on the dates of the various offenses alleged, was and has continued to be in the military service as a member of the

37th Engineer Combat Company (R 15,37; Pros Ex 10). Master Sergeant, then Captain, George C. Carlton was Commanding Officer of the 37th Engineer Combat Company from 17 July 1948 to 31 March 1949, and from April 1949 through the remainder of the period of the offenses alleged his successor was Captain Joseph C. Reaves (R 37; Pros Ex 10; R 38, Pros Ex 11). During Captain Carlton's tenure as commanding officer, he appointed accused personnel officer and in such capacity from January 1949 until Captain Carlton left the company, accused had the duty of depositing soldiers' deposits with the finance officer (Pros Ex 10). Under Captain Reaves, accused was company administrative officer and in that capacity was supposed to deposit soldiers' deposits in the finance office (Pros Ex 11).

From January 1949, money received in the 37th Engineer Combat Company for soldiers' deposits was turned over to Master Sergeant Isaac H. Samples who entered or supervised the entering of, the deposits upon form 14-15 which was executed in quintuplicate, and upon the deposit cards of the soldiers making the deposits. The soldiers' deposit cards were kept in the company safe and not in the possession of the depositors (R 65). Upon completion, a form 14-15, otherwise designated "Soldiers' Deposits Collection Voucher," indicates the date of the deposit, the officer with whom the deposits were made, and the names of the depositors together with the amounts respectively deposited by them (R 67, Pros Exs 14-19). Paragraph 56, C 6, TM 14-502, provides that the personnel officer will certify to the correctness of the detailed information entered upon the form 14-15, and provision for such certificate is made on the form. Provision is also made upon the form for the receipt of the disbursing officer with whom the deposit is made. A soldiers' deposit card, form 14-38, provides for the entry of each deposit made by its holder with provision for the receipt thereof by the finance officer with whom the deposit is made, and an attestation for each deposit by the commander of the depositor (R 20, Pros Ex 3).

Upon verifying the entries on the form 14-15 and the individual deposit cards, Sergeant Samples would give the forms 14-15, the deposit cards, and the money to be deposited to accused who would in turn normally bring them to the commanding officer, for verification. After verifying the deposits the commanding officer would sign the cards in the space provided for attestation; subsequently, accused was supposed to take the deposits, forms 14-15 and deposit cards to the finance office to make the deposits (R 65,66,68).

From 1 December 1946 to 30 April 1949, Captain Joseph B. Isbell was finance officer at Fort Gulick, Atlantic Sector, Canal Zone (R 90, Pros Ex 24). His successor up to the time of trial was Captain W. E. Brown (R 91). During Captain Isbell's tenure and thereafter until 9 May 1949, Master Sergeant J. W. Collyer was cashier (R 39). Collyer was relieved

as cashier so that he could devote full time to his duties as chief clerk. His integrity was never questioned by either Captain Isbell or Captain Brown (R 90, Pros Ex 24; R 94,96). Collyer, however, had been indebted to enlisted men of lower rank than himself, and Captain Brown spoke to him about it, and prevailed upon him to arrange to pay the indebtedness. Collyer was also the owner of a large automobile (R 104). Corporal J. J. Vandover served as cashier from 10 May 1949 until he was relieved on 1 September 1949 because of his lack of necessary book-keeping background and his lack of familiarity with the various vouchers processed through a "cashier's cage" (R 77,96). Captain Brown had no reason, however, to doubt his integrity (R 74).

In the finance office at Fort Gulick, soldiers' deposits were initially received by the cashier and only by the cashier, unless he were absent, in which case they would be received by the finance officer (R 90, Pros Ex 24, R 93). In general, the cashier would enter the transaction in his cashier's account book, receipt the forms 14-15 with a time and date stamp and have the forms 14-15 and the soldiers' deposits cards signed by the disbursing officer. Two copies of the form 14-15 and the soldiers' deposits cards would be returned to the unit making the deposit. While Collyer served as cashier, of the two copies of the form 14-15 returned to the unit one was receipted and the other bore a time and date stamp (R 39). Vandover usually had the finance officer receipt the copies returned to the unit; if the finance officer was not present Vandover would receipt one copy with his time and date stamp as a temporary receipt. Ultimately, both copies returned to the officer making the deposit would be receipted by the finance officer (R 82). If the finance officer were available the deposit books would be signed at the time of the deposit and returned immediately. Otherwise, they would be signed by him and returned later (R 52). Paragraph 56, C 6, TM 14-502, provides that of the two copies of the form 14-15 returned to the unit the personnel officer will retain one copy, and will "promptly forward one copy direct to the soldiers' deposits branch, Army Finance Center, OCF." The purpose of the latter is to serve as a check on the finance office (R 59,90; Pros Ex 25). In accordance with TM 14-502, supra, the Fort Gulick Finance Office distributed the original and remaining two copies of the form 14-15 as follows: the original was sent to the Accounting Division, Army Finance Center; one copy was sent to the Insurance and Deposits Division, Army Finance Center; and one copy was retained in the files of the Fort Gulick Finance Office (Pros Ex 10; R 59).

Prosecution Exhibits 14-19, inclusive, were identified by Sergeant Samples as copies of forms 14-15 which were returned to the company for file and which he kept in the company safe. The deposits represented thereon had been verified by Sergeant Samples prior to turning the forms and deposits over to accused (R 66-67). The exhibits (Pros Exs 14-19)

which were admitted in evidence without objection (R 67) reflect deposits by the following named men in the amounts and on the dates shown opposite their respective names:

<u>Name</u>	<u>Amount</u>	<u>Dates</u>
Jack O. Field	\$ 60.00	3 February (Pros Ex 19)
	\$ 50.00	3 March 1949 (Pros Ex 17)
Morris Covert	\$180.00	3 February 1949 (Pros Ex 19)
	\$100.00	3 March 1949 (Pros Ex 17)
	\$ 50.00	11 April 1949 (Pros Ex 16)
	\$ 50.00	5 July 1949 (Pros Ex 14)
Billy B. Sands	\$ 20.00	3 February 1949 (Pros Ex 19)
	\$ 60.00	3 March 1949 (Pros Ex 17)
	\$100.00	2 May 1949 (Pros Ex 15)
	\$ 20.00	5 July 1949 (Pros Ex 14)
Norvin W. Roessing	\$ 50.00	3 February 1949 (Pros Ex 19)
Thomas W. Dugan	\$ 40.00	11 February 1949 (Pros Ex 18)
	\$ 50.00	3 March 1949 (Pros Ex 17)
William Charbonneau, Jr.	\$100.00	3 March 1949 (Pros Ex 17)
Edward Bringas	\$ 60.00	3 March 1949 (Pros Ex 17)
	\$100.00	2 May 1949 (Pros Ex 15)
	\$ 30.00	5 July 1949 (Pros Ex 14)
Malcolm Radisic	\$ 60.00	2 May 1949 (Pros Ex 15)
Richard M. Zimmerman	\$ 25.00	5 July 1949 (Pros Ex 14)

Prosecution Exhibits 19, 18, 17, and 16 recite that the deposits listed thereon were made with "J. B. Isbell, Capt, FD, Ft Gulick, CZ" but were not receipted by that officer or otherwise, although the certificates to the correctness of the abstract of deposits were made over the signatures "Robert P. Morton." Prosecution Exhibits 15 and 14 recite that the deposits listed thereon were made with "W. E. Brown, Capt, FD, Ft Gulick, CZ," and the certificates as to the correctness of the abstract of deposits are executed over the signatures "Robert P. Morton." Prosecution Exhibit 15 is unreceipted while the receipt on Prosecution Exhibit 14 is executed over the signature "W. E. Brown." Authorship of this signature was denied by Captain Brown (R 95).

Testimony of the several depositors, except Radisic, shows that the monies credited to their respective accounts on Prosecution Exhibits 14-19, inclusive, were entrusted to representatives of the 37th Engineer Combat Company at or prior to the dates reflected on Prosecution Exhibits 14-19, for deposit to their several soldiers' deposits accounts, that the sums so entrusted had not been returned to them and that they had not authorized accused to use the monies for his own use and benefit (R 15, Pros Ex 1; R 16, Pros Ex 2; R 17-18, R 24-25, R 29-30, R 33-34, R 35, R 32, Pros Ex 7). With reference to his deposit dated 5 July 1949

(Pros Ex 14, Pros Ex 4), Sands testified that the money represented by the deposit was paid by him to accused on 30 June 1949 and that Prosecution Exhibit 5 is a receipt for that money executed in his presence by accused (R 25,27-28).

Prosecution Exhibits 3, 4, 6, 8, 9, 20, 21, and 22 were identified respectively, as the deposit cards of Bringas, Sands, Covert, Roessing, Zimmerman, Charbonneau, Dugan, and Field (R 20, 24,29,33,36,69-70). The deposits thereon corresponding in time and amount to the deposits listed on Prosecution Exhibits 14-19, inclusive, together with the signatures receipting therefor and attesting thereto are set forth as follows:

	<u>Date</u>	<u>Amount</u>	<u>Receipting Signature</u>	<u>Attesting Signature</u>
Field (Pros Ex 22)	2 February 1949	\$ 60.00	J.B.Isbell	George C. Carlton
	2 March 1949	\$ 50.00	J.B.Isbell	George C. Carlton
Covert (Pros Ex 6)	2 February 1949	\$180.00	J.B.Isbell	George C. Carlton
	2 March 1949	\$100.00	J. B.Isbell	George C. Carlton
	11 April 1949	\$ 50.00	J.B.Isbell	Joseph C. Reaves
	5 July 1949	\$ 50.00	W.E.Brown	Joseph C. Reaves
Sands (Pros Ex 4)	2 February 1949	\$ 20.00	J.B.Isbell	George C. Carlton
	2 March 1949	\$ 60.00	J.B.Isbell	George C. Carlton
	2 May 1949	\$100.00	W.E.Brown	Joseph C. Reaves
	5 July 1949	\$ 20.00	W.E.Brown	Joseph C. Reaves
Roessing (Pros Ex 8)	3 February 1949	\$ 50.00	J.B.Isbell	George C. Carlton
Dugan (Pros Ex 21)	11 February 1949	\$ 40.00	J.B.Isbell	George C. Carlton
	2 March 1949	\$ 50.00	J.B.Isbell	George C. Carlton
Charbonneau (Pros Ex 20)	2 March 1949	\$100.00	J.B.Isbell	George C. Carlton
Bringas (Pros Ex 3)	2 March 1949	\$ 60.00	J.B.Isbell	George C. Carlton
	2 May 1949	\$100.00	W.E.Brown	Joseph C. Reaves
	5 July 1949	\$ 30.00	W.E.Brown	Joseph C. Reaves
Zimmerman (Pros Ex 9)	5 July 1949	\$ 25.00	*	Joseph C. Reaves

(* The purported signature of the receipting officer, viz; "W. E. Brown," was placed in the box below and in effect would serve to receipt in blank for the next deposit entered (R 53).)

After the purported making of the deposits, the deposit books would be returned to the unit by accused (R 74,76).

Authorship of the signatures George C. Carlton and Joseph C. Reaves was acknowledged respectively by Captains Carlton and Reaves. In each instance their signatures were placed upon the several deposit cards after verification of the deposits to which attestation was made.

Upon examination of facsimile copies of Prosecution Exhibits 3,4, 6,8,9,20,21 and 22, Captain Isbell denied that the signatures "J. B. Isbell" appearing beside the deposits set forth above were placed thereon by him (Pros Ex 24). Captain Brown, after examination of the original exhibits similarly denied authorship of the signatures "W. E. Brown" appearing beside the deposits set forth (R 93-94).

Sergeant Collyer identified Prosecution Exhibit 12 as his cashier's account book and testified that the last deposit by accused reflected thereon was a \$5.00 deposit on 24 January 1949. His independent recollection was that no other deposits were made by accused after 24 January (R 42-43). When Corporal Vandover became cashier on 10 May 1949 he continued using Sergeant Collyer's cashier's account book up to and including 30 June 1949. Vandover identified Prosecution Exhibit 23 as the account book in which on 1 July 1949 he started to record his transactions. Vandover could find no transaction which he had with accused entered in either Prosecution Exhibits 12 or 23 (R 78-81). Prosecution Exhibits 12 and 23 were admitted in evidence, but were withdrawn, and an extract of Prosecution Exhibit 12 showing accused's deposit of 24 January 1949 was substituted therefor (R 81).

Examination of the file of forms 14-15 retained in the Fort Gulick Finance Office by Captain Brown, the custodian thereof, showed an absence of deposits as reflected by Prosecution Exhibits 14-19, inclusive (R 95-96). Captain Brown's examination otherwise disclosed a form 14-15 evidencing a deposit by Captain Carlton on 4 January 1949 and another evidencing a deposit of \$5.00 to the credit of Private Jack O. Field made by accused on 24 January 1949 (R 93).

Concerning an hypothesis of guilt of one other than accused, Collyer testified as follows:

"Q Now, based on your familiarity with Finance Office procedures, as a result of your experience in these various Finance Offices, I would like you to tell the court whether or not a dishonest Finance Office cashier could accept Soldiers' Deposits from a company officer, take in the cash, destroy his three copies of the Soldiers' Deposit Collection Voucher, Form 14-15, meant for the Finance Office, forge the Finance Officer's signature in the Soldiers' Deposit books, return to the company officer two copies of the Form 14-15 meant for the company and lead him to believe that they were properly receipted, and in that way convert the money to his own use.

* * *

A I would say that it would be possible, but it would be highly improbable. Any Finance Department clerk would know better, but it could be done." (R 54,55)

With reference to the same subject, Captain Brown testified as follows:

"Q Captain, if we assume that a certain cashier in a typical Army Finance Office is dishonest, is it possible that that cashier could accept Soldiers' Deposit books, the Forms 14-15 in quintuplicate, and the cash, destroy three copies of the Form 14-15, forge the Finance Officer's signature in the Soldiers' Deposit books and also on the Soldiers' Deposit Collection Voucher, return two copies of the Soldiers' Deposit Collection Voucher, bearing the forged signature, to the company officer, destroy the three copies meant for the Finance, and in that way convert the money to his own use without fear of detection?

A No, sir, he would get caught.

Q Will you please explain to the court how this conceivably dishonest cashier in this hypothetical case that I have posed to you would be apprehended sooner or later?

A Well, that hypothetical soldier that the deposit was intended for would be getting discharged one day, and those Soldiers' Deposits would have to be repaid to him, and when the voucher that the Soldiers' Deposits were repaid on was audited by the General Accounting Office or the Army Finance Center at St. Louis, it would be verified against the amount of the deposits that had actually been made for the soldier, and at that time, which would be 30, 60 or 90 days after the man was discharged, it would be brought to light, and an exception would be made in the accounts of the Disbursing Officer that made the final payment." (R 98)

He further testified that the fifth copy of the form 14-15 was returned to the unit and forwarded by the unit to the Soldiers' Deposit Branch in St. Louis, as a check on the finance office and if the deposit, upon checking, had not been picked up on the finance office accounts it "should bounce back in 60 days." This had never happened while he was finance officer at Fort Gulick (R 99-100). While Corporal Vandover was cashier the only discrepancies in soldiers' deposit accounts "was this one here." (R 103)

Forms 14-15 sent to the Soldiers' Deposits Branch, Insurance and Deposits Division, Army Finance Center, Office of the Chief of Finance,

St. Louis 20, Missouri, from Atlantic Sector, United States Army, Caribbean, are normally received in the branch two weeks after the end of the month in which deposits are made. Thus a form 14-15 dated 24 January 1949 evidencing a deposit by Jack O. Field was received from the Finance Office servicing the 37th Engineer Combat Company on 11 February 1949. First Lieutenant William J. Morefield, Chief of the Soldiers' Deposits Branch, was unable to find in his files copies of forms 14-15, corresponding or identical to what we find are true copies of Prosecution Exhibits 14-19, inclusive (R 90, Pros Ex 25).

Other records of the Soldiers' Deposits Branch indicate that soldiers' deposits totaling \$160.00 including a deposit of \$60.00 certified by Radisic to have been made on 2 May 1949, were paid to Malcolm Radisic on 20 June 1949 from the accounts of J. H. Davin, Lt. Colonel, F.D., resulting in an overpayment of \$60.00 (Pros Ex 25).

Without objection, a voluntary statement made by accused to Criminal Investigation Division Agent Benjamin E. Donehoo on 31 August 1949 was admitted in evidence as Prosecution Exhibit 26 (R 118). Accused stated therein that he joined the 37th Engineer Combat Company on 5 June 1948 and that from September 1948 to November 1948 and from December 1948 until February 1949 he served as personnel officer of the company. From the time he joined the company, accused made the soldiers' deposits about 90% of the time and after Captain Carlton's relief made all the deposits and also signed the collection vouchers. Prior thereto, when two copies of the collection vouchers were returned to the company, accused gave them to the First Sergeant to put in the company safe. Accused was not aware that one copy was to go to St. Louis for record. He identified collection vouchers dated respectively "24 Jan 49," "11 Feb 49," "3 Mar 49," "11 Apr 49," "2 May 49," and "5 Jul 49" as bearing his authentic signature and acknowledged receiving the funds represented thereon totaling nine hundred dollars, but added that these funds had been deposited by him with the finance officer at Fort Gulick. Accused questioned the authenticity of his purported signature on another voucher which was dated "3 Feb 49" and which evidenced deposits totaling \$310.00. Accused was unaware that the voucher of "24 Jan 49" and other earlier vouchers had "the cashier's initials and time received on the reverse side." Concerning the vouchers admittedly signed by him, accused could not explain why all but the "5 Jul 49" voucher were unsigned by the finance officer, and as to the "5 Jul 49" voucher could not recall seeing anybody place the signature "W. E. Brown" thereon, nor could he recall that the signature was on it at the time he received it after making the deposit represented by it (Pros Ex 26).

Accused claimed that he never received back the "soldiers' deposit cards" signed at the time he made the deposit of funds, but from the

time that five copies of the voucher were required, always received back two copies at the time the deposits were made, and prior thereto received back one copy (Pros Ex 25).

Records of the National Bank of Fort Sam Houston show that accused had a checking account in that bank which on 20 August 1949 by virtue of a \$15.00 charge made against the account on that day, reflected a balance of \$1.75, and thereafter until the account was closed his balance was not greater. Deposits to the account had been made by allotment check, the last allotment check being received on 7 July 1949, and two by money order. Late arrival of allotment checks had on a few occasions necessitated return of checks drawn by accused (R 126, Pros Ex 32).

Daniel E. Dorestant, who was manager of the Fort Randolph Post Exchange from July to December 1949, identified Prosecution Exhibits 29, 30, 31, as checks which he cashed for accused, respectively, in amounts and on dates as follows: \$30.00, 20 August 1949; \$35.00, 3 September 1949; and \$50.00, 9 September 1949. Except for the check cashed on 3 September 1949 which was dated 3 August 1949, the other checks were of even date with the dates upon which they were cashed. The three checks were drawn upon the National Bank of Fort Sam Houston and all were signed by accused in Dorestant's presence (R 128, 130). The three checks were subsequently received at the Central Exchange at Corozal from the Chase National Bank, Balboa Branch, Prosecution Exhibits 29 and 30 being returned due to "insufficient funds" and Prosecution Exhibit 31, due to "account closed." The three checks had bank stamps on their reverse sides (R 121-124).

By deposition First Lieutenant Howell E. Williamson, club officer, Fort Gulick Officers' Club, and custodian of the club's records, testified that accused cashed checks payable to the club, at the club on the following dates in the amounts shown beside the dates:

20 August 1949	- \$20.00
23 August 1949	- \$15.00
26 August 1949	- \$20.00
6 September 1949	- \$20.00

None of the checks was executed in the presence of, or cashed by Williamson. The four checks bore the signatures "Robert P. Morton" which in the opinion of Lieutenant Williamson were genuine. The drawee of the 20 August 1949 check was the National Bank of Fort Sam Houston. The drawees of the other three checks were not disclosed. Lieutenant Williamson deposited the four checks in the Chase National Bank, Christobal, and subsequently received the checks back from the bank marked: "Not sufficient funds." On 9 September 1949, Lieutenant

Williamson talked to accused concerning the 20 August 1949 check which he had then received back from the bank, and accused assured Lieutenant Williamson that the check would be taken care of immediately. Subsequently, on 5 October 1949, accused's wife made restitution for the four checks (R 120, Pros Ex 28).

On the morning of 12 September 1949, accused sought out Colonel Julius E. Slack at the latter's office and had a conversation with him concerning checks. After Colonel Slack made a report to the Commanding General, Atlantic Base Sector, he was appointed special investigating officer to investigate certain matters connected with the accused (R 142), and another conversation between Colonel Slack and accused was held on 12 September. Colonel Slack advised the accused of his rights under Article of War 24. Accused admitted that he had "written" checks without sufficient funds in the bank to meet them (R 140). Concerning specific admissions made by accused, Colonel Slack testified as follows:

"He referred to the 23rd of August, with reference to cashing a check at the Fort Gulick Officers' Club for \$20.00; to the 27th of August and the 3rd of September, in connection with the cashing of checks for \$30.00 and \$50.00, respectively, at the Fort Randolph Post Exchange; and to another check for \$15.00 at the Fort Gulick Officers' Club, as to which he stated that he could not recall the date." (R 141)

Subsequently, during his investigation, Colonel Slack received checks designated as Prosecution Exhibits 33, 34, 35 and 36 (R 134-137). All the checks were drawn on the National Bank of Fort Sam Houston payable to the Fort Gulick Officers' Club, bore the purported signature of accused and on their reverse sides bore bank stamps. Otherwise, they were dated and in amounts shown as follows: 20 August 1949, \$20.00 (Pros Ex 33, R 134); 23 August 1949, \$15.00 (Pros Ex 34, R 136); 26 August 1949, \$20.00 (Pros Ex 35, R 137); 6 September 1949, \$20.00 (Pros Ex 36, R 137).

The records of the National Bank of Fort Sam Houston show the following described checks bearing accused's signature as maker were upon presentment for payment, returned unpaid because of insufficient funds:

<u>"Dated</u>	<u>Amount</u>	<u>Payee</u>	<u>Returned</u>
August 20, 1949	\$20.00	Off. Club	August 27, 1949
August 20, 1949	\$30.00	Exchange	August 29, 1949
August 23, 1949	\$15.00	Off. Club	August 30, 1949
August 26, 1949	\$20.00	Off. Club	September 6, 1949
September 6, 1949	\$20.00	Off. Club	September 15, 1949
August 3, 1949	\$35.00	Exchange	September 15, 1949
August 31, 1949	\$20.00	Cash	September 15, 1949"

(Pros Ex 32)

b. For the defense.

Sergeant Samples recalled as a witness for the defense identified Defense Exhibits A-M, inclusive, as copies of forms 14-15 retained in the files of the 37th Engineer Combat Company (R 144-146). Examination of the copies shows that all were receipted either on the reverse side within the time and date imprint or upon the face by the purported signature of the finance officer. On some, the date on the face differed from the date shown by the time and date stamp on the reverse side.

Sergeant Samples also testified that there was no copy of TM 14-502 in the library of the 37th Engineer Combat Company in the period extending from January to August 1949 (R 146).

Captain Lyndon A. Sundberg testified that from approximately 1 January 1949 to 1 March 1949 he was military personnel officer of the Atlantic Sector. It was not until the latter part of February, however, that action was initiated which "gathered the units together as a Personnel Section at Sector Headquarters" (R 150,152). As personnel officer, one of his duties was to enter deposits in the service records of enlisted men. In practice, the entries would be made in the service records by personnel clerks who would bring to Captain Sundberg the service records and the form 14-15 which evidenced the deposits. Captain Sundberg would compare the entries in the service records against the entries on the forms 14-15 and if they were identical would initial the entries on the service records (R 150-151). Captain Sundberg could not vouch that the forms 14-15 with which he verified the service records were receipted but assumed that they were "properly authenticated" (R 151-152). Captain Sundberg did not know of the disposition made of the forms 14-15 which he used to authenticate the service records and did not know if any copies of the forms 14-15 were sent to the Soldiers' Deposits Branch, Army Finance Center (R 151).

First Lieutenant Earl W. Scarborough served as military personnel officer, Atlantic Sector, for five weeks beginning 28 June 1949. Prior to his appointment, however, he worked in the adjutant's office and signed documents for the personnel officers when the latter were absent (R 154,157-158). While he was serving as military personnel officer one copy of form 14-15 would come to his office from each unit. This one copy would go to the unit clerk who would make the entries on the service records, and pass the form 14-15 and service records to Lieutenant Scarborough to initial the entry in the service records. To the best of Lieutenant Scarborough's knowledge, all the copies of form 14-15 received by him were receipted. With one exception the copies of form 14-15 which were utilized for making the entries in the service records were sent back to the units for filing. Lieutenant

Scarborough did not cause to be sent any copies of form 14-15 to the Soldiers' Deposits Branch, Army Finance Center, although he had been assured by the clerk of a unit other than the 37th Engineer Combat Company that he (the clerk) was sending one copy of the form 14-15 there (R 155,160). Corporal Tharpe was the clerk from the 37th Engineer Combat Company who worked in the personnel section (R 161). Lieutenant Scarborough recognized a check mark on Prosecution Exhibit 17 (a completed copy of form 14-15, dated 3 March 1949) as similar to one he used himself, and stated that he might have processed Prosecution Exhibit 14 (form 14-15 dated 5 July) and possibly Prosecution Exhibit 13 (dated 2 May 1949) (R 157-158).

Chief Warrant Officer Douglas E. Carter was military personnel officer, Atlantic Sector, from 25 July 1949 until 1 December 1949. During his tour as personnel officer the procedure prescribed in TM 14-502 with reference to entering soldiers' deposits on service records was followed (R 163). Mr. Carter, however, was unable to find that there was laxity in the processing of forms 14-15 in the personnel office prior to his becoming personnel officer (R 160). According to Carter, the unit received back two copies of form 14-15 from finance, one copy signed and the other unsigned. All entries in the service records were made from the signed copies which were subsequently kept in the company files. The unsigned copy was the one which was supposed to be sent to St. Louis (R 167-168). After Carter took over as military personnel officer there were no soldiers' deposits from the 37th Engineer Combat Company (R 168).

Corporal Bobby E. Tharpe, the personnel clerk of the 37th Engineer Combat Company, had served in that capacity since 17 December 1948. As personnel clerk, he worked in the "orderly room" until 2 March 1949 when he moved to the personnel section at Fort Davis, serving there until 6 December when the company moved to Fort Clayton. In the period from January to July 1949 he would receive one copy of form 14-15 by messenger from the company, make the entries in the service records and have the personnel officer initial the entries. Tharpe never checked the copies of form 14-15 received by him to see that they were properly receipted. After the entries were made on the service records and the service records were initialed, Tharpe would return the copies of form 14-15 to the company (R 169-171).

It was stipulated that Sherman F. Bowles, cashier of the National Bank of Fort Sam Houston would testify that his bank received from accused on 18 May 1949 a letter, the original of Defense Exhibit N, with reference to the status of accused's account, and in answer thereto sent a letter of which Defense Exhibit O was stipulated to be a copy (R 178-179).

The letter designated as Defense Exhibit N recited that on two occasions accused had forwarded cash to the bank which evidently the

bank had not received, and suggested that if checks of accused were received for which there were not sufficient funds on hand for payment the bank forward to accused a note in the amount of overpayment. In its reply letter, Defense Exhibit O, the bank stated its inability to follow accused's suggestion.

It was stipulated that the records of the National Bank of Fort Sam Houston show deposits to his account by accused other than by allotment were made as follows:

\$ 45.00 - 21 January 1949
 \$160.00 - 11 February 1949 (R 180).

It was stipulated that Captain Thomas E. Mine Hart, Atlantic Sector Exchange Officer, would testify that on 7 October 1949 accused's wife paid to him the sum of \$115.00 in full payment for checks cashed at Atlantic Sector Exchange by accused and which had been returned marked "Not sufficient funds" (R 180).

Accused after being apprised of his rights elected to testify in his own behalf and his testimony is summarized as follows:

He identified Defense Exhibit Q as a document which he received on or about 18 March 1943 and it was admitted in evidence (R 202,203). The document is entitled "Restoration of Civil Rights" and over the seal of the State of Oregon and the signature of the governor of the State purports to restore to accused all political rights, privileges, and immunities of which he had been deprived by virtue of a conviction of the crime of obtaining money by false pretenses.

Accused attended the Infantry School at Fort Benning, Georgia, and the Engineer School at Fort Belvoir. After his graduation from the latter school he received his commission which was dated back to 1 November 1947, the date upon which he graduated from the Infantry School (R 182-183). While he was attending Engineer School he was accompanied by his wife and their three children. The only quarters he could acquire were in a tourist court at a cost of \$125.00 a month. At this time, his wife secured a civil service job at the Engineer School library. Accused was transferred from the States on 28 May 1948 after graduating from the school. His family did not join him until September and in the meantime they kept living at the tourist court. During this period accused's expenses were rather high, and his wife incurred considerable expense in getting herself and the children to the Canal Zone. When she finally arrived the family finances were "down practically to zero." Around Christmas, accused applied for and received a loan of \$300.00 from the National Bank of Fort Sam Houston, and in February accused's wife obtained a civil service job with a salary of \$208.00 a month. Accused then had

a \$100.00 a month allotment to the National Bank of Fort Sam Houston, \$50.00 of which was used to amortize his loan, and the other \$50.00 for deposit to his account. He also had a \$63.00 a month allotment to cover a debt on his automobile; this allotment also took care of insurance on the automobile. With these allotments taken out, accused received \$204.00 a month (R 191-193).

Accused had arrived at the Canal Zone on 5 June 1948 and was assigned to the 37th Engineer Combat Company. Accused set forth with great detail the multifarious duties which were thrust upon him by a shortage of personnel, and inferentially, at least, by the inefficiency of the various commanding officers of the company. According to accused, Captain Carlton, during the eight months he was nominally in command, was not actually present for duty for as much as two months, and neither Captain Carlton nor Captain Reaves exercised any supervision over accused (R 183-186).

Accused first started to make soldiers' deposits in October 1948 although until January Captain Carlton signed the forms 14-15 (R 187). On the first occasion that accused went to the finance office he had been given but four copies of the form 14-15 and was told he had to have five. He returned to the company and had another made up. On every occasion, accused received back two copies but never ascertained if these were receipted (R 189). Usually, when accused went to the finance office to make the deposits he was accompanied by five to six men with pay problems. He would go to the cashier's cage, leave the money which he counted at that time, the books and the forms, and then go to the Enlisted Men's Pay Roll Section. After completing his business there, he would return to the cashier who would give him his forms. He never at this juncture received back the deposit books, although on one occasion when he made a deposit in the morning he was able to pick up the books in the afternoon (R 188). When he did receive the deposit books he checked to see if they contained the finance officer's signature. Accused had never seen TM 14-502 and was unaware that he was supposed to send one of the returned copies of form 14-15 to the Soldiers' Deposit Branch. To the best of his knowledge neither the First Sergeant, the company clerk, nor the military personnel officer at Atlantic Sector, sent a copy to the Soldiers' Deposit Branch. Accused denied taking or embezzling any money which was entrusted to him to deposit in the finance office for soldiers' deposits, and added that he had no occasion to check with the Fort Gulick Finance Office or the Soldiers' Deposits Branch to see if the deposits made by him were recorded (R 190). He acknowledged the authenticity of his signatures appearing on Prosecution Exhibits 13-18, inclusive, and acknowledged being entrusted with the monies shown thereon. He questioned the authenticity of his purported signature upon Prosecution Exhibit 19 and in view thereof would not state that he received the monies shown thereon (R 206-207). He recalled that he made the deposits listed on Prosecution Exhibits 15 and 16 with Sergeant Collyer. He made the deposits shown upon Prosecution

Exhibit 14 at the cashier's cage in the Fort Gulick Finance Office but did not recall the person with whom the deposits were made (R 207,208). Although in his various visits to the finance office he had been accompanied in the aggregate by at least fifty men, he named but one, Master Sergeant Howard Tully (R 208).

In March and April 1949 accused had difficulties with his checking account in the National Bank of Fort Sam Houston. One or two of the checks were returned by the bank due to the late arrival of his allotment checks. In May, accused wrote to the bank "inquiring about the difficulty," and also informing the bank of his sending \$20.00 in cash upon two occasions which cash evidently had not been received by the bank (R 195,205).

After that, his "account ran along smoothly" until August. On 15 August, despite his previous experience in sending cash through the mail, he mailed \$200.00 in cash to the bank (R 196,200,223). At the time, he believed his account was down to zero. Accused did not wait for acknowledgement from the bank that it had received his \$200.00, but on the assumption that the money had been received, wrote the seven checks which were introduced in evidence as "Prosecution Exhibits." The total amount of these checks was less than the \$200.00 (R 206,216, 223). The first inkling which he had that the money had not been received came on 9 September as on that date he was notified by the Fort Gulick Officers' Club that one of his checks had been returned. He promised to make the check good but on Monday (evidently 12 September) he was placed under arrest. On 12 September, he went to see Colonel Slack, the deputy commander, to inform him that there was going to be "difficulty." There was nothing accused could say "other than that he didn't have the money in the bank," he could not prove his \$200.00 deposit (R 197-198). At this time, accused also made known to Colonel Slack that he "had been convicted and confined" (R 203). Reimbursement to the Fort Gulick Officers' Club was made for all checks "cashed" at the Club, and reimbursement was likewise made for all checks "cashed" at the Fort Randolph Post Exchange (R 198).

Mrs. Robert P. Morton, accused's wife, testified that she had first heard of accused when he was her brother's employer, but had first met accused when he was incarcerated in the Oregon State Penitentiary. Her mother had interested herself in accused's case and Mrs. Morton accompanied her to the penitentiary when she visited him. When accused was released, Mrs. Morton's mother was ill, and at the mother's request Mrs. Morton accompanied accused from Salem to Portland, Oregon. Accused immediately secured employment and was employed until he was drafted into the Army. Mrs. Morton and accused were married on 14 November 1942. Mrs. Morton had three daughters, who at the time were 3, 4 and 6 years of age, and accused talked with them prior to his marriage to their mother to see if they would accept him as a father. Following accused's

induction Mrs. Morton and the three girls remained in Portland until January 1946 when they joined accused at Fort Warren, Wyoming. Since that time, Mrs. Morton and her daughters stayed with accused (R 225-226).

According to Mrs. Morton, accused set a very high standard for herself and her daughters as concerns actions and morals. She never saw her husband intoxicated and added that he did not gamble. He did everything possible to assist Mrs. Morton in bringing up the three girls and spent two or three hours every evening helping them with their homework (R 226-227).

Mrs. Morton secured employment in the United States Army Caribbean School in February and from February until July when "the differential" was lost, made almost \$110.00 every two weeks. After the loss of "the differential" her salary was approximately \$80.00 every two weeks. The combined income of herself and her husband was more than adequate and enabled her "to put by a little." She had no reason to believe that in the period extending from January to August 1949 accused was spending large sums of money derived from a source other than his Army pay and further claimed that he had no opportunity so to do (R 227-229).

Her first intimation that anything was wrong came when Colonel Slack told her that her husband had been placed under arrest for his own protection, that he had threatened to commit suicide. Colonel Slack asked her if she had noticed suicidal tendencies in her husband. She told him "of course not." Colonel Slack put her under oath and questioned her. She did not recall half of what she was asked. The following day, Colonel Slack suggested that she relinquish her job and return "home" with her daughters (R 229-230).

It was stipulated that Major Don C. Romine would testify that accused, then a staff sergeant, had served under him from April 1946 to May 1947; that he found accused was a loyal, conscientious man of the highest integrity and moral attitude; and that accused was a loving father and husband. Major Romine rated accused "superior" in character and efficiency. Major Romine's stipulated testimony further reflects that he "rejects the implication of these charges when considered as applying to accused," and that he should be happy to have accused serve under him again (R 230-231).

Major John E. Johnson testified that he had first made accused's acquaintance when accused reported for duty in the theatre. At the time, Major Johnson was commanding officer of the 37th Engineer Combat Company, but was in the process of leaving to become Sector Engineer, Atlantic Sector. The 37th Engineers were under the supervision of the Sector Engineer and hence Major Johnson continued to have close contact

with that unit. Major Johnson was in frequent contact with accused officially and socially, and would rate accused as an "Excellent" officer, if not "Superior." Major Johnson was of the opinion that accused's habits were normal and his character "unquestionable." Prior to the investigation which led to accused's trial, Major Johnson was unaware of any derelictions of duty on the part of accused (R 232,233).

Major Johnson had occasion to inspect reports of survey coming from the 37th Engineer Combat Company and his inspection thereof indicated that the administration of the company was very poor and the supply records were not up to standard (R 260-263). His observation of accused's performances of duty led him, on the other hand, to conclude that accused was doing an outstanding job, although accused was responsible for the supply records (R 263).

Captain Joseph J. McCarthy testified that he became acquainted with accused in January 1949 and since that time had seen accused socially two or three times a week. He observed that accused was a dutiful husband and that the manners of accused and his family were exemplary. Prior to August 1949 he had not heard anyone make unfavorable comments about accused, and he was not aware that accused possessed any undesirable habits or traits of character (R 234-235).

First Lieutenant Howard L. Griffin testified that he first met accused in October of 1948 and later attended food service school with accused. Accused was top man in their class at the school. Lieutenant Griffin was not aware of any bad habits or undesirable traits that accused might have, and had never heard any unfavorable comments about him (R 236-237).

c. For the court.

Colonel William Sackville testified that in August 1949 he inspected the units of the Atlantic Sector concerning the handling of soldiers' deposits. He went over the unit files of forms 14-15 and checked against the records of the Finance Office. With the exception of the 37th Engineer Combat Company, deposits as reflected by the unit files were recorded in the retained files in the Finance Office. In only two instances, in units other than the 37th Engineers, did he find unreceipted forms 14-15. In both instances, however, there was a record of the deposits in the Finance Office (R 244-250). His inspection also disclosed that the personnel officer in the military personnel office was responsible for sending copies of forms 14-15 to St. Louis, but such copies were not being sent (R 251).

Court's Exhibits I, II, III and IV were identified respectively as the service records of Private Richard M. Zimmerman, and Privates

First Class Morris Covert, Billy B. Sands and Norvin W. Roessing and were admitted in evidence (R 253-254,256). The following pertinent entries are shown thereon:

<u>Date</u>	<u>Deposited</u>	<u>Name, Grade and Arm or Service of Disbursing Officer</u>	<u>Initials</u>
5 Jul 49	\$ 25.00	W. E. Brown, Captain, F.D.	EWS (Courts Ex I)
3 Feb 49	\$180.00	J. B. Isbell, Capt, F.D.	HC
3 Mar 49	\$100.00	J. B. Isbell, Capt, F.D.	HC
11 Apr 49	\$ 50.00	J. B. Isbell, Capt, F.D.	
5 Jul 49	\$ 50.00	W. E. Brown, Captain, F.D.	EWS (Courts Ex II)
3 Feb 49	\$ 20.00	J. B. Isbell, Captain, F.D.	H
3 Mar 49	\$ 60.00	J. B. Isbell, Captain, F.D.	H
2 May 49	\$100.00	W. E. Brown, Capt, F.D.	EWS
5 Jul 49	\$ 20.00	W. E. Brown, Captain, FD	EWS (Courts Ex III)
3 Feb 49	\$ 50.00	J. B. Isbell, Capt F.D.	HC (Courts Ex IV)

4. Discussion.

Accused has been charged with and found guilty of larcenies of approximately \$1200.00 from nine named enlisted men, said larcenies being alleged to have occurred during the period from about 24 January 1949 to about 5 July 1949, inclusive. During the period in question accused was an officer of the 37th Engineer Combat Company and was charged with the duty of receiving monies from the enlisted men of the company and making deposits of the monies received in the finance office to the soldiers' deposits accounts of the enlisted men concerned. The unit file of retained copies of collection vouchers (Form 14-15) contains copies of five collection vouchers (Pros Exs 14-19, inclusive) upon which the deposits in question were entered. Each of these copies bear the purported signature of accused, and accused judicially admitted the genuineness of his signature upon four of the copies and further admitted the receipt of the monies shown upon these four copies. Upon comparison of the signature questioned by accused with the admittedly genuine signatures, the court could and did find the questioned signature to be genuine (CM 325112, Halbert, 74 BR 89). The copies of collection vouchers in question, together with their originals and other copies, had been prepared by or under the supervision of Master Sergeant Samples of accused's unit. Samples testified that after verifying the deposits shown on the five copies, he had given the original vouchers and copies thereof, together with the monies represented thereon, to accused. The deposits entered on the collection vouchers (Pros Exs 14-19) were also entered in the deposit book of the depositor's concerned, and given to accused who brought them to the officer commanding the unit who would

verify the deposits and attest the entry in the deposit book. Entries in the deposit books corresponding to the deposits entered upon the pertinent collection vouchers were attested in each instance by the officer then commanding the unit. The receipt by accused of the bulk of the monies alleged to have been stolen by him is established by his judicial admissions and the receipt by him of all the monies is otherwise established beyond doubt.

As hereinbefore shown, collection vouchers showing the receipt of money for soldiers' deposits are executed in quintuplicate. Upon the making of the deposits shown therein, the voucher and copies are distributed as follows: The original is sent to the Accounting Division, Army Finance Center; a copy is sent to the Soldiers' Deposit Branch, Army Finance Center, and one copy is retained by the finance office; the remaining two copies are returned to the unit from which the deposits emanate; the personnel officer of the unit is to send one copy to the Soldiers' Deposits Branch, Army Finance Center, and retain one for the unit file. At the Fort Gulick Finance Office the copies returned to the person making the deposit were receipted either by the cashier or by the finance officer, and the deposit books which accompanied the collection vouchers and money deposited were always receipted by the finance officer.

If the monies received by accused were, in fact, deposited by him, identical copies of Prosecution Exhibits 14-19, inclusive, should be in the files of the Fort Gulick Finance Office, and in the files of the Soldiers' Deposits Branch, Army Finance Center, and the entries on the pertinent deposit books corresponding to the deposits shown on Prosecution Exhibits 14-19, inclusive, should be receipted over the signature of the finance officer receiving the deposits. In addition, the copy retained by the unit would be receipted, either by the cashier or by the finance officer, as are not Prosecution Exhibits 14-19, inclusive. It is established by the testimony of the finance officer, Fort Gulick, that the files of his office do not contain copies of the vouchers of which Prosecution Exhibits 14-19, inclusive, purport to be copies, and the absence of such copies from the files of the Soldiers' Deposit Branch is similarly established by the chief of that Branch. The absence of such copies from the two files in question is competent evidence that the deposits were not made (CM 334270, Stricklin, 1 BR-JC 141).

During the period of the alleged larcenies Captains Isbell and Brown served successively as finance officer, Fort Gulick, and the deposits entered on the deposit books of the soldiers concerned except Radisic corresponding to the deposits reflected on Prosecution Exhibits 14-19, inclusive, were receipted over the purported signature of either Captain Isbell or Captain Brown. In each such case, the officer concerned denied that the signature was his.

The circumstance that accused had possession of the deposit books and returned them in each instance to the unit, would support an inference that accused was the author of the false signatures upon the deposit books (CM 334270, Stricklin, supra).

Accused testified in his own behalf and admitted the genuineness of his signatures appearing upon Prosecution Exhibits 13-18, inclusive, admitted receiving the monies shown upon the same exhibits, and claimed that he in fact made the deposits shown thereon in the finance office at Fort Gulick. We are not inclined to afford accused's claim any more weight than did the court. We do not believe that an officer, or for that matter any other person, would pay over comparatively large sums of money not belonging to himself without obtaining some receipt to evidence the paying over of the money.

Inferentially, at least, the claim is made by the defense that Sergeant Collyer, who was cashier at the Fort Gulick Finance Office during the greater part of the period in question, was the person who in fact committed the bulk of the larcenies alleged. Collyer was relieved as cashier in May 1949, and was succeeded by a Corporal Vandover, who was serving as such on 5 July 1949 when the deposits shown upon Prosecution Exhibit 14 were presumably made by accused. Vandover was subsequently relieved as cashier because of his lack of familiarity with bookkeeping and with the various forms of vouchers. The purported deposits shown by Prosecution Exhibits 15-19 should have been made while Collyer was cashier, and the purported deposits shown by Prosecution Exhibit 14 should have been made during Vandover's tour as cashier. That losses attributable to Collyer's dishonesty and Vandover's inefficiency would occur only in the transaction with one unit is too unlikely to be considered fact (Mintz v. Premier Cab Ass'n, Inc., 127 F. 2d 744). We, as did the court, conclude that accused did not deposit the various monies entrusted to him for that purpose but converted them to his own use.

Where, as in this case, an officer received money belonging to enlisted men to deposit the said money in the soldiers' deposits accounts of said soldiers and does not, and conceals the fact that he had not so deposited the money by resort to forgery, viz, the false signatures in the deposit books, a finding that the officer had committed larceny is warranted.

"* * 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). * * *." (CM 323764, Mangum, 72 BR 403).

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

It might be contended that the total of the money stolen by the accused was entrusted to him on six occasions, that he failed to deposit the money received as was his duty upon each occasion, and that he thereby committed but six larcenies instead of the nine individual larcenies corresponding to the number of victims. However, the sentence imposed is supported whether this contention is considered meritorious or not and the rights of the accused are not prejudiced thereby.

We conclude that the record of trial warrants the findings of guilty of Additional Charge III and its Specifications.

Accused was also found guilty of having, on seven occasions, with intent to defraud, wrongfully and unlawfully made and uttered checks and having fraudulently obtained money thereby, knowing that he did not have and not intending to have sufficient funds in the drawee bank for payment of said checks (Charges I and II, Specs; Add. Charges I and II, Specs).

The evidence shows that accused had an account in the National Bank of Fort Sam Houston which on 20 August 1949 reflected a balance of \$1.25. Checks drawn upon that bank and payable to the Fort Randolph Post Exchange, signed by accused, were cashed by accused in their face amounts at the Fort Randolph Post Exchange in the amounts and on the dates shown,

\$30.00 - 20 August 1949 (Charge I, Spec 1; Charge II, Spec 1)
 \$35.00 - 3 September 1949 (Add Charge I, Spec 1; Add Charge II, Spec 1)
 \$50.00 - 9 September 1949 (Add Charge I, Spec 3; Add Charge II, Spec 3).

With the exception of the check cashed 3 September 1949 which was dated 3 August 1949, the checks were of even dates with the dates upon which they were cashed. The records of the National Bank of Fort Sam Houston show that the following described checks signed by accused were returned unpaid upon presentment because of insufficient funds:

<u>Date</u>	<u>Amount</u>	<u>Payee</u>
August 20, 1949	\$20.00	Exchange
August 3, 1949	\$35.00	Exchange

It is apparent that the checks cashed at the Exchange on 20 August and 3 September were presented to the drawee bank for payment and were dishonored by the bank. Although the circumstances that the 9 September check bore bank stamps indicating that it had been in banking channels, and had been returned unpaid, would ordinarily be evidence of presentment (CM 335738, Carpenter, 2 BR-JC 245), the records of the payee bank fail to show that the check had in fact been presented. Presentation and dishonor are not, however, necessary elements of the offenses under consideration (CM 336515, Stewart, 3 BR-JC 128,130,131), but proof of presentment and dishonor would negative any hypothesis that a drawee bank might extend credit upon a particular check. In this case, however, it being shown that two prior checks of accused had been presented and dishonored any possibility that credit would be extended upon the check cashed on 9 September is effectually negated. As to the checks cashed at the Fort Randolph Exchange the evidence is conclusive that accused made and uttered them as alleged and obtained their face amount from the payee alleged. In addition to any constructive knowledge of the status of his account which may be imputed to him, accused's actual knowledge of the depleted state of his account is shown by his extrajudicial admissions. His testimony to the effect that he had mailed \$200.00 in cash to the payee bank on 15 August 1949 is not credible. The findings of guilty of the specifications here considered are warranted by the evidence.

There were introduced in evidence checks bearing accused's admitted signatures, drawn upon the National Bank of Fort Sam Houston, payable to the Fort Gulick Officers' Club bearing the following dates and amounts:

20 August 1949 - \$20.00 (Charge I, Spec 2; Charge II, Spec 2)
 23 August 1949 - \$15.00 (Charge I, Spec 3; Charge II, Spec 3)
 26 August 1949 - \$20.00 (Charge I, Spec 4; Charge II, Spec 4)
 6 September 1949 - \$20.00 (Add. Charge I, Spec 2; Add. Charge II, Spec 2).

Checks of similar identity were deposited by the club officer to the account of the club at the Chase National Bank, Cristobal, at or about the dates shown on the checks, and checks of like identity were presented to the drawee bank and dishonored. It must be concluded that the four checks introduced in evidence were the same ones deposited by the club officer, and subsequently dishonored by the drawee bank. From the circumstance that the checks were received by the payee without indorsement, it may be inferred that the checks were negotiated directly to the payee by the maker, the accused (CM 335738, Carpenter, 2 BR-JC 245,262). That accused received a then present consideration for the

checks under consideration is established by his testimony to the effect that reimbursement was made for all checks "cashed" at the club. The findings of guilty of the specifications here considered are supported by the evidence.

5. Records of the Department of the Army show that accused is 33 years of age, married, and has three stepdaughters. He completed $3\frac{1}{2}$ years of high school, and subsequently attended the Portland School of Drafting. In civilian life he was employed as a draftsman. It further appears that on 29 October 1940 he was convicted before the Circuit Court of Union County, Oregon, of the crime of obtaining money by false pretenses and sentenced to imprisonment for fourteen months in the Oregon State Penitentiary. He was discharged from the Penitentiary on 9 August 1941, and on 17 March 1943, the Governor of Oregon restored to accused all political rights, privileges and immunities, enjoyed by him prior to his conviction. In his application for Entrance to Officer Candidate School, dated 1 April 1947, accused denied that he had ever been arrested, indicted, or convicted of any civil offense other than a misdemeanor. He had enlisted service from 10 December 1942 until he was commissioned as second lieutenant, Corps of Engineers, in the Army of the United States. He was subsequently promoted to first lieutenant. His one over-all efficiency rating of record is "066." His tour of duty in Panama extends from 5 June 1948.

6. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to be dismissed the service is mandatory upon conviction of violations of Article of War 95, and a sentence to dismissal, total forfeitures after promulgation, and confinement at hard labor for five years is authorized upon conviction of an officer of violations of Articles of War 93 and 96.

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

William H. Headhart, J.A.G.C.

John Lynch., J.A.G.C.

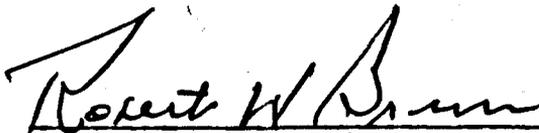
(74)

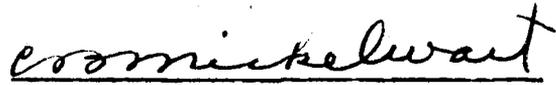
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant
Robert Paul Morton (O-1342390), 37th Engineer
Combat Company, upon the concurrence of The
Judge Advocate General the sentence is confirmed
and will be carried into execution. A United
States penitentiary is designated as the place
of confinement.

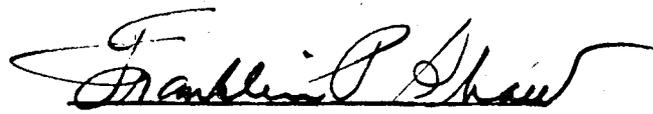

Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

24 May 1950

I concur in the foregoing action.


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

24 May 1950

(GCMO 43, June 2, 1950).

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

(75)

CSJAGK - CM 340589

6 APR 1950

UNITED STATES)

SECOND ARMY

v.)

First Lieutenant HENRY A. BELL)
(O-2033042), Infantry, 2306th)
Area Service Unit, Fort Hayes,)
Columbus, Ohio.)

Trial by G.C.M., convened at Fort
George G. Meade, Maryland, 14 and
15 December 1949. Dismissal, total
forfeitures after promulgation, and
confinement for two and one-half
(2-1/2) years.

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

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

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

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

Specification: In that 1st Lieutenant Henry A. Bell, 2306th Area Service Unit, Fort Hayes, Columbus, Ohio, then attached to 9963rd Technical Service Unit Surgeon General's Office, Army Detachment of Patients Pipeline, Valley Forge General Hospital, Phoenixville, Pennsylvania, did, at Valley Forge General Hospital, Phoenixville, Pennsylvania, without proper leave, absent himself from his station from 3 August 1949 to about 5 August 1949.

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

Specification: In that 1st Lieutenant Henry A. Bell, 2306th Area Service Unit, Fort Hayes, Columbus, Ohio, having been restricted to the limits of Fort Hayes, Columbus, Ohio, did, at Fort Hayes, Columbus, Ohio, on or about 27 August 1949 break said restriction by going to the Deshler-Wallick Hotel, Columbus, Ohio.

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

Specification 1: In that 1st Lieutenant Henry A. Bell, 2306th Area Service Unit, Fort Hayes, Columbus, Ohio, did, at Columbus, Ohio, on or about 20 June 1949, make and utter to Hugo Monaco a certain check in words and figures as follows, to wit:

Youngstown, Ohio

Columbus, Ohio June 28 1949

THE UNION NATIONAL BANK
Name of Bank

Pay to the
order of Mr. Hugo Monaco \$ 250.00

Two Hundred Fifty Dollars and no cents ----- DOLLARS

/s/ Henry A Bell
1st Lt Inf
- 0203342 -

REVERSE SIDE

A.
/s/ Hugo Monaco
3680 E. Broad St.

and by means thereof did obtain from said Hugo Monaco Two Hundred Dollars (\$200.00) in cash and a check in the amount of Fifty Dollars (\$50.00), and did wrongfully fail to maintain sufficient balance in the Union National Bank, Youngstown, Ohio, to meet payment of said check when presented for payment through the normal banking process for checks.

Specification 2: (Finding of guilty disapproved by reviewing authority).

Specification 3: (Withdrawn prior to arraignment).

Specification 4: (Finding of not guilty).

Specification 5: In that 1st Lieutenant Henry A Bell, 2306th Area Service Unit, Fort Hayes, Columbus, Ohio, being indebted to the City National Bank & Trust Co. of Columbus, Ohio, in the sum of Two Hundred Forty Three Dollars and Sixty Cents (\$243.60) for money borrowed, which amount became due and payable on or about 11 July 1949, did, at Fort Hayes, Columbus, Ohio, and Valley Forge General Hospital, Phoenixville,

Pennsylvania, from about 11 July 1949 to about 17 August 1949 dishonorably fail and neglect to pay said debt.

Specification 6: (Withdrawn prior to arraignment).

Specification 7: In that 1st Lieutenant Henry A Bell, 2306th Area Service Unit, Fort Hayes, Columbus, Ohio, then attached to Detachment of Patients, Valley Forge General Hospital, Phoenixville, Pennsylvania, did, at Fort Hamilton, New York, on or about 11 July 1949, with intent to defraud, wrongfully and unlawfully make and utter to the Fort Hamilton Post Exchange, Fort Hamilton, New York, a certain check in words and figures as follows, to wit:

11 July 1949 No. 24

Union National Bank
Youngstown, O.

Pay to the order of Ft. Hamilton Ex - - - - - \$ 35.00

oo/00

Thirty Five Dollars and no - - - - - DOLLARS

Valley Forge
Gen Hosp
39 White Hall

/s/ Henry A Bell
Capt Inf
O-2033042

and by means thereof did fraudulently obtain from the Fort Hamilton Post Exchange, Fort Hamilton, New York, Thirty Five Dollars (\$35.00) in cash, he, the said 1st Lieutenant Henry A Bell, then well knowing that he did not have and not intending that he should have sufficient funds in the Union National Bank, Youngstown, Ohio, for payment of said check.

NOTE: Specifications 8 through 12: These specifications are practically identical with Specification 7 except as to place offense committed, date of offense, date of check, amount of check, payee, and to whom uttered, as follows:

<u>Spec.</u>	<u>Place offense committed</u>	<u>Date of offense</u>	<u>Date of check</u>	<u>Amount of check</u>	<u>Payee</u>	<u>To whom uttered</u>
8	Valley Forge Gen Hos	12 Jul 49	12 Jul 49	\$25.00	Cash	Valley Forge Gen Hos PX
9	"	20 Jul 49	20 Jul 49	\$30.00	"	"
10	"	22 Jul 49	22 Jul 49	\$30.00	"	"
11	Phoenixville, Pa.	22 Jul 49	21 Jul 49	\$25.00	"	Benjamin Woolfberg
12	"	26 Jul 49	23 Jul 49	\$30.00	"	"

Specifications 13, 14 and 15: (Findings of not guilty).

Specification 16: In that 1st Lieutenant Henry A Bell, 2306th Area Service Unit, Fort Hayes, Columbus, Ohio, then attached to Detachment of Patients, Valley Forge General Hospital, Phoenixville, Pennsylvania, with intent to defraud Captain Paul W. Hurley, did, at Valley Forge General Hospital, Phoenixville, Pennsylvania, on or about 27 July 1949, unlawfully pretend to said Captain Paul W. Hurley that he, the said 1st Lieutenant Henry A Bell, was the sole owner of a 1949 Super Buick Convertible, registered in his name at the Ohio Motor Bureau, with license No. A-4204; and that said vehicle was unencumbered and that the said Captain Paul W. Hurley would have a right of seizure if a loan of Three Hundred Dollars (\$300.00) was not repaid, well knowing that said pretenses were false, and by means thereof did fraudulently obtain from the said Captain Paul W. Hurley his signature and credit to a promissory note in the amount of Three Hundred Dollars (\$300.00), made payable to the Phoenixville Trust Company.

Specification 17: (Finding of not guilty).

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

Specification 1: In that 1st Lieutenant Henry A Bell, 2306th Area Service Unit, Fort Hayes, Columbus, Ohio, then attached to Detachment of Patients, Valley Forge General Hospital, Phoenixville, Pennsylvania, did, at Valley Forge General Hospital, Phoenixville, Pennsylvania, on or about 15 July 1949, present for approval and payment a claim against the United States by presenting a voucher to Colonel W C Steiger, Finance Department, an officer of the United States duly authorized to approve and pay such claims, in the amount of Two Hundred Seventeen Dollars and Six cents (\$217.06), for services alleged to have been rendered to the United States by the said 1st Lieutenant Henry A Bell during the month of June 1949, which claim was false and fraudulent in that 1st Lieutenant Henry A Bell had previously rendered a voucher to Lieutenant Colonel Wilfred Knobloch, Finance Department, for services performed during the month of June 1949 and had received payment thereon, and which claim was then known by the said 1st Lieutenant Henry A Bell to be false and fraudulent.

Specifications 2 and 3: (Findings of not guilty).

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

Specification: In that First Lieutenant Henry A Bell, 2306th Area Service Unit, Fort Hayes, Columbus, Ohio, then well

knowing that his motor vehicle, a Plymouth Coupe, Motor No. P 1514402 and bearing Ohio license No. A 7420, was encumbered and subject to a lien in favor of the Interstate Securities Company, Columbus, Ohio, did, at Fort Hayes, Columbus, Ohio on or about 18 April 1949, consummate an unconscionable sale of said motor vehicle to Sergeant Gerald J. Harr, by failing to disclose to said Sergeant Gerald J. Harr the fact that said motor vehicle was so encumbered, by obtaining from said Sergeant Gerald J. Harr during the period from 18 April 1949 to 16 May 1949 the sum of Seven Hundred and Fifty Dollars (\$750.00) in payment of said motor vehicle and by delivering to said Sergeant Gerald J. Harr on 16 May 1949 a writing in words and figures as follows, to wit:

FORT HAYES, COLUMBUS 18, OHIO.

16 May 1949

I Henry A. Bell O2033042 Inf. do certify that I have this date transferred to Gerald J. Haare 20717369 Sgt. one PLYMOUTH CPLE. COUPE MOTOR NO. 1514402 Lic A 7420 Ohio, in consideration of an authorized sum. This vehicle is unencumbered and due to the emergencie title could not be changed at the present time, However title will be executed and forwarded with the least practible delay ... complete coverage insurance is in effect and will be forwarded.

_____/s HB
/s/ Henry A. Bell
/t/ HENRY A. BELL
l/st Lt

WITNESS.

/s/ Sgt Carl E. Cundy
Ft Hayes MP.
16 May 1949

which conduct was unbecoming an officer and a gentleman.

Prior to arraignment, by direction of the appointing authority, Specifications 3 and 6 of Charge III were withdrawn. The accused pleaded guilty to all charges and specifications. He was found not guilty of Specifications 4,13,14,15 and 17 of Charge III and Specifications 2 and 3 of Charge IV, and was found guilty of all other specifications and of all charges. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor at such place as proper authority may direct for

two and one-half years. The reviewing authority disapproved the finding of guilty of Specification 2 of Charge III and approved only so much of the finding of guilty of Specification 1 of Charge III as involves a finding of guilty of the specification in violation of Article of War 96, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

Specification and Charge I

Two duly authenticated/^{extract}copies of morning reports of the 9963d Technical Service Unit, Surgeon General's Office, Army Detachment of Patients Pipeline, Valley Forge General Hospital, Phoenixville, Pennsylvania, dated 11 August 1949 and 17 August 1949, admitted into evidence without objection, list the following pertinent entries:

As to Morning Report 3 August 1949 -

"Bell Henry A (Inf) 02033042 1st Lt
Atchd fr other orgn - Hosp to AWOL 2000" (R 27, Pros Ex 19).

As to Morning Report 5 August 1949 -

"Bell Henry A (Inf) 02033042 1st Lt
Atchd fr other orgn - AWOL to hosp 0300" (R 27-28, Pros Ex 20).

Specification and Charge II

A letter signed by Brigadier General F. G. Brink, USA, Commanding General, Fort Hayes, Columbus, Ohio, addressed to accused, dated 23 August 1949, relieved accused from arrest and placed him under restriction within the limits of the Military Reservation of Fort Hayes, Ohio, effective 23 August 1949. This letter, indorsed by accused under date of 23 August 1949 acknowledging receipt thereof, was admitted in evidence without objection (R 22, Pros Ex 2). It was stipulated that this letter is genuine in all respects; that on 27 August 1949 the restriction invoked therein had not been lifted; and that if Major Emmon R. Shaw were present in court, he would testify that he observed the accused dancing in the Ionian Room at the Deshler-Wallick Hotel, Columbus, Ohio, between the hours of 2100 and 2200 on 27 August 1949 (R 21; Pros Ex 1, par 1).

Specification 1, Charge III

On or about 20 June 1949, Hugo Monaco, Columbus, Ohio, loaned accused \$250.00 by giving him \$200.00 in cash and a check for \$50.00. At the same time, accused gave Monaco a check for \$250.00 dated 28 June 1949, drawn

on the Union National Bank of Columbus, Ohio, payable to Monaco. Monaco knew that the check was postdated, that he was not to deposit it until 28 June 1949 or thereafter, and that accused did not have sufficient funds in his account to cover its payment at the time the loan was made. Accused told Monaco that he would deposit sufficient funds in the bank at the end of the month to cover the payment of the check (R 32-33, 37-39; Pros Ex 22). Monaco deposited the check according to accused's instructions but it was returned unpaid. Monaco again deposited the check and it was again returned unpaid. At the time of trial it was still unpaid. The records of the Union National Bank on which the check was drawn showed that it had been presented to the bank for payment and had been returned unpaid because of insufficient funds in accused's account (R 32, 37-43).

Specification 5, Charge III

A photostatic copy of an installment note, dated 11 May 1949, payable to the order of the City National Bank and Trust Company of Columbus, Ohio, in the sum of \$365.40, payable in three consecutive monthly installments of \$121.80 each, beginning 10 June 1949, was admitted in evidence without objection (R 22, Pros Ex 4). It was stipulated that the above described note is genuine in all respects, that if the cashier of said bank were present in court he would testify that accused had borrowed \$365.40 from the City National Bank and Trust Company on the above described note, that one payment of \$121.80 had been made thereon leaving a balance of \$243.60, that the balance was not paid when due, and that Major Frederic C. Bett, shown as having signed the note with accused, signed the instrument "by way of guarantor" (R 21, Pros Ex 1, par 2c). Major Bett testified that he signed the note jointly with accused but had received no part of the money borrowed on the note (R 54-55).

Specifications 7 through 12, Charge III

Photostatic copies of six checks, reproduced in Specifications 7 through 12, Charge III, were admitted in evidence without objection (R 23-25; Pros Exs 5, 6, 7, 8, 9). It was stipulated that these exhibits were true photostatic copies of checks that were in fact filled out and signed by the accused, and that the accused presented the originals of the checks to the persons or organizations shown thereon and received in exchange cash or its equivalent, as hereinafter set forth:

<u>Spec.</u>	<u>Date of check</u>	<u>Date Cashed</u>	<u>Amount</u>	<u>Received from</u>
7	11 July 49	11 July 49	\$ 35.00 cash	Fort Hamilton PX
8	12 July 49	12 July 49	\$ 25.00 cash	Valley Forge Gen Hos PX
9	20 July 49	20 July 49	\$ 30.00 cash	" " " " "
10	22 July 49	22 July 49	\$ 30.00 cash	" " " " "
11	21 July 49	22 July 49	\$ 25.00; \$7.05 cash; \$12.95 mdse, \$5 services	Benjamin Woolfberg
12	23 July 49	26 July 49	\$ 30.00 cash	" "

(R 21, Pros Ex 1, pars 2d, e, f, g, h, i).

The records of the Union National Bank of Youngstown, Ohio, drawee of the above described checks, revealed that these checks were presented to the bank for payment and returned unpaid because of insufficient funds in accused's bank account (R 33-33a). Further, a bank statement showing the status of accused's account in said bank reveals that on 11 July 1949 accused's balance was \$38.54, that on 12 July 1949 it was reduced to \$3.63, that on 14 July 1949 it was further reduced to \$1.63, and that from 14 July 1949 to 6 August 1949 it remained \$1.63 (R 30-31, Pros Ex 21). Accused never requested or received a monthly bank statement (R 36, 106-107).

Specification 16, Charge III

On or about 27 July 1949, at the Valley Forge General Hospital, Phoenixville, Pennsylvania, accused asked Captain Paul W. Hurley for a loan of \$300.00, stating that he was in financial difficulties (R 72-73, 77). Captain Hurley did not have the money and accused told him that he owned an unencumbered 1949 Buick automobile which he could keep until the debt was paid (R 73-75). In order to obtain the money for accused, Captain Hurley jointly signed with accused a promissory note for \$300.00, dated 27 July 1949, payable 30 days after date to the order of the Phoenixville Trust Company, Phoenixville, Pennsylvania. On 28 July 1949, Captain Hurley, using the note as collateral, obtained \$300.00 from the Phoenixville Trust Company and gave it to accused, at which time accused again asserted that he was the owner of a 1949 Buick automobile; that it was unencumbered; that it was in a Buick garage in Phoenixville; that he would repay the loan to Captain Hurley on 3 August 1949 (R 73, 76, 78-81; Pros Ex 25). The accused then gave Captain Hurley the following document:

"28 July 49

"To Whom it may Concern,

I 1st Lt Henry A Bell do certify that I am sole owner of a 1949 Super Buick Convertible registered in my name at the Ohio Motor Bureau with license number A-4204 - I further certify that this vehicle is free and un-encumbered and in consideration of \$300.00, (Three Hundred dollars) do give 1st Mortgage to Capt. Paul W. Hurley, said \$300.00 to be repaid by 3 of August 1949 - and in case of non payment do give right of seizure to said Capt Hurley to fullfill said amount.

s/ Henry A Bell
1st Lt Inf

Henry A Bell
s/ P W Hurley

Paul W Hurley

s/ Oliver P Watson
1st Lt Inf

Witness"

(R 75-76, Pros Ex 27).

On 3 August 1949, when accused did not pay him as promised, Captain Hurley requested the automobile. Accused told him to pick it up at the Buick garage in Phoenixville and gave him the following note:

"3 Aug 49

"Dear Sir -

Please let the bearer of this note Capt Hurley have my Buick Convertible A-4204 - Ohio 49 'Super' Light Blue - and send repair bill care of Lt H. A. Bell, Wd 16^{cd} Valley Forge General Hosp -

s/ Henry A Bell
1st Lt Inf" (R 74-75, Pros Ex 26).

Captain Hurley went to the only Buick garage in Phoenixville and was informed that no such automobile was there or had ever been there (R 75, 79). Captain Hurley immediately telephoned accused who stated he would meet Captain Hurley at the 210 Club in Phoenixville in 30 minutes. Captain Hurley waited for three hours but accused did not appear (R 79).

The next time Captain Hurley saw accused was on 6 August 1949 when accused stated that he had sent him \$275.00 by telegraph and would personally deliver the automobile to him. Captain Hurley never received the automobile or the money at any time thereafter (R 76-77, 79).

It was stipulated that neither on 27 July 1949, or at any other time, was a Super Buick convertible automobile, license number A-4204, registered in the name of accused at the Ohio Motor Bureau, and that in fact accused never owned such an automobile (R 21, Pros Ex 1, par 2m).

Specification 1, Charge IV

A photostatic copy of Pay and Allowance Account Voucher Number 10549, signed by accused certifying to its correctness and as having received payment therefor, admitted in evidence without objection, showed that accused, on duty at Valley Forge General Hospital, Phoenixville, Pennsylvania, received \$217.06 from the account of W. C. Steiger, Colonel, Finance Department, on 15 July 1949, for base pay, longevity, and subsistence allowance accrued from 1 June 1949 to 30 June 1949 (R 26, Pros Ex 12). Item 31 of said voucher states:

"I certify that the foregoing statement and account are true and correct; that payment therefor has not been received; and that payment to me as stated on the within

voucher is not prohibited by any provisions of law limiting the availability of appropriation(s) involved. (Applicable certificates on reverse made a part hereof.)"

Attached to the voucher as part of this exhibit is the following statement:

"I have not previously signed a pay voucher covering the period stated on this voucher or any other portion thereof. If such voucher was presented to another disbursing officer, It was withdrawn personally by me and has been destroyed, or I received or requested a partial payment in the amount of
\$ None

HENRY A BELL
1st Lt Inf"

Another photostatic copy of Pay and Allowance Account Voucher Number 146438, signed by accused certifying to its correctness and as having received payment therefor, admitted in evidence without objection, showed that accused, on duty at 2306th ASU, Fort Hayes, Ohio, received \$216.86 from the account of Lieutenant Colonel W. Knobloch, Finance Department, on 30 June 1949, for base pay, longevity and subsistence allowance accrued for the same period from 1 June 1949 to 30 June 1949 (R 26, Pros Ex 13). The difference between the \$217.06 in the first voucher and \$216.86 in the second voucher is due to a 20 cent difference in the Class "N" National Service Life Insurance allotment deduction as listed on each voucher.

At the bottom of both vouchers, described above, are statements signed by E. H. Stephenson, Chief, Reconciliation and Clearance Sub-division, General Accounting Office, Army Audit Branch, St. Louis, Missouri, that said vouchers are true photostatic copies of the original vouchers on file in his office.

It was stipulated as follows:

"It is stipulated that the photostat copies of Pay and Allowance Vouchers 10549 and 146438 ***, together with all appended inclosures as they appear under the verification of E. H. Stephenson are in fact true photostat copies of vouchers which were paid at the time, places and in the manner indicated thereon, that all signatures appearing in the vouchers or appended papers purporting to be signatures of the accused, Lt Bell, are in fact the signatures of the accused, 1st Lt. Henry A. Bell, as they appear on the original voucher upon which payment was made as indicated, and finally that all indications of

record on the vouchers and attendant papers indicating places, amounts, method of payment, place of payment, are in fact the circumstances under which payment was actually claimed and made" (R 21, Pros Ex 1, par 3a).

Specification and Additional Charge

On or about 18 April 1949, at Fort Hayes, Ohio, where accused and Sergeant Gerald J. Harr were stationed, accused sold Sergeant Harr a 1946 Plymouth coupe for \$900.00 after stating that he was the owner of the automobile, that it was fully paid for, and that he would furnish Sergeant Harr with the title to the automobile in two or three days. Sergeant Harr then gave accused \$600.00 as first payment and took possession of the automobile, and made two additional payments of \$100.00 and \$50.00 several days later (R 82-87, Pros Exs 29,30,31).

On 16 May 1949, not having received title to the car and because he was being transferred from Fort Hayes, Ohio, to Fort George G. Meade, Maryland, Sergeant Harr requested and received from accused the following statement, which was admitted into evidence without objection:

"FORT HAYES, COLUMBUS 18 OHIO.

18 May 1949

"I Henry A. Bell O2033042 Inf. do certify that I have this date transferred to Gerald J. HAARE 20717369 Sgt. one PLYMOUTH CPLE. COUPE MOTOR NO. 1514402 Lic. A 7420 Ohio. in consideration of an authorized sum, This vehicle is unencumbered and due to the emergencie title could not be changed at the present time, However title will be executed and forwarded with the least practible delay ... complete coverage insurance is in effect and will be forwarded.

s/ HB

WITNESS:

s/ Henry A Bell
t/ HENRY A. BELL
1/st Lt.

s/ Sgt Carl E Cundy
Ft Hayes MP
16 May 1949" (R 83,86, Pros Ex 28).

After Sergeant Harr was transferred to Fort Meade, the automobile he had purchased from accused was repossessed by the Interstate Security Company of Columbus, Ohio, which held a first lien on the vehicle, and which gave Sergeant Harr his first information that the vehicle was not fully paid for (R 84,87). No part of the \$750 Sergeant Harr paid to

accused was ever returned to him (R 91).

A photostatic copy of a Certificate of Title No. 250998529, issued by the State of Ohio on 18 April 1949 to Henry A. Bell for a 1946 Plymouth Special Club Coupe, Motor Number P 1514402, serial number 11503620, admitted in evidence without objection, showed that accused purchased said automobile from Sutton Sparks Car Company, Columbus, Ohio, for \$1275.00 on 18 April 1949, and listed a chattel mortgage as first lien therefor on the same day for \$1221.36 from Interstate Securities Company, Columbus, Ohio. (R 27, Pros Ex 18). It was stipulated that the above described photostatic copy of Certificate of Title is a true photostatic copy of the original Certificate of Title issued by the State of Ohio to accused for the automobile indicated, and further that the first lien indicated thereon was in fact an outstanding and unsatisfied lien on April 19, 1949 (R 21, Pros Ex 1, par 4b).

A photostatic copy of an Assignment of Certificate of Title showing assignment of title of a motor vehicle from Sutton Sparks Car Company, Columbus, Ohio, to Henry A. Bell, 2306 ASU, Fort Hayes, Columbus, Ohio, by purchase for \$1275.00, and listing a first lien thereunder to Interstate Securities Company, Columbus, Ohio, for \$1221.36, was admitted in evidence without objection (R 98, Pros Ex 32). It was orally stipulated that the above described photostatic copy of Assignment of Certificate of Title is a true photostatic copy of the original on file with the Ohio Motor Bureau, that the accused's signature thereon is genuine and that the vehicle described therein is the same vehicle listed in Prosecution Exhibit 18 referred to in the next paragraph above (R 98).

4. Evidence for the Defense

After being advised of his rights as a witness, accused elected to be sworn and testified in his own behalf (R 98-99).

The accused recited his military history from the time he entered the Army as a private on 5 June 1940 at the age of 18 until his latest assignment at Fort Hayes, Columbus, Ohio, where he was transferred on 27 February 1949. He received periodic promotions, being promoted to corporal, sergeant, staff sergeant, technical sergeant and master sergeant, and obtaining a permanent warrant as technical sergeant on 21 May 1946. On 22 November 1946 he successfully completed Company Grade Officers School and was commissioned second lieutenant, AUS. About 19 or 20 months later he was promoted to first lieutenant. During the war he was wounded three times in the "jump on the Rhine" and was awarded the Purple Heart, the Distinguished Service Cross and the Silver Star during 1944 and 1945. In addition, he is entitled to wear the Army of Occupation Medal, World War II Victory Medal, Combat Infantryman's Badge, Good Conduct Medal and the European-African-Middle Eastern Service Medal with two bronze stars and one arrowhead (R 100-106, Def Exs E, G, H, I, J and K).

He stated that he understood the effect of his plea of guilty to all charges and specifications and had so pleaded in order to save embarrassment, to save the Government "any more cost of money than I already have," and to cooperate to the fullest extent (R 102-103,110). He stated he did not desire to change his plea of guilty and that the purpose of his testimony was by way of explanation and mitigation only (R 110,120).

As to the Specification of Charge I, wherein he was charged with being absent without leave from the Valley Forge General Hospital from 3 to 5 August 1949, he stated that he requested permission from the Executive Officer to leave the hospital to take care of certain financial matters. He signed out of the ward, and, discovering he had been marked absent without leave, he telephoned the Executive Officer who informed him he was "AWOL" (R 110-111). He stated that it was permissible to leave the ward or the post by signing out on the ward register and he had seen the ward nurse prior to leaving the ward (R 120-121).

As to the Specification of Charge II, wherein accused was charged with breach of restriction on 27 August 1949, he stated that he did not want to change his pleas of guilty as to this specification and charge, nor repudiate the stipulation to which he had previously agreed that he was under legal restriction on 27 August 1949 and that he was seen on that date dancing at the Deshler-Wallick Hotel. He was at the hotel at the time, but could not have been dancing as he had a "semi-cast" on his leg which made dancing impossible (R 111,121).

As to Specification 1 of Charge III, wherein accused was charged with wrongful failure to maintain a sufficient balance in his bank account to cover payment of a check payable to Hugo Monaco in the sum of \$250.00, he stated that he gave Monaco the check on 20 June 1949 postdated to 28 June 1949, but could not explain why he did not have sufficient funds in the bank on the latter date to pay it (R 122).

As to Specification 5 of Charge III, wherein accused was charged with dishonorable failure and neglect to pay a debt of \$243.60 to the City National Bank and Trust Company of Columbus, Ohio, accused admitted his indebtedness and his failure to pay it, but stated that he had made one payment and was unable to pay the balance of \$243.60 because his pay had been stopped on "the first of June" (R 113,124).

As to Specifications 7,8,9,10,11 and 12 of Charge III, wherein accused was charged with wrongfully and unlawfully making and uttering six checks and fraudulently obtaining cash, merchandise and services therefor, knowing that he did not have and not intending to have sufficient funds in his bank account to cover payment of the checks, he stated that when he wrote the checks he had no reason to believe that he had insufficient funds in his bank account; that when the checks were returned by the bank unpaid, he had no opportunity to redeem them as they were received by the

Commanding Officer of the Valley Forge General Hospital where the accused was a patient, and was informed that the matter was being referred to his home station at Fort Hayes, Ohio (R 113-114). On cross-examination accused admitted issuing the checks and receiving value therefor as alleged, but stated that he believed there were sufficient funds in his account to cover their payment (R 124-127).

As to Specification 16 of Charge III, wherein accused was charged with fraudulently obtaining from Captain Paul W. Hurley his signature and credit to a promissory note for \$300.00 payable to the Phoenixville Trust Company, Phoenixville, Pennsylvania, by pretending to Captain Hurley that he was the sole owner of an unencumbered 1949 Buick automobile to which Captain Hurley would have the right of seizure if a loan of \$300.00 was not repaid, accused stated that he had made a "written effort" to pay the loan but that he could not because he had no money (R 115).

As to Specification 1 of Charge IV, wherein accused was charged with presenting for approval and payment a pay voucher for services for the month of June 1949 in the amount of \$217.06 which was known by accused to be false and fraudulent as he had previously rendered a voucher for the same services, accused stated that "Finance" had prepared both vouchers and he was confused because he had received only \$25.00 the month before (R 116).

As to the Specification of the Additional Charge, wherein accused was charged with consummation of an unconscionable sale to Sergeant Gerald J. Harr of a Plymouth coupe automobile by failing to disclose to Sergeant Harr that the automobile was encumbered and subject to a lien in favor of the Interstate Securities Company of Columbus, Ohio, accused stated that he had informed Sergeant Harr that the car was not fully paid for, but that the accused was unable to continue making payments on the automobile because it was "a physical impossibility." The reason accused gave Sergeant Harr a statement (Pros Ex 28) that the car was unencumbered was because Sergeant Harr had requested the statement in order "to get the automobile on the post" at Fort Meade where he was transferred (R 118-120, 133-135).

Relative to the financial difficulties of accused, accused stated, "Sir, I was continually paying debts, I was getting into debt to pay debts." In answer to questions by defense counsel, accused testified further on this point as follows:

"Q. I notice, Lt. Bell, that you are wearing 11 ribbons, 4 rows of ribbons and 2 rows of medals, including the Purple Heart, Silver Star and the DSC. Are you authorized to wear all those?

"A. Yes, sir.

"Q. You seem to have much better success in accumulating ribbons than a bank account.

"A. Yes, sir.

"Q. You are more successful as a soldier and combat officer than you were in keeping your finances straight.

"A. Yes, sir. I was never a combat officer, sir" (R 137-138).

5. Discussion

Specification and Charge I

In this specification, accused was charged with absenting himself without proper leave from his station from 3 to 5 August 1949. Two duly authenticated extract copies of morning reports, admitted into evidence without objection, constituted prima facie evidence of accused's guilt of absence without leave for the period alleged (146a, MCM 1949; CM 296066, O'Dell, 58 BR 61,64). In view of accused's plea of guilty as to this offense, his contention that he left the Valley Forge General Hospital, where he was assigned as a patient, to take care of certain financial matters without obtaining an authorized leave of absence, but after he had spoken to the hospital executive officer and ward nurse and had "signed out" on the ward register, was at best an explanation showing good intentions. The offense of absence without leave was proved by accused's plea of guilty, his admissions on the witness stand, and the extract copies of the morning reports of his organization and is legally sufficient to support the finding of guilty as to this specification and charge (CM 322548, Oliver, 71 BR 265, 267).

Specification and Charge II

In this specification, it was charged that, having been restricted to the limits of Fort Hayes, Columbus, Ohio, accused broke restriction by going to the Deshler-Wallick Hotel, Columbus, Ohio. The evidence shows that accused was restricted to Fort Hayes by competent authority, and that while under such restriction, he wrongfully left Fort Hayes and was seen dancing at the Deshler-Wallick Hotel. Accused admitted going to the hotel but stated that he was not dancing there. However, the gravamen of the offense is breaking restriction and accused's actions at the hotel are immaterial. The evidence and accused's plea of guilty are legally sufficient to support the findings of guilty as to the specification of Charge II and Charge II.

Specification 1, Charge III

In this specification it was charged that, on 20 June 1949, accused made and uttered to Hugo Monaco a check in the sum of \$250.00, dated 28

June 1949, that he obtained value therefor, and that he did wrongfully fail to maintain sufficient balance in his bank account to pay the check when presented for payment under Article of War 95. The accused was found guilty of the specification as charged and the reviewing authority approved so much of the finding of guilty as involved a finding of guilty in violation of Article of War 96, properly concluding that the offense indicated conduct of a nature to bring discredit upon the military service rather than conduct unbecoming an officer and a gentleman (MCM 1949, par 183b; Dig. Op. JAG 1912-40, sec 453 (22)).

The essential elements of the offense are (a) making and uttering a check, and (b) wrongfully failing to maintain sufficient balance in the drawee bank to meet payment on said check. These elements are established by the evidence. Accused had actual knowledge that he did not have sufficient funds in the drawee bank to pay the check on 20 June 1949. He postdated the check to 28 June 1949 when he apparently thought he would have sufficient funds in the bank for that purpose. The gravamen of the offense was the wrongful failure by accused to maintain a sufficient balance in the drawee bank to meet payment of said check when presented for payment on or after the date shown on its face (CM 270641, Smith, 45 BR 329,342). Under such circumstances, the burden was upon the accused to show that his act was not caused by his carelessness or neglect (CM 317140, Rust, 66 BR 219,224; CM 284447, Turner, 55 BR 351, 357). This he failed to do. The accused pleaded guilty to the specification, admitted the facts hereinbefore described, and offered no explanation therefor, justifying the approved finding of guilty as to this specification.

Specification 5, Charge III

In this specification accused was charged with dishonorable failure and neglect to pay a debt of \$243.60 to the City National Bank and Trust Company of Columbus, Ohio. The evidence showed that, on or about 11 May 1949, accused borrowed \$365.40, payable in three equal monthly installments of \$121.80 beginning 10 June 1949, that the first installment of \$121.80 was paid, but that no part of the balance of \$243.60 was paid when due or thereafter. Accused admitted the debt but stated that he was unable to meet the payments because his June 1949 pay had been stopped. The record of trial disclosed that accused was paid not once but twice for the month of June 1949 (see Specification 1, Charge IV). Accused's plea of guilty, the evidence, and accused's testimony on the stand, are proof of accused's dishonorable failure and neglect to pay the debt owed the bank as alleged, and is legally sufficient to support the findings of guilty as to this specification (CM 284023, Birdwell, 55 BR 229, 237).

Specifications 7 through 12, Charge III

In these specifications it was charged that accused, with intent to

defraud, did wrongfully and unlawfully make and utter six checks (one for each specification) and fraudulently obtain therefor cash, merchandise and services, knowing that he did not have and not intending to have sufficient funds in his bank account to cover their payment. The evidence established that accused made and passed six checks set forth in these specifications within a two-week period when his bank account was less than sufficient to meet their payment, that accused received full value therefor, and that accused never asked for or received bank statements for his account and apparently kept no records of his account, which showed that accused managed his financial affairs in a careless and irresponsible manner.

As to accused's intent to defraud, it was stated in CM 315578, Bell, 65 BR 47, at page 52, quoting CM 219428, Williams:

"*** 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.***."

With this statement, the Board of Review concurs.

Accused's contention that he had no opportunity to redeem the checks is no defense even if true. Had he reimbursed the losses incurred, the fraud initially attaching to the transactions would not have been removed (CM 322546, Barton, 71 BR 257). The uncontradicted evidence and accused's plea of guilty clearly establish the commission of this offense and is legally sufficient to support the finding of guilty of this specification. The making and uttering of checks with intent to defraud constitutes a military offense and conduct unbecoming an officer and a gentleman (CM 322546, Barton, supra).

Specification 16, Charge III

In this specification it was charged that accused unlawfully pretended to Captain Paul W. Hurley that he was the sole owner of a 1949 Buick automobile, license number A-4204, registered in his name at the Ohio Motor Bureau, that the vehicle was unencumbered, and that Captain Hurley would have a right of seizure if a loan of \$300.00 was not paid, well knowing such pretenses were false, and by means thereof fraudulently obtained from Captain Hurley his signature and credit to a promissory note for \$300.00, payable to the Phoenixville Trust Company. The evidence established that accused, in order to obtain Captain Hurley's assistance in

procuring a loan of \$300.00, represented to Captain Hurley that he (accused) was sole owner of an unencumbered 1949 Buick automobile, license number A-4206, registered at the Ohio Motor Bureau, and that, if the loan was not paid, Captain Hurley would have the "right of seizure" to the vehicle. Actually no such vehicle existed and accused's narration thereon was untrue. Relying on accused's promises, Captain Hurley signed, jointly with accused, a promissory note in the sum of \$300.00, payable to the Phoenixville Trust Company. Using the note as collateral, Captain Hurley obtained the money from the bank and gave it to accused. When accused failed to repay the loan as agreed, Captain Hurley tried to obtain the vehicle and learned that the vehicle was nonexistent. Accused stated that he was unable to repay the loan because he had no money.

The following elements of proof were required to establish the commission of the offense as charged: (a) that accused intended to defraud Captain Hurley; (b) that accused actually defrauded Captain Hurley by false pretense; and (c) that the fraud resulted from the use of said false pretense (CM 322337, Jones, 71 BR 129,152). Independent of accused's plea of guilty, the evidence hereinabove described fully established each of these elements and is legally sufficient to support the finding of guilty as to this specification. The deceit, dishonesty, and unfair dealing of accused showed him to be totally lacking in those moral attributes required of an officer and a gentleman and is violative of the 95th Article of War (MCM 1949, par 182).

Specification 1, Charge IV

In this specification it was charged that accused presented for approval and payment to an officer authorized to approve and pay such claims a pay voucher in the sum of \$217.06 for pay and allowances for the month of June 1949 which claim was, and was known by accused to be, false and fraudulent, as accused had previously rendered and received payment for a pay voucher for pay and allowances for the same month of June 1949. The evidence established that accused had presented for approval and received payment on two pay vouchers under date of 30 June 1949 and 15 July 1949, respectively, for pay and allowances for the same month of June 1949. Accused's comment by way of explanation for his action was that he had received \$25.00 as pay the month before and was confused.

The following elements of proof are required to establish the offense as alleged: (a) That the accused presented or caused to be presented for approval or payment to a certain person in the civil or military service of the United States having authority to approve or pay it a certain claim against the United States as alleged; (b) that such claim was false and fraudulent in the particulars alleged; (c) that when the accused presented the claim or caused it to be presented he knew it was false or fraudulent in such particulars; and (d) the amount involved, as alleged

(MCM 1949, par 181c). That elements (a), (b) and (d) were proved is self-evident. The only question is whether, at the time accused presented the pay voucher for payment on 15 July 1949 he knew or had reason to know that it was in fact false. The evidence shows that only 15 days elapsed between the dates accused received the duplicate payments. The voucher in question shows statements thereon that the voucher was true and correct and that the payee had not previously signed a pay voucher for the period stated in subject voucher, both of which were false. There can be no reasonable doubt that accused knew that the voucher in question was false and fraudulent.

Further, the accused pleaded guilty and did not offer any evidence inconsistent with his plea. The evidence and accused's plea of guilty are legally sufficient to support the findings of guilty as to this specification and charge under Article of War 94.

Specification, Additional Charge

In this specification accused was charged with consummating an unconscionable sale to Sergeant Gerald J. Harr of a Plymouth automobile by failing to disclose to Sergeant Harr that the automobile was encumbered by a lien in favor of the Interstate Securities Company for Columbus, Ohio. The evidence established that on 18 April 1949 accused sold Sergeant Harr a Plymouth automobile for \$900.00, after representing that the vehicle was unencumbered. Actually, the accused had completed the purchase of the vehicle on the same day (18 April 1949) for \$1275.00 from the Sutton Sparks Car Company of Columbus, Ohio, financing the transaction with a loan of \$1221.36 from the Interstate Securities Company of Columbus, Ohio, which loan became a first lien of record against the vehicle. Later, accused gave Sergeant Harr a written statement, admitted in evidence without defense objection, that the vehicle was unencumbered. Although accused testified that when he sold the vehicle to Sergeant Harr he told him of the encumbrance, in view of the testimony and documents presented by the prosecution, the evidence is compelling and the court was clearly justified in finding that accused was guilty of the offense as alleged. The action of accused, a commissioned officer, in promoting such a sale to Sergeant Harr, a noncommissioned officer, was, under the circumstances, unconscionable and the antithesis of the conduct required of an officer and gentleman, and is thus cognizable as an offense under Article of War 95 (CM 277458, Patnode, 51 BR 131,136).

4. Accused pleaded guilty to all charges and specifications after being advised of the meaning and effect of such a plea. As a witness in his own behalf he stated that he realized the effect of his plea of guilty and had done so in order to save embarrassment, to save the Government "any more cost of money than I already have," and to cooperate with the prosecution to the fullest extent (R 102-103). On two other occasions he stated he did not want to change his plea of guilty and

that his testimony relative to the offenses of which he was charged was only by way of explanation and mitigation (R 110,120). Although on occasion, accused testified in a manner apparently inconsistent with his pleas, the prosecution presented compelling evidence to establish the commission of each offense of which accused was found guilty. A plea of guilty admits the facts set forth in the specification to which the plea is applicable. The approved practice when the accused enters a plea of guilty but offers evidence inconsistent with such plea is for the court to direct that his plea be changed, and a plea of not guilty entered for him (Dig. Op. JAG 1912-40, sec 378(3)). Although this practice was not followed in the instant case, in view of the insistence of accused that his pleas of guilty remain unchanged and because of the compelling evidence justifying conviction, there was no error which affected the substantial rights of the accused.

5. The Board of Review has given due consideration to a letter of Congressman Michael J. Kirwan dated 9 January 1950, a letter of accused attached to the letter of Congressman Kirwan dated 4 January 1950, and a letter of Major William A. Hunt, JAGC, Trial Judge Advocate, dated 29 December 1949.

6. Department of the Army records show that accused is 28 years of age and has no living close relatives. He was married in 1943 and divorced in 1946. No children were born of this marriage and he is not responsible to his former wife for alimony payments. He completed two and one-half years at Ohio University in 1940. Accused was an enlisted man from June 1940 to November 1946, at which time he was commissioned a second lieutenant in the Corps of Military Police. He was promoted to first lieutenant (AUS) in August 1948. He is credited with 54 months overseas service and is entitled to wear the following decorations: Silver Star, Bronze Star with oak leaf cluster, Purple Heart, Good Conduct Medal, European-African-Middle-Eastern Campaign Medal with two battle stars and one arrowhead, World War II Victory Medal, Army of Occupation Medal, Croix de Guerre avec Palm, Combat Infantry Badge and the Presidential Unit Citation with two oak leaf clusters. His efficiency ratings include three of "Superior" and one of "Excellent," and his latest efficiency ratings from 12 July 1948 to 9 May 1949 are 074, 083 and 064.

7. The court was legally constituted and had jurisdiction over the accused and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of violations of Articles of War 94 and 96.

Charles E. McElroy, J.A.G.C.
Samuel P. Loepp, J.A.G.C.
Joseph T. Brack, J.A.G.C.

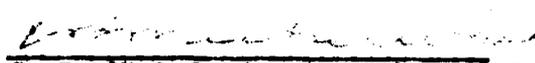
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

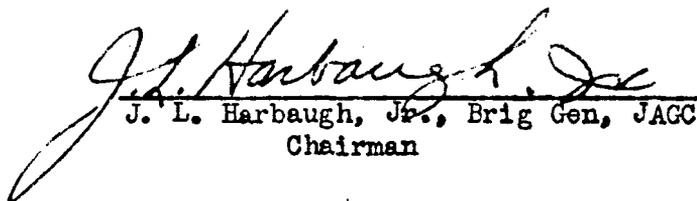
THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant Henry A. Bell,
Corps of Military Police
O-2033042, (Infantry), 2306th Area Service Unit, Fort Hayes,
Columbus, Ohio, upon the concurrence of The Judge Advocate
General the sentence is confirmed and will be carried into
execution. A United States Penitentiary is designated as
the place of confinement.

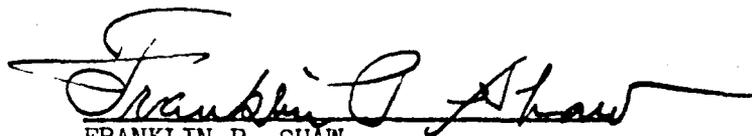

Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

23 MAY 1950

I concur in the foregoing action.


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

23 May 1950



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

CSJAGI CM 340598

MAR 28 1950

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

FORT BRAGG, NORTH CAROLINA

v.)

Trial by G. C. M., convened at

Sergeant HENRY SULECKI
(RA 12251252), Headquarters
and Headquarters Detachment
Number One, 3420 Area Service
Unit, Fort Bragg, North Carolina.

Fort Bragg, North Carolina,
10 February 1950. Dishonorable
discharge (suspended), total
forfeitures after promulgation,
and confinement for two years.
Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
JOSEPH, McDONNELL and TAYLOR
Officers of The Judge Advocate General's Corps

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Sergeant (then Staff Sergeant) Henry Sulecki, Headquarters Headquarters Detachment One, 3420 Area Service Unit, Fort Bragg, North Carolina, did, at Fort Bragg, North Carolina, on or about 13 January 1948, desert the service of the United States, and did remain absent in desertion until he was apprehended at Houston, Texas, on or about 16 January 1950.

Accused pleaded not guilty to the specification and the charge. He was found guilty of the specification and the charge 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 proper authority may direct, for two years. 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, New Cumberland, Pennsylvania, or elsewhere as the Secretary of the Army may direct, but not in a penitentiary, as the place of confinement. The proceedings were published in General Court-Martial Orders Number 4, Headquarters, Fort Bragg, North Carolina, dated 1 March 1950.

CSJAGI CM 340598

The morning reports from which the entries pertaining to accused were extracted were official records and admissible in evidence as an exception to the hearsay rule provided the requirements of paragraph 130b, Manual for Courts-Martial, U. S. Army, 1949, are met. It is provided therein:

"An official statement in writing (whether in a regular series of records or a report) concerning a certain fact or event is admissible in evidence when the officer or other person making the writing had 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."

An extract copy of a morning report is likewise admissible (par. 129b, MCM, 1949). The commanding officer of an organization for which morning reports are required has the duty imposed upon him by regulation to prepare the morning report of that organization (par. 7j, Special Regulations No. 345-400-1, 12 October 1949). This regulation, which was in effect at the time the morning report entries here in question were made, contains specific instructions for the preparation of the morning report, including the Remarks Section, wherein is permanently recorded the changes in the status of the individual. Paragraph 43, Special Regulations 345-400-1, 12 October 1949, contains the following requirement for entries to be made for confinement or arrest:

"43. Entries to be made for confinement or arrest.

- a. * * * *
- b. * * * *

c. Data required in entry.—Basic data; prior duty status; statement that individual is in arrest or confinement; statement of nature of alleged offense and place of confinement; whether the individual is being held for trial, has been tried, or has been dismissed without trial, or when tried whether acquitted or convicted; and statement indicating return to duty when applicable.

d. Supplemental instructions.—When an individual in an AWOL status is reported to be in confinement in the hands of civil authorities, such fact will be reported on the morning report. The individual will, however, continue to be reported as AWOL in column 12 of the strength section of the morning report until physically returned to military control or until other disposition is accomplished.

(100)

CSJAGI CM 340598

(ENTER BASIC DATA)

AWOL since 16 May 48 Conf hands civil
auth Houston Tex 22 May 48 awaiting
trial chg drunk and disorderly

FIGURE 46.—Example remark for individual
confined in hands of civil
authorities." (Underscoring supplied)

A thorough study of the entries required to be made in a morning report upon receipt of information that an individual is confined by civil authorities fails to disclose any duty imposed on an officer preparing a morning report to record information that such individual has been apprehended by civil authorities. There is merely a duty imposed to record information that an individual has been confined by civil authorities. No other Army or Special Regulation in effect at the time the entries pertinent hereto were made imposed a duty on the officer preparing a morning report to record information that an individual was apprehended by civil authorities. Consequently, there was no duty imposed on the officer preparing the morning report at Fort Crockett, Texas, on 17 January 1950, to record the fact of apprehension of accused by the civil authorities at Houston, Texas, on 16 January 1950, and such entry cannot be used to establish apprehension by civil authorities.

A review has been made of the Army Regulations preceding Special Regulations 345-400-1, which became effective on 12 October 1949, in order to ascertain whether such prior regulations imposed any duty on the officer preparing a morning report to record information with respect to the apprehension of military personnel by civil authorities. Prior to 12 October 1949 instructions with respect to remarks in morning reports dealing with confinement of individuals by civil authorities were contained in Army Regulations 345-400. Such regulations were issued as early as November 1921, and have been re-published in April 1924, September 1926, August 1938, May 1943, May 1944, and January 1945. In none of these prior Army Regulations was there any requirement that the apprehension of a military individual by civil authorities be recorded in a morning report remark. Accordingly, it appears that there has been no requirement which has become a custom that a remark of this type be made in a morning report.

We are not unmindful that morning reports are documents which may come within the further exception to the hearsay rule whereby they may be admissible in evidence as business entries (par. 130c, MCM, U. S. Army, 1949). However, in the cases in which proof of absence without leave and desertion has been established through morning report entries introduced under the business entry rule, the record of trial contains further evidence showing such entries to have been the product of a regular course of business followed by the reporting organization (CM 312023, Schirmer, 61 BR 333). No such evidence was introduced in the record under consideration.

CSJAGI CM 340598

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NAVY DEPARTMENT

Since there was no basis in law for the receipt of such reported information in evidence, either as an official writing or otherwise, the failure of defense counsel to object does not constitute a waiver to the introduction of the incompetent remark with respect to apprehension of the accused. There being no other proof of apprehension, it must be held that the desertion was terminated in a manner unknown, the maximum punishment for which cannot exceed that fixed for desertion under similar circumstances terminated by surrender.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the finding of guilty of the Specification of the Charge as involves a finding of guilty of desertion, at the time, place and for the period alleged, terminated in a manner unknown, and 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.

Robert Joseph, J. A. G. C.
SICK IN HOSPITAL, J. A. G. C.
John F. Taylor, J. A. G. C.

16859

(102)

JAGI CM 340598

1st Ind

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

APR 27 1950

TO: Commanding General, Fort Bragg, North Carolina

1. In the case of Sergeant Henry Sulecki (RA 12251252), Headquarters and Headquarters Detachment Number One, 3420 Area Service Unit, Fort Bragg, North Carolina, 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 finding of guilty of the Specification of the Charge as involves a finding of guilty of desertion at the time and place, and for the period alleged, terminated in a manner unknown, and 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 50e, this holding and my concurrence therein vacate so much of the finding of guilty of the Specification of the Charge as involves a finding that accused's desertion was terminated other than in a manner unknown and so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for one and one-half years.

2. It is requested that you publish a general court-martial order in accordance with the said holding and this indorsement, restoring all rights, privileges and property of which accused has been deprived by virtue of the findings 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 this case are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 340598)

2 Incls

1. Record of trial
2. Draft of GCMO

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

RECORDED

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

JAGH CM 340605

APR 26 1950

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

YOKOHAMA COMMAND)

v.)

Master Sergeant CLEMONS)
JOHNSON (RA 38354974),)
Headquarters Battery, 76th)
Antiaircraft Artillery)
Automatic Weapons Battalion)
(SP), APO 713.)

Trial by G.C.M., convened at)
Headquarters Yokohama Command,)
13-18 January 1950. Dishonorable)
discharge, total forfeitures after)
promulgation, and confinement for)
life.)

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Master Sergeant Clemons Johnson, Headquarters Battery, 76th Antiaircraft Artillery Automatic Weapons Battalion (Self Propelled), did, at Zama, Honshu, Japan, on or about 7 November 1949, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill Sergeant William A. Hicks, a human being, by shooting him with a carbine.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

The prosecution and the defense stipulated that Prosecution Exhibit 1, received in evidence (R 12), although not drawn to scale, was a fair representation of the area in question. This chart indicates that the main entrance to the First Three Graders' Club faces upon a road running east and west, labeled on Prosecution Exhibit 1 as Road 1. Another road, designated as Road 2 intersects Road 1 directly in front of the main entrance, and runs north to Road 5, which runs east and west parallel to Road 1. Roads 3 and 4 run north and south between Roads 1 and 5, to the west of and parallel to Road 2. "B" Battery Building is located on the east of Road 2 and extends almost to Road 1 on the south and almost to Road 5 on the north. The space between Roads 2 and 3 is a parking lot upon which half tracks are parked (R 218). "A" Battery Building occupies the space between Roads 3 and 4. The BSO (Battalion Supply Officer) building occupies the north half of the space west of Road 4, and Headquarters Battery Building is directly north of the BSO building and across and to the north of Road 5 (Pros Ex 1).

a. For the prosecution.

Sometime between 2100 and 2200 hours on 7 November 1949 Master Sergeant Clemons Johnson, the accused, who was First Sergeant of Headquarters Battery, 76th Automatic Weapons Battalion, was asked by one of the participants to settle an argument between two other sergeants at the First Three Graders' Club at Camp Zama, Japan (R 12-13). Loud talking ensued and Sergeant William A. Hicks, the Club custodian (who was later killed) told them to go outside because they "were making too much noise" (R 16,23). Thereupon the accused and the two sergeants moved out onto the back porch and after some words the accused became engaged in a "tussle" with one of the sergeants (R 23,36,57). Sergeant Hicks and a "few other fellows" grabbed the accused (R 24). Hicks, who was much taller than accused and about as broad, had "his arm locked" around the accused's neck and was choking him (R 31,37,58,73,74,93,159). At this time they were in a crouching position (R 48), or "on the floor" (R 59), and when the accused was turned loose he "didn't look like he was winded or was beaten or anything" but "looked a little excited" (R 48-49). He went over to the bar, picked up his helmet liner and his papers and started out. "As he came to the club room floor he told Sergeant Hicks no one ever held him from behind and lived," and added "Don't stay in the club tonight because I will get you before the night is over" (R 37-38,42,59). Hicks replied that he was merely trying to avoid trouble at the Club (R 46). The accused then left the Club and proceeded up Road 3 toward "A" Battery, which also leads to Headquarters Battery (R 38,42).

Between 2130 and 2200 on 7 November 1949 the accused entered the orderly room of Headquarters Battery and obtained the keys to the armory room from the charge of quarters. When he returned the keys "he had a carbine" (R 107-108).

Shortly after the accused left the Club Sergeant Hicks (who lived at the Club (R 83)) was standing at the bar and was called to the telephone (R 60,72). At approximately 2220 hours Master Sergeant Randolph Williams, Jr., left the Club to go to his barracks. Sergeant Hicks went out just ahead of him and they proceeded together north on Road 2. Sergeant Hicks stated he was going to Headquarters, he "seemed normal", and neither the "scuffle" nor Sergeant Johnson's name was mentioned. When they reached a point about half way between Roads 1 and 5 Williams said "Goodnight" and turned into the center entrance of "B" Battery building. Williams met no one else after he left the Club until he turned in. He did not tarry or speak to anyone else and as he reached the landing between the first and second floors on a stairs near the entrance he heard shots. It took Williams "a couple of minutes" to "get up those steps" and so far as he knew Hicks proceeded alone on up the road (R 188-191,277,280).

At some time after 2200 hours, and approximately fifteen minutes after the "scuffle" Sergeant Haydel left the Club. As he proceeded west on Road 1 which ran in front of the Club he noticed the accused proceeding east (in the direction of the Club). In answer to a question on cross-examination "Did you see a carbine in his possession?" he answered "No, sir, I didn't observe anything too closely, sir" (R 16-18).

At about 2215 Sergeant Felix J. Cole, Jr. left the Club, entered a car driven by Sergeant First Class Stanley F. Cabell, and proceeded west on Road 1. Just before they reached the intersection of Roads 1 and 3 they heard about five "rapid"shots (R 60). From the testimony of these and other witnesses there may have been a pause between the first and the others (R 91) or between the second and third (R 101,105); or four or five separate shots (R 116). Sergeant Cole got out and ran back about fifty yards in the direction of the shots. At a point on Road 2, "as much as 10 yards", or fifteen yards, north of the intersection with Road 1, he saw the accused (R 60-61,68,84). He testified as follows:

"Q And when you saw Sergeant Johnson, what did he say? Did he speak first?

A No, sir; I spoke first. I asked him what happened.

Q What did he say?

A 'I shot somebody'.

Q Did you see anybody there?

A At the time I asked him, 'Who?'

Q Did you see someone there?

A The only person I saw when I ran up was Sergeant Johnson.

Q Did you later see somebody there?

A After he directed my attention to it later, I did.

Q What did you see?

A I saw Sergeant Hicks lying on the ground.

Q And did you observe Sergeant Johnson at that time?

A No, sir because as soon as I saw Sergeant Hicks I went and grabbed his right pulse.

Q You grabbed whose right pulse?

A Sergeant Hicks.

Q What did you feel?

A I didn't feel anything, sir.

Q What did you do then?

A I stood up and turned around facing Johnson.

Q Then what did you see?

A I saw Sergeant Johnson standing there. At the same time I noticed some sort of object in his right hand.

Q What was that?

A It appeared to be a carbine.

Q You say it appeared to be a carbine?

A I didn't know what it was until after I asked him to give it to me.

Q You asked him to give it to you?

A Yes, sir.

Q And did he give it to you?

A Yes, sir.

Q What was it?

A A carbine.

Q And who did you give the carbine to?

A To an MP." (R 61-62)

The body lying on the road was that of Sergeant William A. Hicks (R 74, 114). Sergeant Johnson was standing "I will say as many as three yards" from the body (R 84). The body was lying "approximately in the middle" of Road 2. It was about due west of the northwest corner of the "B" Battery latrine. The head was pointed northwest and the feet were one to two feet from the edge of the road (R 64,84,100-103,134; Pros Ex 1).

Sergeant Hicks was pronounced dead at 0015, 8 November 1949, by the medical officer of the day (R 55). The body was searched and no weapons were found (R 165). An autopsy revealed five gunshot wounds. One bullet entered just behind the left ear and exited from the "posterior portion of the skull;" one perforated the left arm and entered the left side of the chest; one entered the front of the abdomen and passed out the back; one entered the lower portion of the abdomen, coursed upward through the body and passed out the back approximately at shoulder level; and the last was a flesh wound in the "right lateral chest" which passed out at the back on the right side. The wound in the head was "incompatible with life" and gunshot wounds were the cause of death (R 78). "The liver alcohol was 0.3 mgm/gm" which "is definitely not evidence of intoxication" (R 79).

The second person to arrive at the scene was Sergeant Cabell. When he asked the accused what happened "he /the accused/ told me that Sergeant Hicks had choked him until he urinated in his trousers" and, two or three minutes later, that "He went up to Headquarters and checked out his carbine", and "that he had shot him". On cross-examination Cabell testified that the accused did not tell him where the choking took place and he did not know whether the accused "meant on the road or where." The witness did not recall anything about the condition of accused's uniform; he thought the accused had his helmet on but was not certain (R 89,94-96,98,102).

Major Leer, the Provost Marshal, arrived at the scene about 2230 and as he arrived the accused voluntarily said, "I's the murderer; nobody can say anything like that to me" (R 119). On cross-examination he admitted that he had mentioned this statement to no one but the Trial Judge Advocate prior to trial. Because "about twenty other people" heard the statement, and since the case was turned over to the Criminal Investigation Division he "didn't interfere with it whatsoever" (R 125-127). Captain Siercks, the Assistant Provost Marshal, was present when Major Leer arrived at the scene and did not "recall Sergeant Johnson /the accused/ talking to him" (R 162).

Six empty carbine shells were picked up six to seven feet from the body in a ditch which ran along the east edge of Road 2 (R 135-136,166). One round was either in the ditch or within a foot of the ditch (R 160), and some were "alongside of the ditch" (R 176). They were all in the ditch but some were on the easterly wall of the ditch (R 183). The

carbine taken from the accused and five of the shells which were picked up were properly identified and introduced in evidence (R 172,177; Pros Ex 4,11a through e) and it was stipulated that if First Lieutenant Joseph J. Corr, Jr., were present he would testify that the empty shells (Pros Ex 11a-e) had been fired through the carbine (Pros Ex 4) (R 186).

After being warned of his rights under the 24th Article of War (R 136), the accused made two pretrial statements during the night of 7 and 8 November which were received in evidence as Prosecution Exhibits 2 and 3 (R 153). The accused was too nervous to write and the statements were taken down by others (R 137). The accused read them and corrected them before he signed them (R 138,143). These statements were as follows:

"On 7th November 1949 I was in the first three graders club at 2145. I was eaten when Sgt. Hydell, Eugene F. called me and I said what is the trouble he said Sgt Dixon said I missed used him during the Aniversary. At that time Sgt Hydell started to move, and Sgt Dixon grabbrd Sgt Hydell and said mother fucker dont move. I then said to Sgt Dixon just a moment let me found out what you and Sgt Hydell is talking about. I then Sgt Dixon you are just a new commer in the club. Sgt Dixon said you dont have a god dam thing to do with it. Upon that time I didn't have a damn thing to do with it or Sgt Hydell, so come on lets go----- Upon that time Sgt Dixon come on lets go. Sgt Dixon and I started toward the door. In a tussling manner Sgt Hicks came in and graped meby the neck. I then was unable to speak or say anything because Sgt Cole was holding me by the hand, and Hicks was chocking me. Sgt Cole told Sgt Hicks to Release the man you are chocking him Sgt Hicks continued to apply pressure, at that time I blacked out. Afterwards I got up from the floor and said Sgt Hicks you have done me wrong. (Hicks replied no sooner to die now than ever). I said okay I'll see you later. I then left the club. I went to Hq's Btry and drew my weapon, a carbine. Upon return to the club Sgt. Hicks were walking towards the Btry. I called Sgt Hicks, I said Sgt Hicks lets go back to the club and straighten this out. Sgt Hicks replied no sooner to die now than never. Upon repeating that word several times, and still approcking me, I told Sgt Hicks not to come upon me, I asked Hicks please dont come upon me, and he still came toward me, and I opened fire." (Pros Ex 2)

"On the 7 of November at Approx. 2200 I went to Hqs. Btry, 76 AAA Bn and picked up carbine ammunition from the Btry Commander's desk Approx. two clips or all that was in the drawer. I then went to the charge of quarters a soldier named Mason and got the keys for the armory and then took my carbine number #5 this is organizational number, then I left the bldg. and went back towards

the club. I saw Sgt Hicks and another soldier going to Hqs Btry. away from the club. I then asked Sgt Hicks lets go back to the club to straighten things out, and Sgt Hicks said to me, 'no sooner to die now than ever'. I said Sgt Hicks lets go back to the club and straighten things out. Then he came towards me and I said dont come toward me lets go back to the club and straighten things out. He then kept approaching me and he was about five foot away from me when I loaded and raised the carbine and fired the first shot I quit firing when the man fell. I then cleared the gun and replaced the cartridge that had been in the clip." (Pros Ex 3)

The statements were admitted over the objection of the defense based on the ground that the accused was so nervous at the time they were made as to render their making involuntary (R 143). The accused took the stand and testified under oath that he could not write because he could not think, that he was in no condition to read the statements; that he could understand some of the questions asked him but did not know what he said; that he signed the statements but was in no condition to read them; and that he was just trying to get some ease (R 145-153).

Agent Davis testified that at the time accused was interrogated on the night of 7 November, he observed the condition of accused's clothes; they "were in no way dirty or torn that I observed;" and if they had been he would have observed it (R 169). During the interrogation the accused was nervous, his hand was shaking, his eyes were normal, and he seemed thoroughly familiar with details (R 140-141).

b. For the defense.

At 0830 hours, 8 November 1949 the accused went on sick call. He stated that his throat was sore on the outside as a result of having been choked the night before. He had "bilateral acute tonsillitis." "There were no objective signs of external violence on the throat." A choking would not cause tonsillitis (R 204-205).

Major Leer did not tell the officer who performed the Article of War 46 investigation that the accused had at the scene of the accident "confessed to murdering Sergeant Hicks" (R 208).

His rights as a witness having been explained to him by the defense counsel and the law member, accused elected to be sworn and testify in his own behalf as follows (R 209):

The accused was first sergeant and Hicks was a sergeant in Headquarters Battery. On 17 October accused ordered Hicks to report that night to help pick up some mattresses, pillows and beds. He did not show up and the accused "bawled him out." Hicks made an obscene reply.

The accused then told Hicks to report at 0730 the next morning. Hicks came at 0900 after the accused and the captain had done all the work. The accused was "chewed out" by his commanding officer, Captain Charles B. Brown, and told Hicks about it. Hicks replied: "I'll take care of Hicks. You let me take care of Hicks." On 2 November Hicks had refused to perform duties assigned him by the accused. About 1415 hours on 7 November, the accused met Hicks and remonstrated with him. Hicks replied that "On Mondays I'll take off and do just as I want." About 1715 hours the same day accused was in the kitchen of the Club "chewing" a sandwich when Hicks (club custodian) came in and told him to "stay out of the back." Accused did not drink that night (R 210-213). His version of the scuffle was as follows:

"I shoved Dixon away. In shoving Dixon away he was pushed down as he stepped back. Being pushed down, Sergeant Cole and a Sergeant named Gaines, grabbed me on the left and right hand. I stood up till Dixon got up off the floor. I told Haydel to tell Dixon I would see him in the morning. Haydel did so. Dixon left. I walked to the door. Sergeant Cole and Sergeant Gaines was still holding me on the arm so I turned and said, 'Turn loose of my hand; I want to pick up my cap.' Gaines turned me loose. I turned to my right to stoop down on the outside of the door to pick up my cap. Upon bending right, this Sergeant Hicks approached me from behind and grabbed me. He put a nelson on me and also put his knee in my back to straighten me back up in a crouching manner or position. Upon doing so the pressure was applied to me with such force that all I had was a big breath of inhale. It was just all in me. I couldn't tell him turn me loose or what not. I flopped this hand here as I could. Sergeant Cole was still holding this one and I twisted this one. He twisted my thumb open. I kept fighting this hand until Sergeant Cole saw my tongue come out. Upon that I heard him say to Sergeant Hicks, 'Turn him loose; you are choking him.' Sergeant Hicks still applied pressure and at that time sat down - he sat back. When he did that I didn't have any more force. I heard him say again, 'Turn him loose'. Just heard that from then on - 'Turn him loose, turn him loose, turn him loose.' Everything blacked out. When I regained consciousness I got up off the floor, brushed myself off and cleared my throat. I said to Sergeant Hicks, 'Sergeant Hicks, why you grab me and choke me? I wasn't doing anything.' Sergeant Hicks turned around, looked, and said, 'Who? What you say?' I said, 'I wasn't doing anything. Why did you grab and choke me?' Then from the others there was a lot of catcalls and different other things as they called me, 'Rick' for a nickname. 'Hicks's paying down the Rick'. I said to Sergeant Hicks, 'It looks like you would beg me apologies because you did me wrong.' Sergeant Hicks looked around at me and said, 'You think so?' I said, 'Yes. I says, 'There's never

no living man that had ever did that to me.' He said, 'Why you say that?' I said, 'Because I didn't think you was that dirty.' And I said, 'You did me wrong', and he says, 'Just stay here if you think so', and he walked back to his room, back next to the bar, behind the bar." (R 214)

Accused left the Club about 2210 or 2220 hours, walked toward his battery and eventually turned down another road back towards the Club. A voice "yelled" out of "A" Battery window "Johnson don't go back to the club. If you do you are going to get hell beat out of you" (R 215). Then he changed his mind "about going there" and headed back north. In walking through the BSO building he went into the "medics." No one was there so he called Hicks on a telephone in that office (R 216-217,228). His testimony as to the conversation follows:

"* * I said, 'Sergeant Hicks, this is Johnson. I am the First Sergeant of Headquarters Battery.' I said, 'You and I has got to get along. I want to leave here with a good record.'

* * *

'And that I am planning on getting a transfer soon.' I says, 'I understand that you or someone is going to whip me.' He says, 'I told you this evening about you take care of Johnson and I take care of Hicks.' 'That's right.' 'About you thinking I did you wrong, I am going to put an end to it. I am coming to get you right now. You done done enough to me. I am going to settle it out my way.' And he hung up." (R 216)

Knowing that Sergeant Hicks had recently purchased a pistol he got the keys to the armory, drew a carbine, got ammunition out of his Battery Commander's desk drawers, and proceeded back toward the Club. Just before he reached Road 1, coming down Road 3, he turned off east through the parking lot where half tracks were parked. He expected to find Sergeant Hicks "on that road some place." As he walked up beside a half track to walk out on Road 2, Hicks hit him from behind and said "Hoo-hoo, I got you and got you god damn well; I'm going to finish you right now." He fell, lost the weapon but recovered it and retreated, warding off Hicks with butt strokes with the carbine. At this time Hicks was three or four feet away and the clip was still in accused's pocket (R 217-219,239). His testimony continues:

"Q Now, did Sergeant Hicks lay hands on you after that?

A Sergeant Hicks followed me as I backed across the road. All the way across- I was backing in an eastward manner and I kept motioning him to get back, to get off me - 'You are wrong; you are mad; get off me; I wanted to straighten things out with you. You are wrong, Hicks,' all the way across the road.

Q What did he say, if anything?

A 'No; you can't straighten out nothing; you are a god damn coward. You got a weapon; I'm going to make you use it. I got something to take care of myself.' I said, 'Get away, Hicks; you are wrong.' As I kept backing in an eastward manner I backed into a ditch or manhole or something and just about fell down. Hicks then wanted to lunge and get me. As he made a lunge I fired a round. I fired that round just as I had got back on the other side of the ditch - I fired it into the ground.

Q Go ahead.

A After firing into the ground I backed up all the way to about three more foot where my elbow was touching a building. I shift. I said, 'Hicks; get back off me.' He said, 'You done did it, now; you fired at me. I'm going to get you.' He reaches into his pocket. I fired another round. He makes one more step and he starts - coming out in a motion of pulling up. What he had I didn't know. It was a matter of being dark but you could see the motion of his elbow. I fired until he fell backwards.

Q Do you recall how many rounds you fired that evening?

A No, sir; I fired two and then a burst of rounds; I don't know just exactly. I fired one back into the ditch, back into the manhole; I fired one more as I hit the building as I tried to shift myself, and Hicks made a motion of coming out with something.

Q Was the clip in the weapon at the time when he lunged?

A No, sir; It was in my pocket.

Q Which pocket was that?

A Right hip pocket.

Q You fired till he fell?

A Yes, sir." (R 219)

After Hicks fell, the accused cleared the weapon, put the clip in his back pocket and gave the weapon to Sergeant Cole who was the first man on the scene. He did not remember what he said to Sergeant Cole, nor that he spoke to Sergeant Cabell or Major Leer. Major Leer said nothing to him. He fired because he was afraid. He knew if Hicks "got him" with the carbine "he could have took it, shot me, killed me - either that or he could have beaten me up unmercifully with that just the same." He could not run away because of the wall behind him (R 220-221). When a carbine is fired the empty shell "goes forwardly to the right" (R 223).

The accused served overseas in North Africa from 6 April 1944 and landed on Utah beach in France on D-Day, 6 June 1944. He received battle stars from the "invasion of France, participation of the Rhine and the Middle East which is from Dragon's Teeth on out to Munich" (R 222).

On cross-examination accused testified that he was not mad when Sergeant Hicks was choking him. After he got up he did not say "No man ever lived and held me like that" but he did say "No living man ever held me like that" (R 225). After the accused got the gun he met Sergeant Butler who said something to him. He could not remember what Sergeant Butler said. He was not mad or drunk (R 229). After Sergeant Hicks hit him from behind they "turned over and had the scuffle in the ditch" (R 231). They tumbled over once and "kicked over there, I would say about a minute." The ground was damp and his clothing got "dirty" (R 240-241). Accused lost two or three buttons off his jacket in the scuffle (R 238). Sergeant Hicks was on the road by the ditch five to seven feet (or ten feet) from the wall of the building where accused was standing when he fired (R 233,251). He shot from the waist and the gun must have been on a horizontal line with the ground (R 245,247).

c. Rebuttal evidence.

Captain Herbert M. Siercks, a prosecution witness, was recalled and testified that sometime after the accused made his first statement on 7 November, he asked the accused whether he had made a telephone call to the club to Sergeant Hicks. Accused answered "no, he had not." This testimony was corroborated by Stonewall J. Scott, a CID agent, who was also recalled (R 255,258).

Private Robert E. Holland was charge of quarters at the dispensary on 7 November. He did not leave the dispensary between 2000 and 2230 hours. The accused made a telephone call to the dispensary but he did not come in nor make a telephone call from the dispensary, during that time. There was no other dispensary in the BSO building (R 260-262).

At about 2130 hours on 7 November, Master Sergeant Kenneth O. Butler saw the accused at the armory getting a carbine. He tried to persuade the accused to leave the carbine in the armory but was unsuccessful. In answer to the question "Did he appear angry?" the witness said "I couldn't reason with him, sir." The accused was not "raving mad" and the witness could not remember just what the accused said. He "informed the charge of quarters at Headquarters Battery to call the Officer of the Day." (R 264-267). Private First Class Mason, who was charge of quarters at Headquarters Battery on 7 November was recalled and testified that he did not see Sergeant Butler that evening (R 287).

An ordnance expert testified that a carbine fired in a horizontal position would normally eject an empty shell to the right and to the rear about four to six feet at from three to five o'clock (R 272). This testimony as to the direction was corroborated by a demonstration of manually ejecting empty shell cases from the carbine (R 236, Pros Ex 4). By tilting the muzzle downward, the shells would tend to go "partially forward" (R 236,272).

4. Discussion.

The accused was convicted of a charge and specification alleging premeditated murder.

The elements of proof of this offense are as follows:

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

The evidence, both of the prosecution and the defense, clearly establishes that the accused committed a homicide at the time and place and upon the victim alleged. Likewise there is no dispute as to the evidence that there was ill-feeling between the deceased and the accused; that the deceased used force against the accused in quelling a disturbance at the club; and that accused walked to the armory, armed himself with a carbine and ammunition, and proceeded back to the vicinity of the club where he shot five bullets into the body of the deceased, one of which coursed upward in a manner indicating that it hit while the deceased was lying flat on his back. A period of between twenty and forty-five minutes elapsed between the "scuffle" and the shooting, during which time accused talked to at least two other soldiers and did not appear to be excited or in a hurry, and, according to his own testimony at the trial, was not "mad." Although denied by the accused, other witnesses testified that as he was leaving the club after the "scuffle" he told Hicks that no one ever held him from behind and lived, and that he would "get" him before the night was over. This is sufficient to establish both premeditation and malice aforethought.

The accused's testimony, if believed, would tend to establish that the killing was in self-defense. To constitute the crime of murder, a killing must be "unlawful" or "without legal justification or excuse."

"* * * To excuse a killing on the ground of self-defense upon a sudden affray, the killing must have been believed on reasonable grounds 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. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense, the person doing the killing must not have been the aggressor or intentionally provoked the altercation; but if after provoking a fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor." (Par. 179a, MCM, 1949, pp. 230-231)

The accused testified that he checked out his carbine as a result of a telephone call which he made from the "medics" and in which the deceased threatened him; that as he walked out onto the road the deceased hit him from behind, knocked him down, during the ensuing scuffle on the ground the accused lost his carbine, recovered it again, got to his feet and retreated until his back was against the wall of a building; that during this time he was warding off the deceased with butt strokes, inserting a magazine in the carbine and firing two warning shots into the ground; and that when his back was to the wall and the deceased made a gesture as if to pull a gun, he fired until the deceased fell.

There was no eyewitness to the actual meeting of the accused and the deceased at the scene of the killing. The court, however, was fully justified in disbelieving the uncorroborated testimony of the accused relative to this event. His testimony that the deceased hit him from behind is contradicted by accused's pretrial statement that he saw Hicks and another soldier going away from the club and that he asked Hicks to go back to the club and straighten things out. Furthermore, it is inconceivable that the deceased could have hidden himself and ambushed the accused during the short period of time elapsing between his parting with Williams and the firing of the shots. His testimony that he was standing with his back to the latrine when he shot is disproved by the fact that the empty shell cases were all found along the ditch by the road which was five to seven feet in front of the wall. His testimony that he got his clothing dirty and lost two or three buttons off his jacket during the scuffle when the deceased jumped on him is discredited by the lack of any evidence that his clothes were in fact dirty or torn immediately after the shooting. Finally, the statement as to the threats by telephone is discredited by the testimony of the charge of quarters that accused did not come to or make a call from the dispensary during the time in question. All these discrepancies lead to the conclusion that accused's story was of recent

contrivance and should have been given no credence by the court. It follows that the evidence fully supports the court's findings of guilty of premeditated murder.

The extrajudicial statements of the accused were properly received in evidence since any nervous condition of the accused at the time the statements were made would affect their weight and not their competency (CM 336419, Halprin, 30 Sept 49, citing Morton v. United States, 147 F.2d 28,31). The statement made by the accused to Major Leer as he arrived at the scene of the shooting was spontaneous and was admissible even though the accused had not been warned of his rights under the 24th Article of War (CM 336350, Hoover, 3 BR-JC 39,45-47). The fact that Major Leer did not report this statement to anyone except the Trial Judge Advocate prior to the trial did not affect its admissibility. Since this fact was fully developed on cross-examination, it must be assumed that the court considered it in weighing the evidence.

5. In arriving at its opinion in this case the Board of Review has carefully considered the matters presented in oral argument by Charles L. Carpenter, Esquire, before it in Washington, D.C., on 28 March 1950.

6. The accused is twenty-nine years of age and unmarried. He graduated from high school in 1940 and attended Shorter College prior to 1942. He was employed from 1938 to 1942 as a shipping clerk, his highest salary being \$35.00 per week. He was drafted on 11 November 1942 from Little Rock, Arkansas, and served in North Africa, France and Germany, from 27 March 1944 to 13 December 1945, and in Japan from 12 November 1946. He reenlisted on 5 January 1949 for a term of three years. His awards include a unit citation, good conduct medal (three times), and three battle stars. His last efficiency and character ratings were "Excellent." His AGCT score is 70. He testified that he had been a first sergeant during and since his tour in Europe.

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

C. F. Hill

, J.A.G.C.

Robert B. Babin

J.A.G.C.

William H. Churchwell

J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Master Sergeant Clemons Johnson,
RA 38354974, Headquarters Battery, 76th Antiaircraft Artillery
Automatic Weapons Battalion (SP), APO 713, upon the concurrence
of The Judge Advocate General the sentence is confirmed and will
be carried into execution. A United States Penitentiary is
designated as the place of confinement.

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

23 MAY 1950

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

I concur in the foregoing action.

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

23 May 1950

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

(119)

APR 14 1950

JAGQ - CM 340608

UNITED STATES

v.

Pvt DUANE G. BRUTOUT (RA 13287943), Pvt EARL V. TURNER (RA 19339100), Pfc JOSEPH V. GONNELLI (RA 12303043), Pfc GEORGE A. TYREE (RA 35758941), all of Hq Co, 73d Armored Ord Maintenance Bn, and Pvt JAMES L. MEEHAN (RA 11182003), 40th Ordnance Depot Company.

UNITED STATES CONSTABULARY

Trial by G.C.M., convened at Stuttgart, Germany, 2 February 1950. All: Dishonorable discharge (suspended) and total forfeitures after promulgation. Brutout, Turner, Tyree and Meehan: Confinement for eighteen (18) months. Gonnelli: Confinement for one (1) year. All: Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW

SEARLES, CHAMBERS and SITNEK

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 in a joint trial upon the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private First Class George A. Tyree, Private Duane G. Brutout, Private Earl V Turner, Private First Class Joseph Vincent Gonnelli, each of Headquarters Company, 73d Armored Ordnance Maintenance Battalion, and Private James L Meehan, 40th Ordnance Depot Company, acting jointly, and in pursuance of a common intent, did, at Munich, Germany, on or about 8 December 1949, with intent to deprive the owner temporarily of its property, wrongfully and without authority, take and use a certain motor vehicle, a 2½ ton, 6x6 truck, of a value of more than \$50.00, property of the United States, furnished and intended for the military service thereof.

Each of the accused pleaded not guilty to and was found guilty of the charge and its specification. Evidence of two previous convictions was

introduced as to the accused Brutout and evidence of one previous conviction was introduced as to the accused Turner, Meehan and Tyree. No evidence of previous convictions was introduced as to the accused Gonnelli. The accused Brutout, Turner, Meehan and Tyree were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for eighteen (18) months. The accused Gonnelli 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 one (1) year. The reviewing authority approved the sentences and ordered them executed but suspended as to each accused that portion of the sentence adjudging dishonorable discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement. The result of the trial was promulgated in General Court-Martial Orders No. 22, Headquarters, United States Constabulary, APO 46, 23 February 1950.

3. Evidence for the Prosecution.

The Company Commander of Headquarters Company, 73d Armored Ordnance Maintenance Battalion, testified that Headquarters vehicle number twenty-nine, a two-and-a-half-ton six-by-six, was assigned to his company for use in the military service and that on 8 December 1949 he authorized its use for transporting the basketball team assigning Private First Class Wolfert as driver. He told him to return the truck to the motor pool upon completion of that particular mission. This witness is responsible for granting permission to use vehicles of his organization and authorized no other person to use the vehicle on that date (R 8).

Private First Class Wolfert, a member of Headquarters Company, testified that on 8 December 1949, he had permission to take the basketball team to Munich in vehicle "Headquarters 29," and upon returning after the game parked the truck, a two-and-a-half ton six-by-six "closed cab job," in front of the billets, between nine and ten o'clock, took a shower and went to bed. He gave no one permission to use the vehicle (R 9-10).

Private First Class Washburn testified that on the night of 8 December 1949, he was a sentry at the main gate of Will Kaserne, Munich, Germany. His post was in a shack which is located between the ingoing and outgoing lanes. Sometime "after eleven" the night of 8 December 1949 a six-by-six vehicle with canvas top and ladder on back, bearing bumper number Headquarters 29 stopped at said gate at which time this witness asked the accused Brutout for his name to which the latter replied "Plack". When the truck left the Kaserne accused Brutout was driving

and accused Meehan was sitting in the front seat. The witness did not look in the back of the truck. His duties as sentry required this witness to check each vehicle going through the gate and to register it and check the trip ticket. He did not, however, check the trip ticket. No other trucks went out about 2300 hours. He did not see the pass truck go out at this time. There are usually two pass trucks, one of which runs on the hour and one on the half hour (R 10-12).

Sergeant Williams testified that he and his companion, Corporal Crossman, entered the Cafe Alt Dachau, Dachau, Germany, the night of 8 December 1949, at "approximately 12:30". Dachau is about 18 kilometers from Munich (R 12). While in the cafe he saw five soldiers in Class A uniform enter. They stayed approximately a half an hour during which time they were eating and drinking at which time the same five men were "involved" in an "incident" (R 14). This witness identified the accused Tyree as one of the five soldiers he saw but was not positive about the other four accused. He saw the five soldiers leave and he and his companion also left and "at the same time they left I saw a government vehicle going up the street" (R 13). It was an "Army two-and-a-half, and had a tarp on it" and was heading back toward Munich. He saw no men enter the truck (R 13-14). Corporal Crossman's testimony corroborated that of Sergeant Williams, except that he stated he and Sergeant Williams entered the cafe at "11:30". He recognized at the trial all of the accused except Brutout (R 21-22).

Erwin Goldberg, Warrant Officer Junior Grade, Headquarters 7822 Station Complement Unit, testified that he was on duty as Officer of the Day at Munich Military Post Ordnance Center on the night of 8 December. At about "one-thirty in the morning" he went to the Alt Dachau Cafe to investigate a report of a fight. Later he and the provost marshal located a "2-1/2-ton GMC truck; it had a Constabulary insignia on the side of the door, and it belonged to the 73rd Ordnance, Headquarters" (R 15). He believed the number was Headquarters 29. The truck was stopped on a road in Dachau which leads toward the main road to Munich. The hood of the truck was up (R 15). Dachau is "about six to eight miles" from the location of the organization to which the truck belonged (R 16). Five soldiers, whom the witness identified as the five accused, were standing around the truck (R 15), which was blocking the road (R 16). All of the accused were sober (R 44). One of the accused was looking under the hood of the truck, one was in the back of the truck and three were standing "around the front of the truck" (R 16-17). When asked "if they had enough gas *** they said yes *** it was the fuel pump that wasn't operating" (R 17). This witness took the five accused back to the main gate leaving the truck where he found it (R 15).

The pretrial statement of each accused was duly entered in evidence, the court being advised that each statement could be considered as evidence only against the individual accused who made it (R 20) (MCM 1949, par 127b). These statements are quoted in full below.

Statement of Accused Brutout (Pros Exh #3).

"Myself, TURNER E, TYREE, GONNELLI, and MEEHAM were at the club, we played bingo and drank very heavy. We stayed there until the club closed and we were all drunk. We left the club, and came across the parade ground. The next thing I remember is that we were in a German Gasthaus. I didn't know where it was or the name of it. When I came too I had some German food and beer before me. I ate some of the food and drank the beer. There was a sergeant and a corporal sitting across the table from us. The sergeant came over to our table and started talking to TYREE about it being a private club and something about combat. I couldn't tell exactly what. we all left. I climbed in the back of the truck. There was myself and TYREE and TURNER in the back of the truck. We drove for about ten minutes and the truck stopped. TYREE and I got out. MEEHAM and GONNELLI in the front had already gotten out. I lifted the hood to see if I could find the trouble. A German and a woman came by on a bicycle. Someone, I don't remember who, gave them \$2.00 and told them to either get some gas or get the MP's. The O.D. and Provost Marshal from MMP Center at Dachau came and took us to the main gate of the Center. A call was placed to the 73rd by the Provost Marshal and he said: 'We have five men from your organization here.' Cpl YOUNGREN and two guards came after us and brought us back to the Kaserne."

Statement of Accused Turner (Pros Exh #1).

"I was at the club (Johnnies Joint) about 2100 hrs 8 Dec 49 in company with BRUTOUT, MEEHAM, GONNELLI, and TYREE. We drank until the club closed. We left and came to the billets. When we came to the billets I was quite drunk. It was mentioned by someone, I don't know who, that we all go have another drink. There was a truck outside the billets so I climbed in the back with GONNELLI. I don't know who else got in back, but I remember BRUTOUT went around to the front of the truck. I don't know who drove. The next thing I remember was being at a German Gasthaus. Someone hollered 'Lets get out and go inside.' I had been asleep. I woke up and went inside with the rest. I don't remember the name or where this Gasthaus is. We ordered drinks and some food. We all left and got in

the truck, I got in the back end. We pulled out and I went to sleep. I have no idea what time it was. The next thing I remember was GONNELLI hollering at me to get out of the back end. A captain was there from Dachau. He told us to get in his car and he would take us to the Guard Shack at the MMP Center. We came to the Guard Shack. He asked us our names and I gave him my name. He phoned the 73rd and asked them to come down and pick us up. Cpl YOUNGREN came and got us and took us back to the Kaserne."

Statement of Accused Meehan (Pros Exh #2).

"On the night of 8 December 49 I was talking to Earl TURNER and some of the boys about going to the club and playing bingo, GONNELLI, BRUTOUT, TURNER, and I went to the club, it was about 1900 hrs. We started drinking and we all stayed until the club closed. Some other guy came over to our table and sat down during the evening. I don't know his name. He left before we did. We left after the club closed. We started across the Parade Ground. I guess the fresh air hit me because I didn't feel no pain after that. I remember going into the billets of the Hq. Co. We went upstairs to FAMOLARE, W. and started eating from some stuff he got in a package. He said 'get the hell out' because I wanted to sleep, so we all left. The guy that sat at the table with us said: 'Let's go to town and get something to eat.' I don't remember anything after that until I noticed we were in a German Gasthaus. Somebody ordered some food and beer. GONNELLI said: 'Let's get out of here,' so we left and got in the truck. Myself, GONNELLI, and TURNER were in the back. BRUTOUT and TYREE were in front. We took off and went up the road and the truck stopped. A German came down the road on a bike. We stopped him and asked him for gas or taxi or MPs. Soon the Provost Marshal and O.D. from MMP Center at Dachau came. They left an IP Guard with the truck and took us back to the main gate of the MMP Center. I saw the O.D. from MMP Center call the O.D. at Will Kaserne and ask for transportation to pick up five men from the 73rd he had there. A Cpl came and picked us up and brought us back to the Will Kaserne."

Statement of Accused Gonnelli (Pros Exh #4).

"Approximately 2000 hrs 8 December 49 I went to Johnnies Joint, it was Bingo night. I saw TYREE, BRUTOUT, MEEHAM, TURNER E, sitting on a table, I joined them. We drank during evening very heavily. We all stayed until we were told it was time to close. We left and went across the Parade Ground. We told the C.Q. we just came from the club and not to make us absent from bed

check. We went to our rooms, then came downstairs. We saw a truck starting from the billets, so TYREE, myself, and TURNER E hopped in the back and the truck took off. MEEHAM and BRUTOOUT were in the front. I didn't know who was driving. Later we found we were at a German Gasthaus, I don't know the name or location of the place. We went in, we ate and had some beer. We sobered up from eating and realized what we were doing. We all ran out and got in the truck and took off. We broke down and couldn't get the truck started. BRUTOOUT and TURNER E said 'let's find out where we are'. TURNER E gave a German \$2.00 to get an MP to get us to camp. A Capt and a W.O. and some IP's came out. They took us to the main gate, MAF Center, where we were held until YOUNGREN came for us. While we were waiting at MAF Center main gate the truck was turned in to the MAF Center."

Statement of Accused Tyree (Pros Exh #5).

"On the night of 8 Dec 49 I was on my way back to the barracks having just left the EM Club with Pvt MEEHAM, Pvt TURNER, Pvt BRUTOOUT, and Pfc GONNELLI. Upon arriving at the building someone said 'Let's go get a beer'. Pvt TURNER, GONNELLI, and I climbed upon the back of a truck. The next thing I knew we were at a guesthouse. We all went in, Pvt MEEHAM and BRUTOOUT were out before I was, they were sitting in front. We were in the guesthouse for a little while. I ran out of the guesthouse and the truck had already started down the road. I caught up with the truck and climbed upon the rear. A little way down the road the truck stopped. I waited for about five minutes and then got off the truck. The hood was raised and MEEHAM was trying to get the truck started. A German came by and someone sent him after some gas. He was gone for a little while when I saw a car coming down the road; I mentioned that it was the MP's. A captain got out and asked what was wrong. We told him the truck was out of gas. He took us to the MP gate house at Dachau. This was the first time that I knew where I was at. At the gate house the captain asked 'which one of you are Woleford'. I said none of us was. He then asked which one was driving the truck, no one answered. It struck me then that something was wrong. I had been under the impression all along that Pvt BRUTOOUT was driving the truck, and that it was properly dispatched to Pvt MEEHAM. I knew MEEHAM drove a truck, but I did not know this was not his assigned vehicle."

4. Evidence for the Defense.

All of the accused testified under oath except the accused Brutout who elected to remain silent (R 24). The direct examination in each

instance was for the purpose of clarifying the pretrial statements theretofore admitted into evidence as prosecution exhibits. There were no other witnesses for the defense.

Accused Turner

The accused Turner testified that in addition to the five accused, who sat together (R 34), there were "quite a number of other companies' soldiers" at the Club when it closed at which time "we all came back across the parade grounds" (R 30, 34). He had no agreement to meet later with any of the other accused. He went from the Club to his billets where he talked to other soldiers.

"Q Was there a truck outside the billets where you were standing?

A The pass truck was sitting there, sir.

"Q It was the pass truck?

A Well, I thought it was at the time — I thought it was the pass truck.

"Q What made you think it was the pass truck?

A Because of the ladder on the back, sir.

"Q Is that the only reason?

A Well, it was standing in its proper position — in the proper position for the pass truck, the pass truck usually sits there.

"Q Do you remember making any statements at the time?

A No, I don't, sir.

"Q You didn't make any statements to any of the other accused when you saw them?

A I did say something to one of the fellows; I don't remember who it was. It might have been Gonnelli or Tyree, I don't remember just who it was, but I said, 'Let's catch the pass truck and go downtown.'

"Q And he happened to be there at the same time?

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

The accused Turner on examination by the court further testified:

"Q If I recall your statement, you mentioned to the group about getting on a pass truck. Do you recall that statement you made?

A Sir, I said I mentioned to Gonnelli, I believe it was,
'Let's get on the pass truck.'

"Q To Gonnelli?

A No, I don't know if there was others standing around or
not.

"Q Was Meehan there?

A Who?

"Q Meehan?

A I don't know, sir.

"Q What about Tyree?

A I believe he was there, too.

"Q What about Brutout?

A I don't know.

"Q You don't know if he was there -- were there any others
besides Gonnelli and Tyree present?

A No, sir, other than --

"Q Just you three?

A Yes, sir.

"Q Were you the first one on the truck?

A No, sir, I don't think so.

"Q Who was on there before you?

A Gonnelli stepped in before, I believe.

"Q Stepped before you?

A Well, I stood there and he went on the truck.

"Q You weren't already on the truck when Gonnelli came out,
is that right?

A No, sir.

"Q Before you got out on the truck, did you check the cab?

A No, sir.

"Q Did you hear a motor running?

A Yes, sir.

"Q The motor was running?

A Yes, sir, the motor started up.

"Q You didn't look in the cab to see who was in there?

A No, sir, I didn't." (R 35).

Accused Turner thereupon climbed into the back of the truck and sat on one of the benches. He had been on the pass truck on other occasions when the driver was not in it. He thought it was going to Munich "but later I found out we were in Dachau." (R 31). On direct examination he further testified:

"Q Did you suspect that anything was wrong with this particular truck at any time?

A Well, at the time the OD came up and he asked who the driver was — Wolfert was, I believe, sir — and no one answered, and then he asked who the driver was and one of the drivers answered, I believe it was Private Brutout — he said, 'I'm the driver, sir'.

"Q Did you question the legality of this trip at any time prior to that?

A No, sir.

"Q Not in the club?

A No, sir.

"Q You didn't ask Brutout some questions in the gasthaus?

A Let's see — yes, I believe I did. No — I don't know about that, I'm not so sure about it, sir.

"Q You didn't check to see if there was a trip ticket while you were in the gasthaus?

A No, sir.

* * * *

"Q At any time between the time you left the kaserne and you got to the gasthaus, did you know where the truck was?

A No, sir.

"Q Was there a cover on this truck?

A Yes, sir.

"Q But you're certain that you did not check for Brutout while you were in the club as to whether he had a trip ticket, and received an answer from him?

A No, sir.

* * * *

"Q Did you make any statement in regard to the legality of this trip in the gasthaus?

A Yes, sir, I did. In the gasthaus, sir.

"Q What did you say?

* * * *

"WITNESS: Yes, sir, I asked him if he had permission, or a trip ticket, and he said he had a trip ticket.

"Q And at the time were you then satisfied that this was still — that this was either the pass truck or a legal trip?

A Yes, sir, I figured it was the pass truck." (R 31, 33)

On further examination by the court the accused Turner testified:

"Q You mentioned that you asked Brutout as to whether he had the trip ticket. What did you bring that question up for?

A It was asked to me by the —

"Q Did you ask him 'Do you have a trip ticket?'

A Yes, sir.

"Q Why did you ask him that?

A I don't know, sir. He just said he had permission to take the truck, as far as I know, sir.

"Q He said he had permission to take the truck?

A Yes, sir.

* * * *

"Q At any time but this one time you weren't sure whether it was legal?

A Well, the pass truck always has a trip ticket, sir.

"Q What did you do — what did you bother to ask the driver for?

A No, sir, I didn't bother to ask the driver.

"Q You didn't?

A I did, sir.

"Q Why? You never did before.

A I guess because of the hour; I don't know.

"Q Because of the hour?

A Yes, sir.

"Q Well, the pass truck left late and if it is the pass truck you shouldn't be worried about the hour either.

A Well, at that time it was pretty late, sir." (R 36-37).

Turner further testified that he had been stationed at Will Kaserne approximately eight months and had been to Munich on the pass truck quite often (R 32, 37). He had never been to Dachau before (R 32). There was no canvas at the rear of the truck. Brutout has driven the pass truck, before, "they don't have any regular driver, they alternate" (R 33).

Accused Meehan

The accused Meehan testified that he and the other four accused and others left the club together. He and a soldier named Murphy then went to a friend's room and had something to eat and drink (R 38).

"Q And then what happened?

A And then out in the hall, I was going to go to the latrine and one of the fellows said 'Let's go get a beer,' and I said 'I'm out here with the guys now and they've got some.'

"Q Then you went to the latrine and came back? And then what happened?

A Well, I don't remember nothing until I got in that gasthaus.

"Q You don't remember going downstairs?

A No, sir, I don't.

"Q You don't remember somebody making a statement 'Let's go to town and get something to eat'?

A No, sir.

"Q And the next thing you remember you were in the gasthaus?

A Yes, sir." (R 38-39).

Accused Gonnelli.

The accused Gonnelli testified that he and the other four accused were sitting at the same table at the club and left together the night of 8 December 1949. The club was closing as they left and others left at the same time (R 25).

"Q Where did you go after you left the club?

A Well, I went up to my room there and I had a beer mug with me that I brought out of the club there and I wanted to bring it up to my room there, and I told the CQ not to mark me for missing bed check because the club just closed and I just came back, and — all right — and I opened the folding doors to go back up to my room and when I opened it — I don't know — I got the notion, I just went out and jumped on the pass truck there.

"Q You jumped on the pass truck?

A That's right, sir.

"Q Was it the pass truck?

A As far as I know it was, sir, yes, sir.

"Q Did you learn later whether it was the pass truck or not?

A Yes, sir, when the MP's there — a captain and a warrant officer — came up there and found us there, and we were in Dachau then. That's when I found out where we were.

"Q What makes you think it was the pass truck?

A Well, it was the only vehicle that was parked near the billets there.

"Q Is that where the pass truck usually parks?

A Yes, sir.

"Q Was it about time for the pass truck?

A I believe it was, sir, I — yes, sir.

"Q Have you ever been on the pass truck before?

A Yes, sir.

"Q Has the driver ever left that truck?

A Yes, sir.

"Q He has. This truck that you got on, where did it go?

A Well, I didn't — I didn't know at first where we were going, but we stopped at a gasthaus after that, later on.

"Q Did you know where this gasthaus was?

A No, sir, I didn't.

- "Q When did you finally find out where you actually were?
 A When the — that captain there, the Provost Marshal of Dachau, and that warrant officer there, the OD, he came — they came along, that's when we told some German there, some German civilian, to go down and pick up the MP's and then they — the MP's — came and took us back over there and that's when I found out that we were in Dachau.
- "Q In other words, you had been to the gasthaus and left, and the truck had broken down, and still you did not know that this was not a pass truck?
 A Yes, sir.
- "Q Were you driving the truck?
 A No, sir.
- "Q Do you know who was — I withdraw the question. Where were you in the truck?
 A In the back end, sir.
- "Q Who was with you in back,
 A Private Turner and Private Tyree.
- "Q Private Turner and Private Tyree. Another question, now, on your statement. You say here after you came downstairs, 'We saw a truck starting from the billets'. Who did you mean when you made this statement, 'we'.
 A I don't know his name, sir, he works in the evacuation platoon.
- "Q It was not one of the accused?
 A No, sir, it was not.
- "Q And you got into the back end." (R 25-26).

This accused had been stationed at Will Kaserne for fifteen months and had been to Munich many times by pass truck and is familiar with the route taken by the pass truck but did not look out of the truck on this trip and did not know it was not the pass truck until they were apprehended (R 26-27). The accused Gonnelli further testified on examination by the court:

- "Q When you came out of the billets to get into the truck, was the tail gate down?
 A It was, there was the gate — the ladder there.
- "Q The ladder — and, in other words, you came up into the truck by the ladder?
 A That's right, sir.

"Q Did you need any assistance?

A No.

"Q Was anybody in the truck when you got in the truck?

A No, sir, I was in there alone.

"Q Did anybody get in the truck after you got in there?

A Yes, sir.

"Q Now, when you came out of the gasthaus, did you need any assistance to get into the truck then?

A As far as I know, sir, Private Turner, the way he told me the day after, why we got off the truck there and I was always falling off. That's what he told me.

"Q Now, when you arrived at the gasthaus and got off the truck, on the inside, did you know that that was a gasthaus that wasn't in Munich?

A No, sir, I didn't know that.

"Q How long were you in the truck before the truck started to move?

A I don't know, sir. I imagine about a couple of minutes as far as I know, I wouldn't know.

"Q Was this truck parked in the same place as the pass truck normally parks?

A Yes, sir.

"Q Exactly the same place?

A Yes, sir.

"Q You say you climbed into the truck. Was the motor running at the time you climbed into this truck?

A Not when I jumped in, no, sir, it wasn't.

"Q At the time you jumped into the truck, did you see if there was a driver in that truck?

A No, sir, but when I was going on — when I was climbing on top of the truck, all I seen was Private Brutout and Private Meehan going around to the front. But, as far as I know, whether they drove it, I wouldn't know.

"Q But you know there was — but as far as a driver, there was a driver there?

A No, I don't know if there was a driver in the — in sight.

"Q How did you know that that pass truck was going to town?
A It was still the hours that the pass truck runs.

"Q You were definite then, that particular hour -- in other words, you knew exactly the hour at the time, is that right?

A It runs about a half hour after the club closes.

* * * *

"Q Well, did you check to find out if that pass truck was ready to leave?

A No, sir.

"Q You didn't? You just walked out and jumped in there and knew it was going right then and there?

A I jumped on, sir -- figured the truck was taking off."
(R 27-28, 29).

Accused Tyree

The accused Tyree testified that all of the accused except Meehan live in the same barracks and that he and the four other accused had been together at the club on the post (R 41), and together with others left the club when it closed and went across "the field". He had no agreement to meet the other accused after they left the club (R 39).

"Q Where did you go after you left the club?

A I went to my room, sir, to get a smoke. I laid down on the bed; I had a pass to begin the next day; it was on a Friday and that happened to be the next day. I wanted to check the guard roster to see if I was on guard the following day. Sometimes he places you on guard not knowing that you are going on pass. I was checking the bulletin board with my back turned toward the door. I heard someone say 'There's the pass truck. Let's go downtown and get a beer.' I turned around and went down and jumped on the pass truck.

"Q Do you know who said 'There's the pass truck'?

A I'm not sure, sir, but I think it was Private Turner. I wouldn't say for sure.

"Q Had you any agreement to meet with these other people?

A Positively not.

"Q You did not?

A (No oral response).

"Q You jumped on the pass truck?

A Yes, sir.

"Q Was it the pass truck?

A At the time, sir, I thought it was the pass truck but I never found out that it wasn't until I got up to the gatehouse in Dachau.

"Q What made you think it was the pass truck?

A All I know, sir, there is no other vehicle supposed to be stationed in front of that kaserne but the pass truck.

"Q Have you been on the pass truck before?

A Yes, sir, I have.

"Q Did you know where this truck was going?

A No, sir, I did not. I was under the impression that it was going to Munich.

"Q Have you been on the pass truck when the driver got on?

A Yes, sir, I have.

"Q Did you think it unusual then that the driver got out?

A No, sir, I didn't.

"Q When the truck broke down, where was it?

A When the truck broke down, sir, I didn't know. I didn't know where it was at.

"Q Yes?

A I was under the impression that I was somewhere close to Munich, close to the outskirts of Munich." (R 39-40).

"Q You had no idea the pass truck was there?

A No, sir, not until I came out.

"Q You didn't see the truck when you went in then?

A No, sir.

"Q You didn't see the truck at all when you went in?

A When I went in I did not see the truck.

"Q After you got through checking that bulletin board you came out with who?

A I came out by myself, sir.

* * *

"Q You went out for the pass truck, is that right? Where did you get in?

A I got on the back end.

"Q Who was in there?

A There was Private Turner and Private Gonnelli, sir.

"Q When you walked toward that pass truck in what direction, with reference to the truck, did you approach it?

A The truck was parked (indicating). There is a walk way that goes out, and the truck had been parked with the front up and the back end right even with the walk way, and it was headed right for the gate.

"Q It was headed right out? And the nearest side of that truck to you was the back end?

A Yes, sir, it was the back end that was to me.

"Q Who did you say you found in the truck when you got in?

A It was Private Gonnelli and Private Turner, sir.

* * * *

"Q And immediately after you got in the truck pulled out?

A That's right, sir.

"Q The truck didn't wait for anyone else?

A No, sir." (R 42,43).

5. The evidence is sufficient to support the findings of guilty and the sentence as to the accused Brutout. The only question presented which will be discussed is the sufficiency of the evidence to support the findings of guilty and the sentences as to the remaining four accused.

Under the findings of guilty and the sentence adjudged by the court, as to each accused, the prosecution was required to prove beyond a reasonable doubt that (a) the accused wrongfully took and used the vehicle without authority of the owner for his own use and benefit; (b) the vehicle was of the ownership alleged; (c) facts and circumstances indicating that the taking and using was with the intent to deprive the owner temporarily of the vehicle.

The ownership of the vehicle and the fact that the owner of the vehicle was deprived of the use temporarily of his property were proved beyond a reasonable doubt. It is the view of the Board, however, that

the prosecution did not prove beyond a reasonable doubt that the accused Turner, Meehan, Gonnelli and Tyree, or any of them, wrongfully took and used the vehicle.

The authority and duty of a Board of Review to weigh evidence is correctly stated in a recently decided case as follows:

"It is the prerogative and the duty of the Board to weigh the evidence as well as to pass upon the formal legal sufficiency of the record of trial. In weighing the evidence the Board may arrive at conclusions different from those of the court and reviewing authority notwithstanding the fact that their conclusions might otherwise be justified legally by the evidence appearing in the record of trial. The Board must itself be convinced of the accused's guilt beyond a reasonable doubt in order to conclude that the record of trial is legally sufficient to sustain the findings of guilty and the sentence adjudged (AW 50g; CM 335070, Brown, 2 BR-JC 39, 45)." (CM 338753, Hicks (9 Nov 1949).)

Possession of recently stolen property may raise a presumption that the person in whose possession the property was found, stole it (MCM, 1949, par 125a). The weight to be given such presumptions "necessarily depends upon all the circumstances attending the proved facts which give rise to the presumptions" (MCM, 1949, par 125a).

*** For this reason the making and weighing of such presumptions and the consideration of evidence tending to overcome them call for the application by members of courts of their common sense and general knowledge of human nature and the ordinary affairs of life.

"The force of any inference of fact which may have been raised by the evidence is not necessarily overcome by the introduction of rebutting evidence. The proof as a whole, including any such inference and the presumption of innocence, is to be considered by the court in arriving at its conclusions." (MCM, 1949, par 125a).

There is no direct evidence that any of the four accused took the vehicle or exercised any control over it or aided and abetted the accused Brutout in the latter's wrongful taking and use thereof. The findings of guilty must, therefore, be supported by circumstantial evidence, as to each of the four accused, sufficient to create an inference that the accused took and used the vehicle or aided and abetted Brutout. Such inference must be sufficient to overcome the presumption of the accused's innocence.

"The rule as to reasonable doubt extends to every element of the offense. * * * Prima facie proof of an element of an offense does not preclude the existence of a reasonable doubt with respect to that element. The court may decide, for instance, that the prima facie evidence presented does not outweigh the presumption of innocence.

* * *

"A reasonable doubt may arise from the insufficiency of circumstantial evidence, and such insufficiency may be with respect either to the evidence of the circumstances themselves or to the strength of the inferences drawn from them." (MCM, 1949, par 78a; underscoring supplied).

In order to hold any of the accused Turner, Meehan, Gonnelli or Tyree as principals it must be proved beyond a reasonable doubt, as to each accused, that he aided, abetted, counseled, commanded, induced or procured the accused Brutout to take and use the vehicle without authority. The elements thereby necessarily involved in finding any accused other than Brutout guilty as principal are:

- "(1) Preconcert of action or prior arrangement with the principal actor, plus presence at the crime; or,
- "(2) Overt act aiding or encouraging the crime done with intent to aid or encourage (CM ETO 10860, Smith and Toll)."
(CM 312657, Reck and Montgomery, 62 BR 247, 255).

The inference, if any, that any of the four accused, wrongfully took and used the vehicle must necessarily be based upon the evidence adduced by the prosecution, and the sworn testimony of each of the accused that each was a passenger in the vehicle and upon incidents preceding and connected with the trip to Dachau. The accused Meehan was sitting beside the accused Brutout, the driver, when the latter gave the gate sentry a fictitious name. Such testimony raises a suspicion that the accused Meehan might be implicated in the wrongful taking or that he thereby might have been put on guard as to the legality of Brutout's taking and using the vehicle but is not proof that the accused Meehan wrongfully took and used the vehicle and there is nothing in the evidence to form the basis of a reasonable inference that Meehan intended to, or did aid, abet, encourage or otherwise assist Brutout in the commission of the offense alleged. There is no proof that any of the acts of any of the four accused

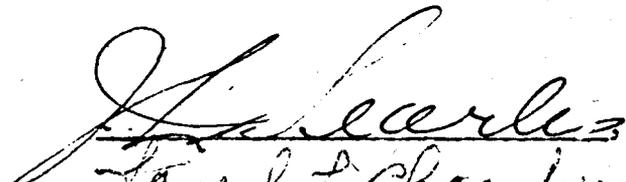
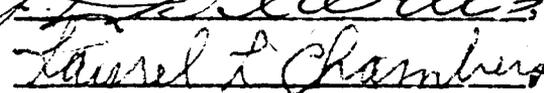
were the result of plan or arrangement between them or any of them and Brutout. Their having been together most of the evening merely raises a suspicion that they may have conspired to take the truck. Furthermore, there is no evidence that any of the four accused, either by word or act, exercised any control over the vehicle so as to indicate possession thereof and thus raise the presumption that the vehicle was taken by any of them. (See CM 312079, Smith, et al, 61 BR 339, 341, 5 Bull JAG 214).

The evidence is without conflict that at the time the accused entered the vehicle it was parked at the place normally used by the regular pass vehicles which are of the same type. The vehicle was not detained by the sentry at the gate. The pretrial statements of all the four accused, which amounted to admissions against interest only, as well as to their testimony, and that of the prosecution witnesses are consistent with their pleas of innocence, and further support the presumption of their innocence. To infer guilt from the facts as established would be basing the findings of guilt upon pure conjecture or at most upon a mere probability.

"*** circumstantial evidence creating a mere conjecture or a mere probability of guilt is not sufficient. The guilt of an accused must be founded upon evidence, which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except that of a defendant's guilt. The circumstances must not only be consistent with guilt but inconsistent with innocence (16 C.J. 766, CM 233766, Nicholl, CM 238435, Rideau)." (CM 258020 Palomera, 37 BR 283, 299; Under-scoring supplied) (See also MCM, 1949, par 78a).

Giving full credence to all the evidence, testimonial and otherwise, adduced by the prosecution, together with whatever evidence adduced by the defense might be considered as favorable to the prosecution's case, we find a failure to prove beyond a reasonable doubt that any of the accused, except Brutout, were guilty of wrongfully taking and using the vehicle.

6. 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 the specification thereof as to the accused Brutout and legally insufficient to support the findings of guilty and the sentences as to the accused Turner, Meehan, Gonnelli and Tyree.


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DISSENT _____, JAGC

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

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JAGQ - CM 340608

APR 14 1950

UNITED STATES)

UNITED STATES CONSTABULARY

v.)

Pvt DUANE G. BRUTOUT (RA
13287943), Pvt EARL V.
TURNER (RA 19339100), Pfc
JOSEPH V. GONNELLI (RA
12303043), Pfc GEORGE A.
TYREE (RA 35758941), all
of Hq Co, 73d Armored Ord
Maintenance Bn, and Pvt
JAMES L. MEEHAN (RA
11132003), 40th Ordnance
Depot Company.)

Trial by G.C.M., convened at
Stuttgart, Germany, 2 February
1950. All: Dishonorable dis-
charge (suspended) and total for-
feitures after promulgation.
Brutout, Turner, Tyree and Meehan:
Confinement for eighteen (18)
months. Gonnelli: Confinement
for one (1) year. All: Disci-
plinary Barracks.

DISSENTING OPINION BY
SITNEK, Judge Advocate

1. I dissent from so much of the opinion of the majority of the Board of Review as holds that the record of trial is legally insufficient to support the findings and the sentence as to the accused Meehan.

2. The competent evidence establishes that:

a. Brutout and Meehan, after drinking together at the enlisted men's club throughout the course of the evening of 8 December 1949, departed when the club closed. They separated, each going to different places. A short time later, at some time after 2300 hours, they were again together when Brutout entered the driver's side of the front seat of a U. S. Army truck and Meehan entered the other side of the front seat and seated himself next to Brutout. Brutout then wrongfully and without authority took and drove away the truck.

b. When the sentry stopped the truck at the main gate of the post and asked Brutout for his name, the latter replied "Plack". Meehan remained silent and the sentry permitted the truck to proceed. Brutout then drove the truck away. Meehan, who was seated in the front seat next to Brutout, knew Brutout and knew that his name was Brutout.

c. The truck later stopped at a gasthaus where Brutout and Meehan obtained food and drink. Afterwards they reentered the truck which was driven away. Shortly after the truck again stopped, involuntarily this time, there is some evidence that they were sober.

3. The facts and circumstances appear to support the conclusion that Meehan collaborated with Brutout in the initial unlawful taking and using. If such conclusion may seem unjustified, the facts and circumstances still support the conclusion that Meehan, at some time after the initial taking and using, collaborated with Brutout. Assuming that Meehan was previously unaware of the wrongful nature of Brutout's acts, Brutout's giving the sentry a false name either did or should have placed Meehan upon notice that something was irregular and improper in Brutout's taking and using of the vehicle. The other facts and circumstances, together with Meehan's silence in the presence of the sentry at this time is sufficient upon which to base a reasonable inference that Meehan thereupon and thereafter, tacitly if not otherwise, did arrange and agree with Brutout to enter upon and continue in the unlawful taking and using, if indeed it had not previously been agreed. Such silence lent support and approval to Brutout's acts (See CM 307006, Foland and Garner, 60 BR 25, 33-34). In legal contemplation, every moment's continuance of a larcenous taking and carrying away of property amounts to a new taking and carrying away (CM 332232, Lillard and Anderson, 81 BR 53, 61-62, and cases cited therein). Correspondingly, Brutout's unlawful taking and using amounted to a new unlawful taking and using at every moment thereafter. If Meehan had been unaware of any irregularity at the time of the initial taking and using, knowledge subsequently obtained by him of the irregularity was such as should have, and presumably did, apprise him of the unlawful nature of these acts.

Meehan should, therefore, be held as a principal inasmuch as he aided, abetted, counseled, commanded, induced or procured the accused Brutout to take and use the vehicle without authority (CM 312657, Reck and Montgomery, 62 BR 247, 255). This conclusion is not inconsistent with the holdings by the Board of Review in cases wherein the mere presence of a person at a crime is not considered sufficient of itself to constitute such person an aider and abettor in the offense and responsible as a principal. For example:

"As to accused Clay, the only evidence tending to connect him in any way with the wrongful taking and asportation of the vehicle is the fact that he was a passenger in the automobile when the civilian policeman apprehended both accused. There is no proof that Clay took the automobile or knew it to have been wrongfully taken, and there is nothing in the evidence to form the basis of a reasonable inference that Clay intended to, or did aid, abet, encourage, or otherwise assist Smith in the commission of the offense alleged. There is no proof that Smith's acts were the result of any plan or arrangement between the accused (see CM 264342, Reis, 42 BR 93). ***" (CM 312079, Smith et al, 61 BR 339, 341, 5 Bull JAG 214 (1946); underscoring supplied).

In this case there is proof that Meehan knew or should have known that Brutout wrongfully took and used the vehicle and that the taking and using was by arrangement between the accused, which is sufficient to form the basis of a reasonable inference that Meehan intended to or did aid and abet Brutout in the commission of the offense alleged.

4. The fact that accused Meehan was subsequently unable, because of his intoxication at that time, to remember anything that occurred after the initial taking and using until he arrived at the gasthaus, is not exculpatory:

"*** As a general rule, drunkenness is not an excuse for crime committed while in that condition. The determination of accused's state of intoxication as affecting his ability to differentiate right from wrong and to adhere to the right was essentially a question to be resolved by the court and where, as in this case, the court's decision is supported by adequate and substantial evidence, it will not be disturbed on appellate review (CM 274678, Ellis, 47 BR 271, 286-287; CM 298814, Prairiechief, 21 BR (ETO) 129, 134-135)." (CM 335138, Bright and Carinelli, 3 BR-JC 281, 303).

Meehan's alleged amnesia with reference to these events does not mean that he did not know, during the amnesic episode, what he was doing, or that he did not intend to do that which he did (cf. MCM 1949, par 125a, 4th subpar; CM 324552, Roberts, 73 BR 269, 272-273). In this connection there is nothing in the record of trial, other than intoxication, showing that Meehan was not mentally responsible at the time of the commission of the offense.

5. The necessary intent or mental state on the part of Meehan to the accomplishment of the offense charged may be inferred from Meehan's conduct, both before and at the time of the commission of the offense. The question of Meehan's mental state with reference to the wrongful taking and using was for the court and has been resolved against him (CM 313545, Hogue and Allen, 63 BR 153, 157). The law determinative of this case is as follows:

"Where one's presence is by preconcert, he may be guilty as an aider or abettor, even though he does not encourage or discourage the commission of the offense by word or act. If the proof shows that a person was present at the commission of a crime without disapproving or opposing it, a jury may consider this conduct in connection with other circumstances, and thereby conclude that he assented to the commission of the crime, lent to it his approval, and was thereby aiding and abetting the same." (CM 268994, Fowler, 3 Bull JAG 284, cited in CM 313545, supra).

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6. It therefore appears that Meehan was properly charged and convicted as a principal in the offense charged.

William D. Strick, JAGC

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

JAGU CM 340608

17 May 1950

UNITED STATES

UNITED STATES CONSTABULARY

v.

Private DUANE G. BRUTOUT, RA
13287943, Private EARL V. TURNER,
RA 19339100, Private First Class
JOSEPH V. GONNELLI, RA 12303043,
Private First Class GEORGE A. TYREE,
RA 35758941, all of Headquarters
Company, 73d Armored Ordnance Mainte-
nance Battalion, and Private JAMES L.
MEEHAN, RA 11182003, 40th Ordnance
Depot Company

Trial by G.C.M., convened at
Stuttgart, Germany, 2 February
1950. All: Dishonorable discharge
(suspended) and total forfeitures
after promulgation. BRUTOUT,
TURNER, TYREE and MEEHAN; Con-
finement for eighteen months.
GONNELLI: Confinement for one
year. All: Disciplinary
Barracks.

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

1. Pursuant to Article of War 50e(4) the record of trial and the holding by the Board of Review in the case of the soldiers named above have been transmitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial each accused pleaded not guilty to, and was found guilty of, jointly, wrongfully, without authority, and with intent to deprive the owner temporarily of its property, taking and using a 2½ ton, 6x6 truck, of a value of more than \$50.00, property of the United States, furnished and intended for the military service thereof, at Munich, Germany, on or about 8 December 1949, in violation of Article of War 96. Evidence of two previous convictions was introduced as to the accused Brutout and evidence of one previous conviction was introduced as to each of the accused Turner, Tyree and Meehan. No evidence of previous convictions was introduced as to the accused Gonnelli. Each of the accused Brutout, Turner, Tyree and Meehan 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 eighteen months. The accused Gonnelli 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,

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and to be confined at hard labor for one year. The reviewing authority approved the sentence as to each accused and ordered the same duly executed but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement of each accused. The result of trial was promulgated by General Court-Martial Orders No.22, Headquarters United States Constabulary, APO 46, 23 February 1950.

The Board of Review, one member dissenting, has held the record of trial legally sufficient to support the findings of guilty and the sentence as to the accused Brutout, and legally insufficient to support the findings of guilty and the sentences as to the accused Turner, Gonnelli, Tyree and Meehan. In a separate opinion, one member of the Board of Review has dissented from so much of the holding by the majority as holds the record of trial legally insufficient to support the findings of guilty and the sentence as to the accused Meehan. The Judge Advocate General has not concurred in that portion of the holding by the Board of Review which holds the record of trial legally insufficient to support the findings of guilty and the sentences as to the accused other than Brutout and has transmitted the holding and the record of trial to the Judicial Council for appropriate action.

3. The Judicial Council concurs in so much of the holding by the Board of Review as holds the record of trial legally sufficient to support the findings of guilty and the sentence as to the accused Brutout. The questions for determination are whether the record of trial is legally sufficient to support the findings of guilty and the sentences as to the accused Turner, Gonnelli, Tyree and Meehan.

4. The evidence is set forth at length in the holding by the Board of Review. The prosecution's evidence shows that, on 8 December 1949, the regularly assigned driver of the truck parked the vehicle without authority in front of the billets of Headquarters Company, 73d Armored Ordnance Maintenance Battalion, at Will Kaserne, Munich, Germany. Sometime after 11 o'clock that evening, the accused Brutout, without authority, drove the truck out through the main gate of the kaserne. The accused Meehan was sitting beside him in the front seat. Brutout stopped the truck at the gate and when the sentry asked him for his name, replied "Plack." The sentry did not check the trip ticket, although his duties required him to do so. One of two pass trucks usually left the kaserne every half-hour.

Between 11:30 and 12:30, all the accused were seen at a cafe in Dachau, some six to eight miles from battalion headquarters. They remained at the cafe about a half hour. After they left, an Army truck, similar to the vehicle in question, was seen leaving the vicinity heading toward Munich. About 1:30 a.m. on 9 December, an officer and a warrant officer discovered

the truck in question on a road in Dachau leading to the road to Munich. The five accused, who were standing around the truck and stated they believed the fuel pump was not operating, were then taken to the main gate of the Munich Military Post Ordnance Center.

The accused made pretrial statements to the effect that, on the evening in question, all five of them were drinking together at the club at the kaserne until it closed. Turner stated that someone suggested they "all go have another drink." He thereupon climbed into the back of a truck outside the billets and the next thing he remembered was being at a gasthaus. After eating and drinking there, they all left and entered the truck. The next thing he remembered was being told to leave the truck and taken to the guard shack at the Munich Military Post Ordnance Center. Gonnelli's statement was to the same effect as Turner's, except that he did not deny remembering what happened. Tyree's statement was similar to Turner's, except that he felt something was wrong after they left the gasthaus. He had believed the truck was properly assigned to Meehan, who drove a truck. Meehan stated he remembered nothing after someone suggested, "Let's go to town and get something to eat," until they were in the gasthaus. When they entered the truck thereafter, Meehan did not sit in front.

For the defense, all the accused testified except Brutout. Their testimony was similar in substance to their pretrial statements, except in the following respects.

Turner testified he believed the truck was the pass truck because of its position and the ladder on the back. He believed the truck was going to Munich but later discovered they were in Dachau. He did not question the legality of the trip prior to the time they were asked about the driver. In the gasthaus, Turner asked Brutout if he had a trip ticket, and Brutout replied he had permission to take the truck. His probable reason for making the inquiry was the late hour. There was no regular driver for the pass truck, and Brutout had driven it before.

Gonnelli testified he believed the vehicle in which they rode was the pass truck because it was the only vehicle parked near the billets, where the pass truck usually parked, and it was about time for the pass truck to leave. On other occasions the driver had got out of the pass truck. Gonnelli did not know where the truck was going or where the gasthaus was. He did not know it was not the pass truck until the accused were apprehended.

Tyree testified he had no agreement to meet the other accused after they left the club. He heard someone (he believed it was Turner) say, "There's the pass truck. Let's go downtown and get a beer." He believed it was the pass truck until he reached the gatehouse, because no other vehicle was supposed to be parked in front of the kaserne. He also believed the truck was going to Munich.

Meehan testified that after the suggestion that they "go get a beer," he remembered nothing until he arrived at the gasthaus, and denied memory of the statement, "Let's go to town and get something to eat."

5. The only evidence tending to implicate Turner, Gonnelli and Tyree in the wrongful taking and use of the truck is that these accused and Meehan were drinking with the unauthorized driver, Brutout, in the kaserne club in Munich, and later rode in the back of the truck to a gasthaus in Dachau, some six to eight miles away. After leaving the gasthaus, they again entered the truck, which failed mechanically on the way back to Munich. They were found at the scene with the other two accused. In substance, their explanation of their presence in the truck was that they believed it to be the pass truck because it was originally parked where only the pass truck was supposed to be and left this place about the time the pass truck usually left. They denied knowledge that the truck was going to Munich. Turner testified that Brutout told him he had permission to take the truck and that Brutout had driven the pass truck, which had no regular driver. Tyree in effect denied preconcert with the other accused with respect to taking the truck. Gonnelli testified that it was not unusual for the driver to leave the pass truck.

The explanation by Turner, Gonnelli and Tyree of their presence in the truck driven without authority is not improbable nor is it controverted by, or inconsistent with, the prosecution's evidence. Moreover, the explanation is corroborated in a measure by the evidence that the truck, after stopping at the gate, was apparently cleared by the sentry.

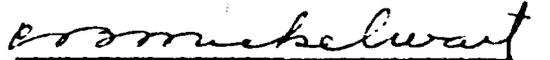
It is well settled that evidence of the mere presence of a passenger in a vehicle driven by another without authority is insufficient to support a conviction of the passenger of the wrongful taking and use of the vehicle as an aider and abettor (CM 334978, *Canta et al*, 1 BR-JC 387; CM 312356, *Preater et al*, 62 BR 135, 140-142; *People v. Zervas* (D.C. App. Cal., 1943), 142 P. 2d 946). The evidence is not convincing that these accused were engaged in a joint unlawful enterprise (Cf CM 234964, *Furtado*, 21 BR 217, where there was other evidence of concerted illegal action besides presence in the stolen vehicle). In the opinion of the Judicial Council, upon the whole record, there is substantial doubt whether any of these three accused aided, abetted, counseled, commanded, induced or procured Brutout to take and use the vehicle without authority. The Judicial Council therefore concurs with the Board of Review in its holding that the record of trial is legally insufficient to support the findings of guilty and the sentences as to the accused Turner, Gonnelli and Tyree.

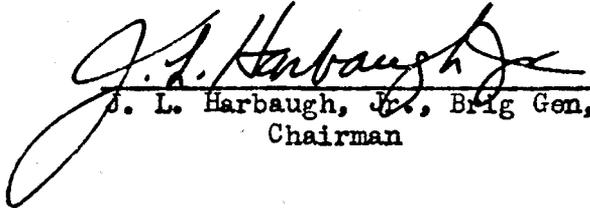
With respect to Meehan, the evidence shows that he sat on the front seat of the truck next to Brutout, the unauthorized driver, whom he knew by name. Meehan heard Brutout tell the sentry at the gate that his name was "Plack." This false identification, under the circumstances, was ample notice to Meehan that Brutout had no authority to drive the truck, yet Meehan remained silent and acquiesced in its continued unauthorized operation. Meehan made

no claim that he believed Brutout had authority to drive the truck. In the opinion of the Judicial Council, Meehan's knowledge of and acquiescence in the unauthorized taking and using of the vehicle constituted him an aider and abettor therein (See CM 321915, McCarson, 71 BR 411, 416, and authorities there cited: CM 310421, Smith, 23 BR (ETO) 193, 198, 61 BR 287; People v. Collins (1922), 234 N.Y. 355, 137 N.E. 753). This conclusion is not altered by the fact, assuming it to be such, that Meehan was unaware that Brutout lacked authority to drive the truck up to the time of his false identification. In law, the unlawful taking and use amounted to a new unlawful taking and use every moment it was continued (See CM 332232, Lillard and Anderson, 81 BR 53, 61-62). Meehan aided and abetted in its continuation from the time the truck left the gate. The Judicial Council is, therefore, unable to concur with the Board of Review in its holding that the record of trial is legally insufficient to support the findings of guilty and the sentence as to the accused Meehan.

6. For the reasons stated, the Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentences as to the accused Brutout and Meehan, and legally insufficient to support the findings of guilty and the sentences as to the accused Turner, Gonnelli and Tyree. The findings of guilty and the sentences as to the accused Turner, Gonnelli and Tyree should, therefore, be vacated.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

(118)

JAGE CM 340608

1st Ind

JAGO, SS, USA, Washington 25, D. C. 28 APR 1950

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

In the foregoing case of Private Duane G. Brutout (RA 13287943), Private Earl V. Turner (RA 19339100), Private First Class Joseph V. Gonnelli (RA 12303043), Private First Class George A. Tyree (RA 35758941), all of Headquarters Company, 73d Armored Ordnance Maintenance Battalion, and Private James L. Meehan (RA 11182003), 40th Ordnance Depot Company, The Judge Advocate General has not concurred in that portion of the holding by the Board of Review which holds that the record of trial is legally insufficient to support the findings of guilty and the sentences as to accused Turner, Gonnelli, Tyree, and Meehan. Pursuant to Article of War 50e (4) the holding and record of trial are accordingly transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.

FOR THE JUDGE ADVOCATE GENERAL:



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

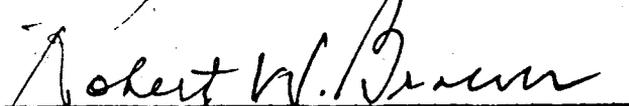
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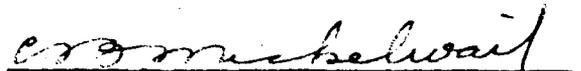
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

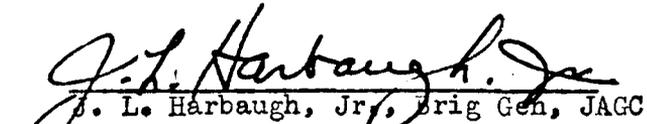
THE JUDICIAL COUNCIL

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

In the foregoing case of Private Duane G. Brutout, RA 13287943, Private Earl V. Turner, RA 19339100, Private First Class Joseph V. Gonnelli, RA 12303043, Private First Class George A. Tyree, RA 36753941, all of Headquarters Company, 73d Armored Ordnance Maintenance Battalion, and Private James L. Meehan, RA 11182003, 40th Ordnance Depot Company, upon the concurrence of The Judge Advocate General, the findings of guilty and the sentences as to the accused Turner, Gonnelli and Tyree are vacated, and all rights, privileges and property of which the accused Turner, Gonnelli and Tyree have been deprived by virtue of the findings of guilty and the sentences so vacated will be restored. Upon the concurrence of The Judge Advocate General, the sentences as to the accused Brutout and Meehan are confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement of the accused Brutout and Meehan.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

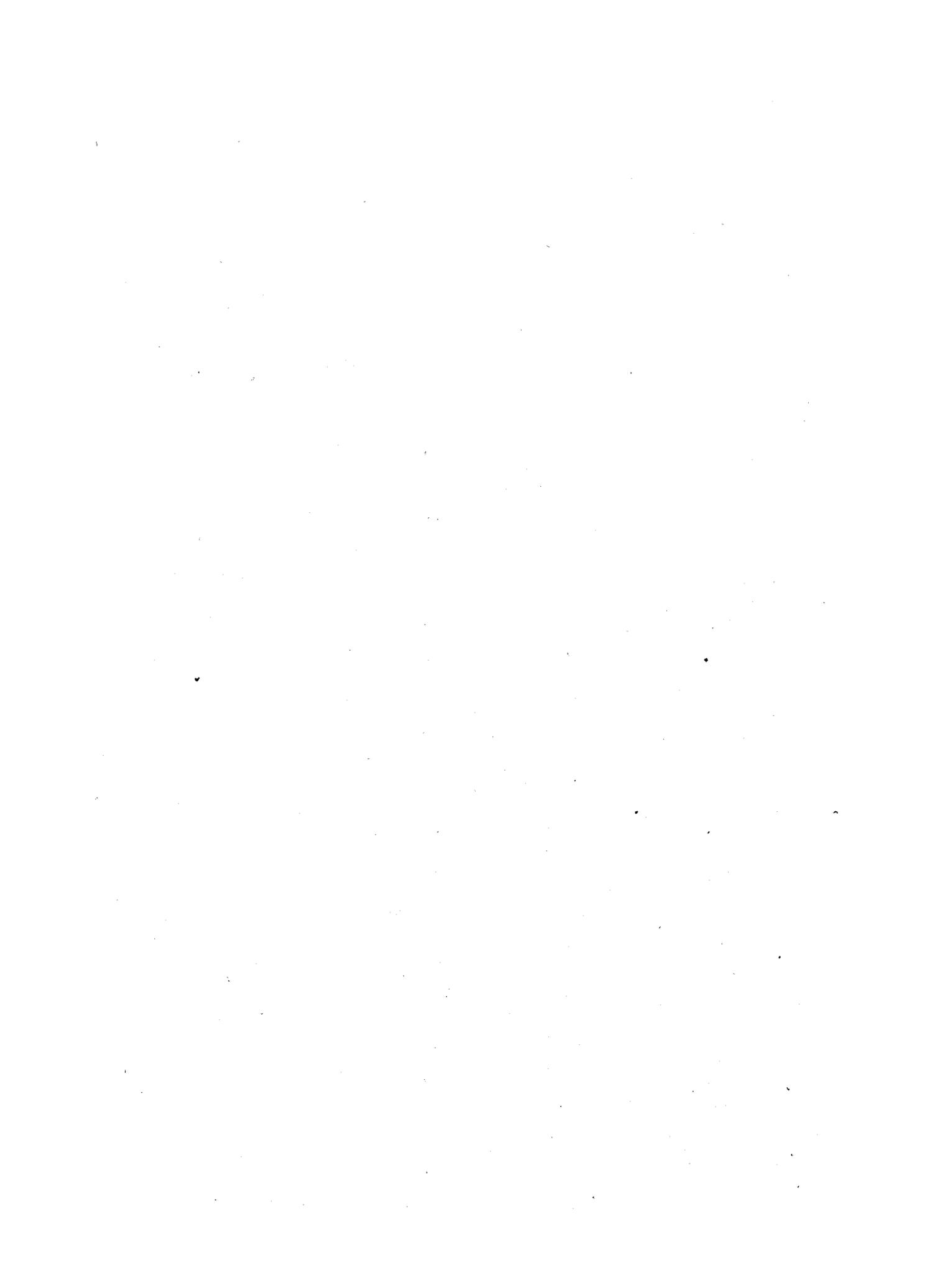
17 May 1950

I concur in the foregoing action.


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

17 May 1950

(GCMO 37, May 25, 1950).



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

(151)

CSJAGH CM 340618

MAR 31 1950

U N I T E D S T A T E S	)	1ST CAVALRY DIVISION (INFANTRY)
)	
v.	)	Trial by G.C.M., convened at
	)	Camp Drew, Koizumi, Japan, 25,
First Lieutenant HERBERT W.	)	26 January 1950. Dismissal.
WILSON (O-1798225), Head-)	
quarters Company, 1st Cavalry)	
Division (Infantry), APO 201.)	

OPINION of the BOARD OF REVIEW
HILL, BARKIN, and CHURCHWELL
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 Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that 1st Lieutenant Herbert W Wilson, Headquarters Company, 1st Cavalry Division (Infantry) then Provost Marshal, 1st Cavalry Division Artillery, did at or near Tatebayashi, Japan, on or about 16 September 1949, wrongfully and knowingly dispose of one gasoline motor vehicle engine, property of the United States, of a value of over \$50.00 by causing it to be delivered to agents of the Rural Police of Japan.

Specification 3: In that 1st Lieutenant Herbert W Wilson, Headquarters Company, 1st Cavalry Division (Infantry) then Provost Marshal, 1st Cavalry Division Artillery, being then and there a married man, having a lawful wife living, did, at or near Kiryu, Honshu Island, Japan, on or about the month of August 1949, wrongfully, dishonorably and unlawfully have sexual intercourse with one Hisano Shinohara, a woman not his wife.

Specification 4: In that 1st Lieutenant Herbert W. Wilson, Headquarters Company, 1st Cavalry Division (Infantry), then Provost Marshal, 1st Cavalry Division Artillery, being then and there a married man, having a lawful wife living, did at or near Tatebayashi Honshu Island, Japan, during the year of 1949, exact date unknown, wrongfully, dishonorably, and unlawfully have sexual relations with one Toshiko Tanaka, a woman not his wife.

Specification 5: In that 1st Lieutenant Herbert W. Wilson, Headquarters Company, 1st Cavalry Division (Infantry), then Provost Marshal, 1st Cavalry Division Artillery, being then and there a married man, having a lawful wife living, did, at or near Ota Honshu Island Japan on or about 14 February 1949, wrongfully dishonorably and unlawfully have sexual relations with one Tori Tobei, alias Sumizo, a woman not his wife.

Specifications 6,7: (Findings of not guilty).

Specification 8: In that 1st Lieutenant Herbert W. Wilson, Headquarters Company, 1st Cavalry Division (Infantry), then Provost Marshal, 1st Cavalry Division Artillery, did, at or near Camp Drew, Honshu Island, Japan on or about 26 June 1949, wrongfully and contrary to the laws of war fail to prevent military subordinates assigned to him from unlawfully assaulting and beating Rokutaro Sunaga and Shigeo Sunaga, Japanese Nationals, but instead permitted and solicited members of his command to wrongfully beat and assault the said nationals of a country occupied by the armed forces of the United States.

The accused pleaded not guilty to the Charge and its Specifications. He was found guilty of the Charge and Specifications 2, 3, 4 and 5 thereunder, and not guilty of Specifications 1, 6 and 7. He was found guilty of Specification 8 of the Charge, except the words "assigned to him" and the words "and Shigeo Sunaga, Japanese Nationals, but instead permitted and solicited members of his command to wrongfully beat and assault the said nationals," substituting for the latter exception the words "a Japanese National." No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

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

The accused was provost marshal of the 1st Cavalry Division Artillery, Camp Drew, Japan, during the times mentioned in the specifications (R 9).

The accused frequently visited with the Chief of the Japanese National Rural Police at Tatebayashi, Japan (R 32,57,71). About 16 September 1949 they discussed a defective engine in a three-quarter ton American type truck which had been released by the United States Government to the Japanese Government, and had been acquired by the police through the Prefecture Government (R 56,57). The accused was eager to help the police, who usually had their trucks repaired at Japanese garages as there was no authority to secure repairs by United States Government agencies (R 58,62). He contacted Lieutenant Bliss, the commanding officer of the United States Army Ordnance Detachment at Camp Conwell, Ojima, Japan, which maintained several service shops, and asked him if he could get a new engine to help out some Japanese friends (R 45,63,64,66). The commanding officer asked if he could help him out in any other way, and told him that he would be glad to look at the defective engine but that a new engine was definitely out of the question (R 64,69). Under the oral directions of the accused in the presence of Corporal Montez of the 27th Ordnance at Camp Conwell, Corporal Hunter, a mechanic at the Military Police Detachment at Camp Drew, told the Japanese police to remove the defective engine by the following morning. The next morning Corporal Hunter picked up the engine, delivered it to the 27th Ordnance Shop and there picked up another engine. Corporal Montez was at the Ordnance shop while a Japanese boy unloaded the defective engine and put a "new crated" United States Government engine on the truck (R 43-46,50,51,54,55,59-61,65). Upon returning to Camp Drew, Corporal Hunter parked the vehicle in front of the Military Police Headquarters and went to the mess hall to eat. The accused directed Corporal Hunter to take the engine "off the post before somebody sees it, from headquarters" and to take it to Tatebayashi, which he did (R 46,47,53,54). There it was uncrated and seen to be a three-quarter ton Dodge engine with a twelve volt electric system (R 47). It had a value of \$301.41 (R 65). This engine was used to replace the defective engine in the police truck (R 48,56,71,72). The commanding officer of the Ordnance Detachment learned of the engine exchange a few days later (R 67). Although the provost marshal was attempting to get the engine back it had not been returned at the time of the trial in January 1950 (R 70).

During the times covered by the specifications the accused was married to Mary Louise Wilson of Jenkintown, Pennsylvania (R 9). During August 1949, he had dinner at the Komatsuma Restaurant in Kiryu, Japan, with Hisano Shinohara, a thirty-two year old female dentist, who had "sexual relationship" with him there and upon two other occasions (R 9-13).

A maid at the Daigo Hotel, Tatebayashi, Japan, first met the accused when he attended a party at the hotel in April 1949. In August 1949 she

saw the accused and Toshiko Tanaka, a geisha girl, having meals together. She saw them "in bed" together with "covers over them" about ten p.m. No one else was present in the room. A pair of United States Army uniform pants were in the corner, and a cap, raincoat and pair of shoes were seen in the room. The next morning the maid also saw the accused and the girl in the garden in front of the room (R 14-19).

One evening about the middle of February 1949, the accused went to a party attended by several people at the Onoya Hotel and Restaurant, Ota, Japan. There he met Tori Tobei, a geisha girl called Sumizo. Later that evening he and the girl went to another room and "slept together." She had "sexual relations with the accused that night" (R 19,28,30,35).

Corporal Barbour was a member of the Military Police Detachment at Camp Drew (R 73). Corporal Watanabe was a military policeman and the interpreter (R 111,132,142). Private First Class Gibson was motor non-commissioned officer of the Military Police Detachment during June and July 1949 under the command of the accused (R 107,108). About 26 June 1949 the accused ordered them to take certain Japanese nationals, including Rokutaro Sunaga, who were accused of black marketing, to building number 9 "and get a statement out of them" (confessions) . . . "irregardless of how;" "beat them;" "just don't leave any bruises on them;" "just don't bruise them up too bad" (R 109,116,119,120,125,137, 139,140,141,143). In pursuance of this "direct order" the Japanese were slapped and beaten, each for a one or two hour period. They were beaten by fist on the face and body. They were beaten on their stomachs with towels wet with hot water. Although the accused did not see the beatings he entered building number 9 at one time when one Japanese was stripped to the waist. This Japanese had red spots where he had been hit. The accused "said not to bruise him up so you could notice it too much" but to use force (R 110,111,114-120,140,143). The Japanese screamed "a little bit" (R 120). They were bruised and bleeding (R 118, 119). Rokutaro Sunago was 48 years of age (R 125). Watanabe hit him with his fist on the face and in the stomach for about a half hour. He could not eat for about a week because his "stomach was very painful" (R 127,128,130). He fixed the date of the beating as the 25th and stated he was slapped on both sides of the face and hit in the stomach about four times (R 130). At that time Japan was occupied by the Armed Forces of the United States (R 124). The court took judicial notice of Paragraph 9 G (1), FM 27-5, United States Army and Navy Manual of Military Government and Civil Affairs, 22 December 1943, and Paragraphs 328, 347, and 357, FM 27-10, War Department Basic Field Manual, Rules of Land Warfare, 1 October 1940, relating to offenses against the laws of war (R 144).

b. For the defense.

The accused after being warned of his rights as a witness elected to take the stand and testify under oath (R 151,152). The chief of

police at Ota told him that the engine in "the 3/4 ton truck was broken down, and that it probably needed a new connecting rod." He wanted to help the police at Tatebayashi keep their vehicle in running condition as it was needed to carry prisoners. These police were investigating a money changing activity operated by "a large ring" which was "broken up." He felt it was his responsibility to get the engine fixed. The accused spoke to Corporal Hunter, his motor sergeant, who said he would "try and see what he could do about it." Thereupon Corporal Hunter contacted Corporal Montez "at ordnance" who explained to the accused that "nothing could be done about the engine" (R 153,154,164). Accused called Lieutenant Bliss who told him that the engine could not be exchanged, but to bring over the engine, without the truck, to "look at." Lieutenant Bliss said nothing would be noticed about it, even if it were a little "out of line." The accused directed Corporal Hunter, "If you will take the engine over to Lieutenant Bliss, he will see what he can do about it. Get it from the Tatebayashi police, and take it over there, because he said he'll look at it." Corporal Montez told Corporal Hunter to take the engine to the engine section and that "they would see what they could do about fixing it or replacing it." When Corporal Hunter brought a green box marked "engine" to the military police headquarters, the accused, realizing that Lieutenant Bliss said it was impossible to trade an old engine for a new one, was "pretty sore" and told Corporal Hunter "Get that thing to hell out of here; don't you know any better than that?", thinking that he would take the engine back to "where he got it." The next day Corporal Hunter stated to the accused that "he had taken the engine over to the Tatebayashi police, and it was in their weapons carrier." Accused was "sorer than hell." He knew it was wrong, but it was already installed. He "made a mistake, insofar as the new engine going into the vehicle." He realized that Corporal Hunter took the engine over as the result of his instructions, but that he should have brought it back as the result of his instructions, too. (R 154,155; Def Ex A). He further testified:

"I told Corporal Hunter to go over to ordnance, tell them if they could possibly do it, to get that engine fixed up and we would take it back over there to the police. The reason I did that is because I knew that the police department at Tatebayashi was one of the best departments we had working under me, and I knew I could get the engine back from them. That is the reason I told Hunter to get the engine fixed up, if he could, and we would replace it and bring back the new one where it belonged." (R 156)

The accused wanted to keep the police vehicle in operation. He actually saw the new engine in the truck. He told Corporal Hunter to get it back. He never had any intention of giving the police that engine. He did not report it to Lieutenant Bliss or anyone in headquarters; he "knew it was wrong" and he "wanted to get it back." He knew that Corporal Hunter had not taken the engine back but knew that he, the accused,

could "get it back" if given enough time. He received no money or anything else for the transaction (R 156,163,164,165). The Japanese police gave one or two parties subsequent to the time they got the engine (R 162). The accused was accustomed to giving orders to the Japanese police (R 162). On cross-examination the accused admitted he "lied to this court" about a matter related to Specification 6 of which he was acquitted (R 159).

Corporal Barbour and accused had been good friends up to the time of the investigation in the case (R 159,160).

The accused conducted himself as an officer and a gentleman at parties and social gatherings, and "at all times." He appeared to be "an honorable character" and trustworthy (R 148-151).

4. Discussion.

From the evidence adduced in support of the allegations of Specification 2 of the Charge, the court was justified in finding that the accused wrongfully disposed of government property under Article of War 96. Although the accused testified that from the instructions he gave Corporal Hunter, he thought the corporal would take the engine back to where he got it, he further testified that he realized the corporal had taken the engine over to the Japanese police as the result of his instructions. From all of the events and circumstances surrounding this transaction, the court was justified in concluding that the corporal carried out the orders and intentions of the accused.

Specifications 3, 4 and 5 purport to allege adultery. Although the form suggested in Appendix 4 (117) MCM 1949, at page 327, is followed in Specification 3, which alleges "sexual intercourse," the term "sexual relations" is used in Specifications 4 and 5. The proof offered in support of Specifications 3 and 5 mentions "sexual relations" and "sexual relationship." However, these terms as used herein are regarded as synonymous insofar as sexual connection is concerned (See CM 329522, Love, 78 BR 93,94). The proof with respect to Specification 4 is circumstantial in nature. The hotel maid observed the accused and his girl companion having meals together, and in bed together at night with covers over them while essential pieces of his clothing were about the room. The next morning she saw the accused and the girl in the garden in front of the room. From these circumstances the act of sexual intercourse may be inferred. "The act of sexual intercourse may be inferred from the man and woman occupying the same bed and room, occupying the same room, being seen together in bed, or being found partially disrobed in the same room" (2 C.J.S., page 492) (See CM 317541, Kochenour, 66 BR 375). The other elements of the offense were adequately proved.

Under Specification 8 the accused was found guilty of wrongfully and contrary to the laws of war failing to prevent military subordinates from unlawfully assaulting and beating a Japanese national of a country occupied by the Armed Forces of the United States. It has been held that the wrongful failure to stop the unlawful treatment of an individual by another constitutes a violation of the 96th Article of War (CM 255436, Reed, 36 BR 93). Furthermore, the "ill-treatment of habitants in occupied territory" is denounced as an offense in violation of the laws of war (FM 27-10, Basic Field Manual, Rules of Land Warfare, Section 347).

"* * * general courts-martial have concurrent jurisdiction with military commissions to try persons subject to military law for violations of the laws of war. The fact that all violations of the laws of war are not specifically enumerated in the punitive articles does not deprive courts-martial of such jurisdiction. Persons subject to military law may be tried under Article of War 96 for violations of the laws of war, either as (a) disorders and neglects to the prejudice of good order and discipline, (b) conduct of a nature to bring discredit upon the military service, or (c) crimes and offenses not capital." (CM 318380, Yabusaki, 67 BR 265,271) (See also CM 337089, Aikins-Seevers).

The proof offered in support of this specification clearly indicates that the accused intended that physical force be used, that he gave orders indicating that it be used, that he knew the victims, including the one mentioned in the finding, were being unlawfully beaten, and that he did nothing to stop it. The evidence is sufficient to support the finding of guilty.

It is noted that the rank of the President of the Court appears as colonel in the orders appointing the detail for the Court. Consultation with the office of The Adjutant General indicates that the rank of this officer was colonel on the date of the orders referred to and at the time of adjournment of the Court upon completion of the trial. It is considered that the rank of lieutenant colonel appearing under the signature of the President of the Court in authenticating the record is harmless error.

5. Department of the Army records show that the accused is 45 years of age and married. The Staff Judge Advocate stated that the accused has one child; however, the records do not so indicate. He was graduated from high school at Ocean City, New Jersey, in 1922, and in civilian life was employed as a motorcycle patrolman and salesman. He served as an enlisted man in the Pennsylvania National Guard from 11 August 1922 until 2 November 1923 and from 31 July 1925 until 30 July 1928. Accused enlisted in the Army of the United States on 15 October

1942 and served in that status until 2 July 1943 when he was commissioned a second lieutenant, Army of the United States after graduation from the Provost Marshal General's Officer Candidate School. He was promoted to first lieutenant, Army of the United States, on 26 January 1945, and was relieved from active duty effective 7 June 1946. He was recalled to extended active duty 20 November 1948. He had no overseas service during hostilities. He is authorized to wear the Army Commendation Ribbon, the Victory Medal and American Campaign Medal. His efficiency ratings include two ratings of very satisfactory, eleven ratings of excellent, and one rating of superior. His last two over-all numerical efficiency ratings were 093 and 064, respectively.

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

C. P. Hill

, J.A.G.C.

Lucas Basin

, J.A.G.C.

William H. Chantwell

, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

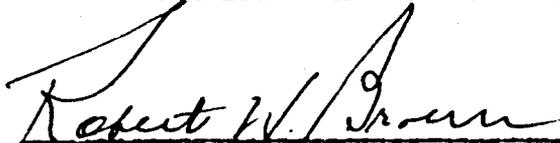
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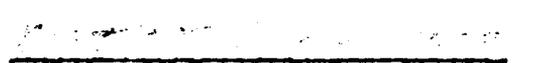
CM 210,618

THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant
Herbert W. Wilson, O-1798225, Headquarters Company,
1st Cavalry Division (Infantry), APO 201, upon the
concurrence of The Judge Advocate General the sentence
is confirmed and will be carried into execution.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

25 April 1950

I concur in the foregoing action.



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

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

(161)

CSJAGX - CM 340628

30 MAR 1950

UNITED STATES)

v.)

Recruit JAMES JOHN DIAMOND)
(RA 32700356), Supply Company,)
Headquarters and Service Group,)
GHQ, FEC, APO 500)

HEADQUARTERS AND SERVICE GROUP
GENERAL HEADQUARTERS, FAR EAST COMMAND

Trial by G.C.M., convened at Tokyo, Japan,
3, 6 and 7 February 1950. Dishonorable
discharge, total forfeitures after pro-
mulgation, and confinement for life. A
Federal Institution.

OPINION of the BOARD OF REVIEW

McAFEE, WOLF and BRACK

Officers of The Judge Advocate General's Corps

1. The record of trial in the case of the 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 92nd Article of War.

Specification: In that Recruit James John Diamond, Supply Company, Headquarters and Service Group, General Headquarters, Far East Command, did, at Tokyo, Japan on or about 26 November 1949 with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill Taeko Goto, alias "Midori", a human being by shooting her with a revolver.

He pleaded guilty to the charge and guilty to the specification except for the words "and with premeditation." He was found guilty of the charge and specification. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at such place as the proper authority might direct for the term of his natural life. The reviewing authority approved the sentence and designated a penitentiary, reformatory, or other such institution as the place of confinement and directed that the prisoner be committed to the custody of the Attorney General or his designated representative for classification, treatment and service of sentence of this confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50e.

3. Evidence for the Prosecution

About 0640 hours on the morning of 26 November 1949 Eiichi Sugiyama left his home in Tokyo, Japan, and started to his place of work. While proceeding along a thoroughfare he saw the naked body of a dead woman, face down in a ditch. He went about 200 meters to a "police box" and called the police. When the police arrived he showed them the body (R 81,82).

On 26 November 1949 Yasunobu Nabeshima was on duty at the Azabu Police Station. About 0730 hours he received a telephone call and was informed that "there was a woman dead near Kasumi-cho." He was to report there immediately. Yasunobu Nabeshima and Police Sergeant Sugiyama, who was also present for duty, proceeded to the reported location of the body where Nabeshima observed "There was a corpse of a woman - there was a dead woman that I first noticed and her face and her legs were in the ditch and there was some dirt on her back and there was a wound in the back of her head." Nabeshima reported the circumstances to the Identification Section and other "various police sergeants" of the Metropolitan Police Bureau. The wounds on the body were described as being:

"As to this wound, as stated before, right by the nape of her neck, right below the base of her skull, there was a sort of a laceration which was four to seven centimeters in length. As to that length, I am not too sure. However, it was criss-crossed and four or five scratches were on the neck. In the hole in the center there was some coagulated blood. There was no evidence it was bleeding so much it was all over her neck. That was about all" (R 84).

The body was found:

"Well, the spot where I found this body was like this: On one side there were vegetable gardens and it was sort of like an open field. On the other side was a house which was under construction. The body was in a ditch right by this house. On the other side of this house there is a road and going further down there are two or three houses down there" (R 85).

A policeman by the name of Watanabe took the fingerprints from each hand of the corpse (R 82-85).

Kiyoji Watanabe, a Japanese policeman residing in Tokyo, Japan, reported for duty at the Azabu Police Station about 0830 hours on 26 November 1949. He was ordered to report at Azabu, Kasumi-cho, where an incident had occurred. Upon his arrival at the designated place he saw the corpse of a naked woman in a ditch. With the assistance of one

of his subordinates named Nabeshima he took finger prints from the body in an effort to identify the deceased. The following day he took the finger prints to the Metropolitan Police Bureau and assisted Police Sergeant Mochida in comparing them with other finger prints on file in that office. The body of the deceased was taken to Keio University and turned over to Doctor Minagawa (R 87-89).

Tokusaburo Mochida, a sergeant in the Metropolitan Police Bureau of Tokyo, Japan, was chief of the Comparison Section of the Tokyo Police Bureau. During 1946 and 1947 all prostitutes residing in Tokyo were fingerprinted by the police. These finger prints were retained in the Comparison Section of the Tokyo Police Bureau. On 27 November 1949 a police officer named Watanabe brought a set of finger prints to the Comparison Section. He compared the finger prints, brought to him by Watanabe, with the finger prints of the prostitutes on file in his office and determined that the finger prints brought in by Watanabe were the finger prints of Taeko Goto.

All deaths, except those resulting from natural causes, which occur in the Tokyo Area, are required to be reported to the Metropolitan Police Bureau. In the regular course of police business the Bureau keeps a record of all such reported deaths. The police records for 25-26 November 1949 show that the deaths of three female Japanese were reported. One such reported death was that of Taeko Goto. Another report was the death of a six-year old child on 25 November 1949. The third death was that of a beggar, of about 25 years of age, in Ueno Park. The cause of her death was malnutrition (R 90-92).

Walter L. Foster, an agent of the "20th CID," talked to the accused several times between 30 November 1949 and 5 December 1949. The accused was warned of his rights on 30 November, 4 December, and 5 December 1949. On 4 December 1949 the accused made a written statement after which he told Captain Clark "that he would like to see him the next day, that he wouldn't waste his time." On 5 December the accused was called into the office and after being warned of his rights he made a statement in writing to Captain Clark and Agent Foster. There were no threats, duress, promises or undue influence used in obtaining statements from the accused. The statement made on 5 December 1949 was introduced as Prosecution Exhibit No. 1 without objection by the defense (R 97,98). This statement reads in pertinent part:

"Q: Give us a detailed summary of your actions from 1500 Hrs on the night of 25 November 1949.

"A: At approximately 1500 hrs I returned to the Finance Building and went to sleep, until approximately 1600. At approximately 1630 I went to the Honor Guard Company Orderly Room in order to receive a Summary Court Martial. I left the

Orderly Room at approximately 1730 and reported to Supply Company Orderly Room where I picked up a 45 automatic and reported to S-4 Office at Takashima Pier. I advised the Sgt of the Guard that I had been reduced to a Private and he relieved me from guard duty. I then returned to the Supply Company Orderly Room and turned in my weapon. I then left the Finance Building and went to Bob Miller's house at Hamamacho. At about 1900 hrs Pvt Barlow, Smith and myself met with three Japanese girls whom we dropped off at a Japanese restaurant. Barlow, Smith and I went to the GHQ Enlisted Mens Club at approximately 1930 hrs and stayed there until approximately 2130 hrs. We returned to the Japanese restaurant and picked up the girls and returned to Hamamacho. I then left the area by myself and drove to either Yurakucho or Shimbashi station where I persuaded the station girl to enter my car. I then drove to a secluded spot in the vicinity of the Finance Building. We smoked a cigarette and talked for a few minutes. At this time I had my pistol in the belt of my pants. I removed it with my right hand and put it behind the front seat. I then cocked it and it discharged accidentally, frightening the girl. I told her that it was a flat tire on another car passing by. I then cocked the pistol again and placed it near the back of her head. I pulled the trigger and she fell against the side of the car. I then placed the pistol in the glove compartment and returned again to Miller's house. I entered the house and advised him of what had happened. He thought I was joking and went outside to verify my statement. Upon his returning I asked him to assist me in disposing of the body. He dressed hurriedly, and we left his house together. I drove, upon his instruction, to Shiba Park. It seemed unsuitable for our purpose, and I drove somewhere in the vicinity of Washington Heights. It was now well after 2300 hrs and I feared that we might be on the streets after curfew and be stopped by the MP's. I chose a side road and disposed of the body by a house which was in the process of construction. Before disposing of the body, I removed all the clothing and attempted to locate the bullet. I was unsuccessful in locating it. I asked Bob to drive the car at this time and seek a suitable spot for disposing of the clothing. He located such a spot and I took all the clothing from the car. We drove a short distance and Bob stopped the car again and suggested that I throw the pistol away. I handed it to him and asked him to throw it in the canal near where we were parked. He did this and then drove back to his house. He and I spent the remainder of the night there. At approximately 0600 hours the following morning I returned to the Finance Building.

"Q: How many times did you shoot the gun?

"A: The first shot was accidental behind the front seat and the second shot was intentional.

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"Q: Did you and Bob wash your hands in the sink in Bob's house?

"A: Yes, we did.

"Q: What were the circumstances of the hands washing?

"A: I had cut my finger and had a quantity of blood on my hand.

"Q: How did you cut your finger?

"A: I cut my finger while attempting to remove the bullet from the girl's neck with a pen knife. The cut is on the right index finger of my hand approximately $\frac{1}{2}$ " long. (Pvt Diamond indicated the cut by pointing to it with his finger.)

"Q: How did you try to recover the bullet from the girl's neck?

"A: By cutting her neck in the immediate vicinity of where the bullet had entered and forcing the flesh apart with the blade of the knife.

"Q: Was the bullet lodged in the vertebrae?

"A: I did not see the bullet.

"Q: Did you use a knife to attempt to recover the bullet?

"A: Yes, sir.

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"Q: Did you cut the clothes from the girl?

"A: Part of them.

"Q: How did you remove the balance of the clothes?

"A: The upper garments I removed over her head and the skirt down over her legs.

"Q: Was the girl wearing a coat?

"A: A suit coat.

"Q: Can you describe the suit coat or how she was dressed?

"A: As I remember, it appeared to be gray. I believe the skirt matched the jacket.

"Q: Was she wearing a coat?

"A: I don't remember her wearing a coat.

"Q: Could you describe her shoes?

"A: They were green suede high heeled pumps.

"Q: Do you remember where you threw the clothes into the canal?

"A: Partly into the canal and partly along the bank.

"Q: Did you scatter the clothing?

"A: No, they were thrown from one spot.

"Q: How close was this to the spot where Bob threw the gun?

"A: Approximately 30 yards.

"Q: Approximately 30 yards in the direction you were driving?

"A: Yes sir.

"Q: Do you own a gun?

"A: Yes sir.

"Q: Will you describe the kind of gun you own?

"A: It a Smith and Wesson 22 Cal. target pistol. I don't know the serial number.

"Q: Is it a revolver?

"A: Yes, instead of a pistol.

"Q: How long have you had this gun?

"A: About 8 or 9 months.

"Q: That gun was registered at the Office of the Provost Marshal, MTA?

"A: Yes sir.

"Q: Where did you normally keep the gun stored?

"A: In the company supply room.

* * *

"Q: Why did you shoot the girl?

"A: I don't know.

"Q: When parked near the Finance Building in the secluded spot you mentioned before, did you make any sexual advances toward her?

"A: None whatsoever.

"Q: Did she desire to be let out from the car so she could go her own way?

"A: No, she made no attempt to leave the vehicle.

* * *

"Q: Did you know the girl that you killed?

"A: No sir.

"Q: Had you ever seen her before?

"A: No sir.

"Q: Do you know of any reason why you should kill her?

"A: I had no reason to kill her.

"Q: Do you own an automobile?

"A: Yes sir.

"Q: Will you describe the automobile.

"A: It is a 1941 Nash coupe, black, license number 1A4919.

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"Q: Did you own a flashlight?

"A: Yes sir - two of them.

"Q: Will you describe them?

"A: One is a 3 cell Japanese flashlight silver coated with a variable focus and the other a 2 cell army flashlight - a TL, OD color.

"Q: Which light was used to enable you to attempt to remove the bullet?

"A: The Japanese.

"Q: Did Miller hold the light for you?

"A: Yes sir."

Agent Foster recovered a 22 caliber Smith and Wesson target pistol from a canal at a place indicated by the accused. This pistol was registered in the Provost Marshal's Office as the property of the accused (R 98,99).

4. For the Defense

The accused was warned of his rights as a witness and elected to remain silent (R 101-102).

5. By the Court

The court directed that further evidence be adduced.

It was stipulated that if Dr. Mamoru Minakawa were present that he would testify in accordance with his autopsy report which is as follows:

"AUTOPSY REPORT on Taeko GOTO, Age 28 Female
Dated 6 December 1949 Reported by Mamoru Minakawa at the
Medical Jurisprudence Room of the Keio University.
On 1510 hrs 26 Nov 1949 we carried out autopsy on the
body of Taeko GOTO and report the result as follows:

- "1. On the location of the wounds:
 - a. One contusion of about a thumb tip size on the curve of the right cheek bone.
 - b. One cut of about 8.5 CM in length and as deep reaching the muscular tissue, on almost the center of the nape.
 - c. One cut about 8.6 CM long and reaching the muscular tissue, crossing the 'B' cut.
 - d. One cut about 4.0 CM in length and reaching the subcutaneous tissue, in pararel to the 'o' cut.
 - e. One cut about 4.0 CM in length and reaching the skin tissue, in paraell to the 'o' cut.
 - f. One cut about 2.0 CM in length and reaching the skin tissue, crossing the 'e' cut.
 - g. On about the center of the hollow of the 'o' wound, there is a wound of about 3.0 CM in diameter in length and about 1.0 CM in width. This hollow is headed toward front, breaking the second neck cord. (The second neck cord, and the left half of the arcus vetebre in about thumb tip size, are destroyed, with a small piece of bone separated. This hollow, reaching the spinal cord cavity, destroying the pars cervicalis, penetrating the upper end of the left tonsils, then reaches the left side of the hyoid radix. The size of the wound of the upper end of the left tonsils and the hyoid radix is of about a small bean size, while the depth of the hollow on the hyoid radix is about 1.0 CM. The depth from the nape skin to the hyoid radix is about 9.0 CM.
 - h. One cut of about 1.5 CM in length reaching the subcutaneous tissue, crossing the 'b' wound.
 - i. One contusion of about a small finger tip size on the left front arm.

- j. One abrasion in line shape on the left front arm. Among the above 10 wounds, 'g' is the fatal wound which caused the lesion of the pars cervicalis.
- "2. The series of article used for injury: The cuts which are pronounced on the nape are caused with a blade. However, pertaining to the wound which is explained in the 'G' it is hard to tell, with what series of article the wound was caused, because the edges of the wound are extremely changed.
- "3. Whether or not the body had sexual intercourse. 4. Since no spermatozoon exists in the vagine of this body, we cannot prove the fact of sexual intercourse.
- "5. Cause of death: The cause is due to the lesion of the pars cervicalis.
- "6. Time elapsed after death: It is presumed that about 15 hrs has elapsed after the death. (On 1500 hrs 26 Nov 1949).
- "7. The blood group of this body is of the 'O' group." (R 103-104)

Private William Barlow, Supply Company, Headquarters and Service Group, testified that he worked with the accused and that on 25 November 1949 he left the Finance Building with the accused. During the evening they went to the "EM" club and drank 8 or 10 double shots of liquor. They left the club at approximately 9:30 p.m. and went to a Japanese restaurant where they met two Japanese girls, after which they proceeded to a house occupied by a soldier named Bob Miller. They were riding in an automobile and the accused asked if his pistol was in the back seat. Private Barlow located a 22 caliber target pistol in the back seat and passed it to the accused. The accused did not give any reason for wanting the pistol. Private Barlow left Miller's house and went to a beer tavern where he remained until about 11:15 p.m. He saw the accused the next morning, at which time he (accused) had a hangover. Referring to the sobriety of the accused during the evening of 25 November 1949, Private Barlow testified:

"I don't believe he was totally drunk. He was perhaps in the same condition I was. I was under the influence myself, but I wasn't drunk" (R 106).

The accused is hot-tempered and moody (R 105-116).

Fuku Miyazawa testified that she had been with the accused nearly every night for about a month prior to 25 November 1949. During the evening of 25 November 1949 she rode with the accused and others to

"Millers place." The accused was drunk. He drove in a reckless manner and at one intersection he almost hit a street car. She saw a pistol in accused's possession on that occasion. They arrived at the house about 10:30 p.m., at which time the accused left without saying anything and she assumed that he had gone to his organization. The accused returned about midnight and talked to Miller. The accused and Miller left the house together and remained away about half an hour. When they returned the accused had a cut on his finger. He stated that he cut his finger on a can he was opening. The accused spent the rest of the night with her. She had had sexual intercourse with the accused during their friendship but on the night of 25 November 1949 they did not have sexual intercourse and the accused did not indicate that he desired sexual intercourse (R 117-127).

6. Mental Condition of Accused

Upon arraignment the accused interposed a plea of insanity. In support of this plea the defense called as witnesses two members of a Board of Officers which had been appointed to inquire into his mental condition. The defense also introduced the deposition of the third member of this Board. From their examination of the accused the Board members, all doctors, came to the conclusion, and each testified, that the accused was not psychotic. In their opinion, the accused has a "marked personality disorder" and was classified as a schizoid personality. The Board further concluded that the accused was able to distinguish right from wrong at the time of the offense and that he was "sufficiently sane to stand trial." They did not reach a definite decision as to whether the accused could adhere to the right at the time of the offense and recommended that the accused be evacuated to a psychiatric center for further evaluation (R 9-24, 37-50; Def Ex A). Captain Silverman, the member of the sanity board who testified by deposition stated:

"Twenty-fourth interrogatory: As a result of your studies did you come to the conclusion that while this man knew the difference between right and wrong, he was unable to adhere to the right, or should I say under particular circumstances?"

"Answer: I did not come to that conclusion. It was the conclusion of the majority of the board. I felt while it was difficult to distinguish between that particular classification in the group of character and behavior disorders in the pathological personality type from schizoid personality and asocial and anti social personality. A doubt was raised in my mind by the observations of the other members who had agreed he represented a schizoid personality and that there was a doubt in their minds at the time whether or not he could adhere to the right. I felt there was sufficient doubt, therefore, to agree with their recommendation that he be evacuated for further study.

"Twenty-fifth interrogatory: As a result of your examination of him can you state whether or not you came to the conclusion that he was sufficiently mentally disordered so that he should not have been tried?

* * *

"Answer: No. The only conclusion we came to was that we felt in the interest of all involved it would be better to have a further period of observation in the Zone of the Interior, inasmuch as the other members had thought he belonged to that rare group of schizoid personalities in whom there may be doubt as to ability to adhere to the right."

And on cross-examination, deponent stated:

"Sixth cross-interrogatory: ***

"Answer: Yes, I agreed with the Sanity Board that he represented a character and behavior disorder of the pathological personality type. I had felt myself that he was rather of the anti social or asocial group, whereas the other members thought he represented the schizoid group more closely and specifically they felt he represented that rare group of schizoid personalities who might have difficulty adhering to the right, though being able to distinguish right from wrong.

"Seventh cross-interrogatory: Tell me just what you mean by a schizoid personality, in layman's language.

"Answer: A schizoid personality, as we discuss it, is defined by the Medical Department of the Army as such individuals who react with unsociability, seclusiveness, serious mindedness, nomadism, and often with eccentricity." (Def Ex A, pp 5-6)

Warrant Officer Junior Grade Nellie Hurley, a psychologist stationed at the 361st Station Hospital, Tokyo, Japan, gave the accused certain tests designed to measure various aspects of his personality functioning. The accused's "IQ" was about 119, which is superior. The results of the tests were transmitted to the sanity board for its consideration (R 24-26,28,35).

First Lieutenant James J. Hook, 361st Station Hospital, a psychologist, was present at the time of the sanity hearing by the Board of Officers and recommended to the Board that the accused be given further psychiatric evaluation (R 53,54).

The prosecution introduced into evidence the testimony of several witnesses relative to accused's behavior prior to this offense.

(17)

Fuku Miyazawa met the accused in October 1949. He was kind to others. When drunk he drives a car dangerously. On the evening of 25 November 1949 the accused was drunk (R 56-59).

Private William Barlow, Supply Company, Headquarters and Service Group, Finance Building, and the accused are in the same organization. He met the accused in September 1949. They are friends and "go out together." The accused "mixes all right," but when under the influence of alcohol he is "more hot tempered." The accused is moody and when he gets "mad" he goes off by himself and does not say anything to anyone. He does not indulge in athletics (R 60-68).

Private First Class Demecio Sanchez, Supply Company, Headquarters and Service Group, lived in the same squad room with accused and about 40 other soldiers. The accused talked to almost everybody and got along fine with them (R 71).

Private Clifford Campbell worked in the same office with the accused. The accused seemed to get along all right with the other personnel in the office. He did his work but did not mix with the others. He appeared to be somewhat anti-social (R 72).

Private First Class Myron Smith lived in the same squad room with the accused for about a month immediately prior to 25 November 1949. The accused was sociable and made friends easily. The accused appeared to be a normal person. He played cards a few times and appeared to enjoy the games (R 74-76).

The court considered the evidence touching upon accused's mental condition as an interlocutory question and held that the "accused presently possesses sufficient mental capacity to understand the nature of the proceedings against him and to intelligently conduct and cooperate in his defense" and further held that the "accused was so far free from mental defect, disease or derangement at the time of the alleged offense as to be able to distinguish right from wrong and to adhere to the right" (R 78). The accused then pleaded "not guilty" to the charge and specification (R 79). During the introduction of the prosecution's evidence the accused changed his plea to "guilty" to the specification except the words "and with premeditation." The meaning and effect of this plea was explained to him (R 96).

At the close of the evidence for the prosecution, the defense counsel requested the court to consider the evidence in the case which pertained to the mental condition of the accused as evidence for the defense (R 100).

In considering the evidence of accused's mental condition as an interlocutory question and then considering it as defense evidence the

court proceeded in an orderly and approved manner (par 112b, MCM, 1949).

The medical officers who examined the accused agreed that he was not psychotic. They determined that he had a personality disorder and classified him as a schizoid personality, however at the time of the offense he could distinguish right from wrong. They also agreed that the accused was "sufficiently sane to stand trial," i.e., that he possessed sufficient mental capacity to understand the nature of the proceedings against him and to intelligently conduct and cooperate in his own defense. His "IQ" was about 119, which is a superior rating. As to the accused's ability to adhere to the right at the time of the offense two members of the Board of Medical Officers who examined him felt that he represented "that rare group of schizoid personalities who might have difficulty adhering to the right" (underscoring supplied). In view of this opinion expressed by a majority of the Board the Board did not reach a conclusion as to whether the accused could adhere to the right and recommended further psychiatric evaluation.

It was also shown that the accused was drunk on the night of 25 November 1949.

In CM 319168, Poe, 68 BR 141,172, the Board of Review said:

"The distinction between the complete defense of insanity which has been caused by excessive drinking and the mitigating circumstance 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). It can hardly be contended in the instant case that deceased, by any act of hers, provoked the fatal assault made upon her by accused or that the purported, delusory provocation existing only in accused's mind would in any sense be sufficient to mitigate murder to manslaughter (Wharton's Criminal Law, 12th Ed., sec. 54; CM 204790, Hayes, supra)."

In CM 320805, Hamilton, 70 BR 191,195, the Board of Review said:

"It has been uniformly held that an impaired ability to adhere to the right, a partial irresponsibility, is no defense to crime. (CM 289355, Smith, 21 BR (ETO) 25,33; CM 243048, Hall, 1 BR (A-P) 213; CM 246548, Maxwell, 2 BR (ETO) 251,273; CM 274678, Ellis, 47 BR 271,285; CM 319168, Poe.)"

The question of the degree of accused's intoxication and the effect of his imbibing on his own volition is generally one of fact for the court where it appears from the evidence, as in the instant case, the accused was capable of retaining in his memory a recollection of the details surrounding his perpetration of the homicide, and had the ability to perform acts requiring a high degree of coordination before, during and after the commission of the crime such as driving an automobile, firing a pistol, the seeking assistance of a friend in disposing of the body of the victim, and the realization that he might be found abroad after curfew while attempting to conceal his connection with the deceased. We can but concur in the implied finding of the court that the accused was not so intoxicated as to be unable to harbor malice prepense in his mind (CM 274678, Ellis, 47 BR 271,286; CM 294675, Minnick, 26 BR (ETO) 11,21; CM 319168, Poe, supra; CM 338934, Jones, Jan 1950).

In the instant case the medical officers who examined the accused concluded that at the time of the commission of the offense charged herein the accused might have had difficulty in adhering to the right. The court had before it all of the evidence, and observed the witnesses and the accused. By its ruling on the plea of insanity and by its findings of guilty the court inherently found that the accused was not affected by any mental disease or derangement to such an extent that he was unable, concerning the particular acts charged to distinguish right from wrong and to adhere to the right. From our examination of the evidence and in view of the uniform holding that an impaired ability to adhere to the right, or a partial irresponsibility, is no defense to crime, we conclude that there is no reason to disturb the court's findings (CM 338934, Jones, supra, and cases cited therein).

The Charge and Specification

The evidence clearly establishes that sometime during the night of 25-26 November 1949 in the City of Tokyo, Japan, Taeko Goto, a female Japanese, met her death in a manner suggestive of murder. She had been shot in the back of the neck and the bullet had severed her spinal column. The place where the bullet entered her body had been probed with a sharp instrument. The fact that the accused was the person responsible for her death is shown by his plea of guilty "without premeditation" and his extrajudicial statement introduced as Prosecution Exhibit No. 1, which sets forth in detail the manner in which Taeko

Goto met her death. While it is axiomatic that an accused cannot be convicted upon his uncorroborated extrajudicial confession, the evidence which must be adduced to corroborate the confession need only show that the offense charged had probably been committed. The general rule being that while the corpus delicti need not be proved aliunde the confession beyond a reasonable doubt or by a preponderance of the evidence or at all, nevertheless some evidence must be produced to corroborate the confession and such evidence must touch the corpus delicti (CM 239085, Jones, 25 BR 41,43). In the instant case the evidence pertaining to the finding of the body of Taeko Goto, the descriptions of the wounds thereon, the recovery of the pistol and the accused's plea all tend to corroborate the accused's confession. Such evidence is, in the opinion of the Board of Review, sufficient corroboration upon which the court was justified in admitting the accused's confession into evidence.

"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.

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"*** 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 record affirmatively shows that the accused murdered Taeko Goto beyond all reasonable doubt. The brutality of the unprovoked attack shows unmistakably that accused's vicious conduct flowed from an evil heart bent on mischief. The law presumes malice from such cruel and deliberate acts manifesting an utter disregard for human life (CM 330963, Armistead, 79 BR 201,230). That the accused committed this murder with premeditation is clearly established by the statements in his extrajudicial confession wherein he stated that after discharging his pistol accidentally he cocked the pistol and placed it near the back of the deceased's head. He then pulled the trigger. Such evidence shows substantial deliberation and design.

7. The reviewing authority designated a United States Penitentiary, reformatory, or other such institution as the place of confinement, and ordered the prisoner to be committed to the custody of the Attorney General or his designated representative for classification, treatment and service of sentence of this confinement. Paragraph 87b, Manual for Courts-Martial U.S. Army, 1949, provides, inter alia,

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

In the instant case, pursuant to the provisions of Article of War 48(c)(2), the confirming authority is the Judicial Council, acting with the concurrence of The Judge Advocate General (CM 336706, Pomada, 3 BR-JC, 209).

8. The record shows the accused to be 26 years of age. He has a Class F Allotment of \$22.00. He enlisted on 29 March 1948 to serve three years. He has 2 years, 10 months and 20 days previous service.

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

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

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

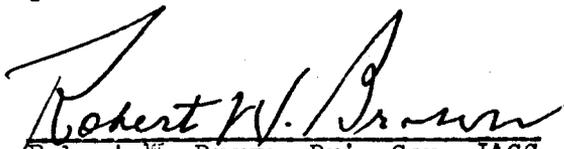
Joseph T. Brack, J.A.G.C.

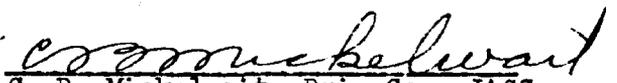
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Office of The Judge Advocate General

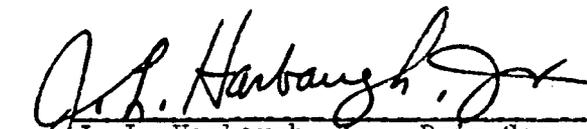
THE JUDICIAL COUNCIL

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

In the foregoing case of Recruit James John Diamond,
RA 32700356, Supply Company, Headquarters and Service Group,
GHQ, FEC, APO 500, upon the concurrence of The Judge Advocate
General the sentence is confirmed and will be carried into
execution. A United States Penitentiary is designated as the
place of confinement.

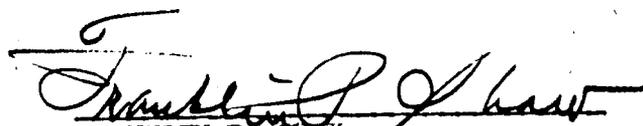

Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

22 May 1950

I concur in the foregoing action.


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

23 May 1950

(GCMO 40, May 31, 1950).

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

(179)

JAGK - CM 340733

11 APR 1950

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

v.)

Captain ALFRED H. HEINDORF)
(O-499465), Headquarters)
Company, 17th Transportation)
Major Port.)

BREMERHAVEN PORT OF EMBARKATION

Trial by G.C.M., convened at Bremerhaven,
Germany, 24 February 1950. Dismissal,
total forfeitures after promulgation,
and confinement for six (6) months.

OPINION of the BOARD OF REVIEW

McAFEE, WOLF and BRACK

Officers of the Judge Advocate General's Corps

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

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

Specification 1: In that Captain Alfred H. Heindorf, Headquarters 17th Transportation Major Port, did, at Bremerhaven, Germany, on or about 4 February 1950 with intent to deceive the Military Police gangway guard of the United States Army Transport General Sturgis, Private Solon M. Rice, officially state that fifty (50) cartons of cigarettes which were being removed from the United States Army Transport General Sturgis, were being transferred to another Army Transport which statement was known by the said Captain Alfred H. Heindorf to be untrue.

Specification 2: In that Captain Alfred H. Heindorf, ***, did, at Bremerhaven, Germany, on or about 4 February 1950 wrongfully and with intent to deceive, direct and cause one Edward H. Loeser to make a false issue slip which purported to issue 100 cartons of cigarettes to the United States Army Transport General Patch from the United States Army Transport General Sturgis.

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

Specification: In that Captain Alfred H. Heindorf, ***, did, at Bremerhaven, Germany, on or about 4 February 1950 wrongfully violate paragraph 8, Circular Number 68, Headquarters European Command, dated 25 April 1949, and Article 1, Paragraph 4, Circular Number 21, Headquarters European Command, dated 12 September 1949, by importing into Germany 100 cartons of cigarettes.

He pleaded not guilty to all charges and specifications. He was found guilty of Charge I and the specifications thereunder and guilty of the specification of Charge II except the word "importing," substituting therefor the words "attempting to import," of the excepted word, not guilty, and of the substituted words, guilty, and guilty of Charge II. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority might direct for six months. The reviewing authority approved only so much of the finding of guilty of Charge II and its specification as involves findings that the accused did at Bremerhaven, Germany, on or about 4 February 1950 wrongfully violate Paragraph 8, Circular No. 68, Headquarters European Command, dated 25 April 1949, and Article I, Paragraph 4, Circular No. 21, Headquarters European Command, dated 12 September 1949, by attempting to import into Germany fifty cartons of cigarettes, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

Between 3:30 and 4:00 o'clock on the afternoon of 3 February 1950, the United States Army Transport General Sturgis docked at Bremerhaven, Germany (R 44,48). A short time thereafter the accused and a Mr. John F. Lewis went aboard the transport and talked to Edward H. Loeser, Administrative Officer of the ship. The accused stated that he was going to be married and that he wanted some cigarettes to help defray his wedding expenses. Mr. Loeser sold 100 cartons of cigarettes to accused from the transport's post exchange at \$1.75 per carton. The ordinary selling price of these cigarettes was \$1.00 per carton. They agreed that the accused would take the cigarettes off the ship on the following day. Mr. Loeser was not authorized to sell 100 cartons of cigarettes to an individual from the ship's store. On 4 February 1950 the accused brought two boxes with him to the ship. Mr. Loeser went to the storeroom and placed 50 cartons of cigarettes in each box. He left the accused at the storeroom and returned to his office. Mr. Loeser testified,

"*** shortly afterward Captain Heindorf came along and said that they had been stopped at the gangway and he said he was transferring them to the 'General Patch' for me, and he asked me to make up a document to support this. So I made up a Property Issue slip from our vessel to the 'Patch' which Captain Heindorf took to the gangway" (R 46).

He identified Prosecution Exhibit 2 as the Property Issue Slip given to accused. He further testified:

"Q. Well, specifically, in the transfer from the 'Sturgis' to the 'Patch' of cigarettes, would you make that transfer?

"A Let me explain it this way. If a man were transferring things like that, he would first go to the officer receiving them, and then have permission of the Superintendent of the Water Division to transfer a critical item.

"Q You could not receive orders from Captain Heindorf to transport them?

"A No, sir.

"Q Then Captain Heindorf had no authority to order you to transfer cigarettes from the 'Sturgis' to the 'Patch'?

"A No, sir.

"Q He had no authority to do that?

"A Nobody had authority over that because I am accountable financially for it.

*

*

"Q Is it not true that when you were here on 4 February 1950 you could not transfer items from your ship's store to the General Patch by an instrument such as Prosecution Exhibit 2?

"A Only with approval of the Port authorities.

"Q Nevertheless, you did voluntarily make up that?

*

*

*

"A I made it up at the suggestion of Captain Heindorf.

"Q You knew at that time however that Captain Heindorf could not direct you to or had no authority to do that?

"A Yes, sir." (R 51,52)

Subsequent to this event, Mr. Loeser, Mr. Lewis and the accused agreed among themselves that upon investigation of this incident they would claim they were transferring the cigarettes to the "General Patch" and that the accused was merely accommodating Mr. Loeser in the transfer of the cigarettes to the "General Patch" (R 45,46,51,52,55).

On 4 February 1950, Johann Bergmann, driver for the "Unit TC Supply, *** made a trip for Captain Heindorf at 12:30." Acting under orders of Captain Heindorf, Johann Bergmann delivered five or six boxes filled with "shackles" aboard the General Sturgis. The accused then directed Bergmann to follow him with a wooden box into a room below the deck. Shortly thereafter Bergmann carried this box from the ship and placed it in the car which he was driving. He returned to the ship and then the accused directed him to take a second box to the car. As Bergmann was about to leave the ship an "MP" soldier asked where he was going with the box and what was in the box. When Bergmann indicated that he did not know what the box contained, the soldier opened the box. The box contained cartons of cigarettes (R 36-43).

Private Solon M. Rice, Company C, 382d Military Police Service Battalion, was on duty as "gangway guard of the General Sturgis" on 4 February 1950. About 1:40 p.m. the accused approached him and stated that he had something that he would like to bring aboard the ship. He told the accused that it was all right to bring supplies aboard the ship. The German driver for the accused brought several boxes aboard ship with supplies. The driver then came aboard with an empty box and Private Rice permitted it to pass because he was informed that the accused wanted the box. About fifteen minutes later the German driver returned carrying the box. On this occasion the lid was nailed in place and the box was closed. He asked for the "paper work" authorizing the removal of the box from the ship. There was no authorization available so he opened the box and found that it contained "approximately 60 cartons of cigarettes." Thereafter the following occurred:

"Q Then what happened.

"A Approximately five minutes later the Captain came up and I asked the Captain for the paper work for the contents of the box and he says that he did not have any paper work. And then I told the Captain, 'You know we don't move things from aboard ship without proper authorization or paper work.' Then the Captain spoke to the PX Officer aboard the ship and asked him for paper work.

* * *
"Q Proceed.

"A The Captain said, 'Could I have the paper work you were going to give me?' The PX Officer answered, 'Sure. Come with me,' and at that time the Captain and the PX Officer disappeared below the ship. On their return, approximately five minutes later, the Captain came back with a pink slip. He opened it and held it up to me, and he said, 'That is for the paper work in removing the package.' I said, 'No, you will have to wait for the Officer of the Guard until he gets here.'

"LAW MEMBER: Who was the Officer of the Guard?

"WITNESS: Lieutenant Pierce.

"Q Did the Captain make any statements to you?

"A No, sir, no direct statements to me except for one thing. When I asked about the paper work, the Captain said to me that the supplies were for the 'General Rose.'

"LAW MEMBER: For what?

"WITNESS: I asked him for the paper work and he said, 'It is only supplies for the 'General Rose.'"

"LAW MEMBER: What were you discussing at that moment?

"WITNESS: The package containing the cigarettes, the box.

*

*

*

"Q Go ahead.

"A When the Officer of the Guard arrived, I reported to the Officer of the Guard at the gangway and the Officer of the Guard was then approached by the Captain and they had a conversation and I don't know the conversation. After that they asked the Officer of the Guard to accompany the Captain, and Mr. Lewis, below deck to an office, that they wanted to talk. Down there it was so noisy that I could not understand the conversation that took place.

"Q Who was present there while this hubbub was taking place?

"A The Captain, Mr. Lewis, Mr. Loeser the FX Officer aboard the ship, myself, Lieutenant Pierce, Sergeant Watts, and another fellow that said he was from the 'General Patch,' sir, I don't know his name." (R 13,14)

Special orders prohibit the removal of any supplies from ships without proper authorization from Port officials (R 10-15,19,21,22).

At about 1:45 p.m. on 4 February 1950, First Lieutenant Franklin M. Pierce, Officer of the Guard at the Bremerhaven Port of Embarkation, went to the "Sturgis," pursuant to a report received from that ship, where he met Private Rice and the accused. The accused approached him and in effect said,

"*** There is some misunderstanding on the part of the MP, and they were transferring some cigarettes from the FX of

the 'Sturgis' to the PX of the 'Patch,' and I have the paper here, and that makes it all right or okay."

Concerning this paper, the witness stated it was "a purported Property Issue Slip, an undated Property Issue Slip indicating an issue from the 'Sturgis' to the 'Patch' of 100 cartons of cigarettes, and it was signed with a signature. I just looked at it shortly. I could not identify the signature" (R 29,30).

"Q Then what happened?

"A Then Private Rice accompanied me off the ship to my car and just as we were starting to drive off, Captain Heindorf approached the car, and he either opened the door or talked to Rice through the open window. I don't remember which. He stated that he wanted to apologize to Private Rice, and that when he first contacted Rice at the beginning of this incident, he may have said the cigarettes were for the 'General Rose,' but he was excited and he did mean the 'Patch.' And at that time we drove away and went over to the 'Patch.'

*

*

*

"Q As you were leaving as the Captain came up to the side of the jeep, did he volunteer the statement you just testified he made to Private Rice, or did Private Rice ask questions?

"A No, sir. He came and opened the conversation.

"Q And Rice said nothing to the best of your recollection, is that right?

"A Well, Rice just said, 'Yes, sir, possibly that is what you meant, but you did say the "Rose."' (R 33,34)

The witness identified Prosecution Exhibit 2, WD AGO Form 446, dated 1 March 1947, which was admitted in evidence over defense objection, as the paper shown to him by the accused on the deck of the "Sturgis" (R 30,32). It is headed "Issue Slip" and purports to authorize a transfer of 100 cartons of cigarettes from the "USAT 'Gen. W. D. Sturgis' to the Exchange Officer USAT 'Gen. Patch'".

It was stipulated that if Alfredo Suarez, Junior Administrative Clerk, United States Army Transport General Patch, were present in court that he would testify that he is a Department of the Army employee and that "he did not authorize any exchange between the Patch and the Sturgis and that he has no personal knowledge of any transfer and that he does not know the accused in this case" (R 57,58).

It was further stipulated that if Captain Leo H. Madison were present in court he would testify as follows:

"That his name is Leo H. Madison, he is a Captain, his

station is Ship's Complement, New York Port of Embarkation with duty aboard the USAT General Patch and that he is the Assistant Transport Commander on board the U.S.A.T. General Patch and also in charge of the Vessel Exchange. He knows nothing about any proposed exchange of cigarettes stocks from his stores aboard the Patch for cigarettes from any other ship. He has not been contacted in any way with any such proposal. Since he is both the Accountable and the Responsible Officer for these stocks in his Stores no other person would have authority to arrange for such exchange in his absence. He does not know Captain Alfred H. Heindorf of the local port. He does not know Mr. John F. Lewis. He does not know Mr. Edward H. Loeser the vessel Exchange Officer of the General Sturgis. He does not know any of these people by name. That he drew enough cigarettes by purchase from LES Branch No 1 at Bremerhaven on 3 February 1950 to balance his stock of cigarettes brands and to see him back to New York." (R 58)

The court took judicial notice of Circular No. 68, Headquarters European Command, dated 25 April 1949 (R 36). Paragraph 8 of this circular reads in part as follows:

"8. Movement of Property and Effects. The provisions of Circular 21, this headquarters, 1949, as changed, which pertain to the export and import, or movement into and out of Germany, of property and goods will have full force and effect in the US area of control, Germany, on all occupation personnel as defined herein. The movement of such property and goods in the possession of occupation personnel when entering or leaving Germany across the international boundaries of the US area of control, Germany, and the movement of such property and goods in the possession of US occupation personnel across the international boundaries of the British and French areas of control, Germany, unless otherwise limited by those authorities, is accordingly prohibited except as follows:

a. Movements Having General Authorization. (1) Ordinary personal effects except:

* * *

(b) Import or export of tobacco products in excess of two cartons of cigarettes, fifty cigars, or one pound of smoking tobacco per person."

The court also took judicial notice of Circular No. 21, Headquarters European Command, dated 12 September 1949 (R 36).

This circular reads in pertinent part:

"2. All members of the Armed Forces of this command are hereby directed to comply with the provisions of Military Government Ordinance No. 38, effective 12 September 1949, subject: 'Prohibited Transactions and Activities,' quoted below, and any such member who violates the provisions of that Ordinance will be subject to disciplinary action.

'MILITARY GOVERNMENT - GERMANY
UNITED STATES AREA OF CONTROL

Ordinance No. 38

Prohibited Transactions and Activities

Article I

* * *

"3. Except as provided in paragraphs 4 and 5 of this Article or as otherwise authorized by Military Government or any agency designated by it, no person subject to this Ordinance shall:

* * *

d. Transport, or cause to be transported, into the United States Area of Control from outside the Western Area or receive in such Area of Control from outside the Western Area, or export from the United States Area of Control to any point outside the Western Area, any property;

* * *

"4. Notwithstanding the provisions of subparagraph 3(d) of this Article, persons subject to this Ordinance may, by transporting such property on their persons or in their possession, import into the United States Area of Control from outside the Western Area or export from the United States Area of Control to any point outside the Western Area, the following property:

* * *

e. Tobacco in a quantity not in excess of four hundred (400) cigarettes, fifty (50) cigars and one (1) pound of smoking tobacco."

4. For the Defense

John E. Lewis, Marine Superintendent, Transportation Corps, Supply Depot, Bremerhaven, Germany, went aboard the "Sturgis" with the accused on 4 February 1950. He was present when the Military Police stopped the German driver with the box of cigarettes. He stated that:

"Q. Will you tell the court just what happened?

"A. I was following the box down the gangway and the MP stopped the driver and wanted to know what it was and I came up and said it was supplies that we were transferring. He said, 'Let's open the box' and he tried to pick it open and couldn't and he finally pried it open.

"Q. Exactly what did you tell the MP?

"A. I told the MP it was property we were transferring to another ship, the Rose; I was not sure.

"Q. Then what happened?

"A. That's all. The MP went in and called up the OD.

* * *

"Q. Did you see Captain Heindorf later on?

"A. Yes, it was quite a bit later on.

"Q. Did you see the MP and Captain Heindorf conversing together?

"A. The MP was on deck when the Captain came up. I was standing inside the lounge and they were saying something.

* * *

"Q. Did you hear any conversation?

"A. No, I did not hear any conversation.

* * *

"Q. Where did you get the information that box was being transferred to another ship?

"A. Through Captain Heindorf. He told me that.

"Q. He told you that?

"A. He did.

* * *

"Q. Mr. Lewis, did Captain Heindorf specifically tell you that those cigarettes were being transferred?

"A. Yes, he said they were being transferred.

* * *

"Q. Did he say, 'ship to ship' or anything of that sort?

"A. No, he said they were transferring property.

* * *

"Q. Did you ever discuss this matter of transfer of cigarettes to another ship between Mr. Loeser and Captain Heindorf?

"A. No, sir.

"Q. Did Captain Heindorf ever discuss cigarettes with you before you started down the gangplank?

"A. No discussion, just that they were being transferred.

"Q. What was being transferred?

"A. The cigarettes.

"Q. How many cartons of cigarettes were being transferred?

"A. I don't know. I wasn't informed that." (R 72,73,74)

Mr. Bobby Grunden, a civilian employed as Chief of the Stock Control Branch, Transportation Corps Supply Depot Office, testified that on 3 February 1950, he received a request from the U.S. Army Transport General Sturgis for certain supplies which were delivered to that ship by the accused on 4 February 1950 (R 76-78).

It was stipulated that if Lieutenant Colonel Charles Everett Capito, Logistics Division, Headquarters EUCOM, Germany, were present in court that he would testify:

"That he has known Captain Alfred H. Heindorf since 1941; that Captain Heindorf worked with Lieutenant Colonel Capito from 1941 to 1943 and again from 1947 to the latter part of 1948 and that Lieutenant Colonel Capito, during these two periods had occasion to observe the performance by Captain Heindorf of his assigned duties and that his performance was superior. Lieutenant Colonel Capito was acquainted with Captain Heindorf's reputation during the two periods of service in which they worked together and he believes Captain Heindorf to be of good moral character with an excellent reputation for truth and veracity." (R 79)

It was stipulated that if Lieutenant Colonel George W. Barry, Chief, Plans, Policy and Management Branch, Office of the Chief of Transportation Division, EUCOM, Germany, were present in court that he would testify:

"That he has known Captain Alfred H. Heindorf since October 1944; that Captain Heindorf was assigned to the same headquarters as Lieutenant Colonel George W. Barry continuously from October 1944 until Captain Heindorf was transferred to the Bremerhaven Port of Embarkation, with the exception of two periods of seven and nine months respectively; that for a portion of said time, during the year 1946, Captain Heindorf served under Lieutenant Colonel George W. Barry as Supply Officer, and in the opinion of Lieutenant Colonel Barry, he is an excellent Supply Officer; that Lieutenant Colonel Barry observed Captain Heindorf's performance of his assigned duties during the period when they were assigned under the same headquarters, and his performance in the opinion of Lieutenant Colonel Barry was conscientious and efficient. Lieutenant Colonel Barry also knew Captain Heindorf socially, and has never had reason to doubt his word or to question his integrity as an officer and a gentleman." (R 79)

The court received in evidence the following letter of commendation:

"HEADQUARTERS
BREMERHAVEN PORT OF EMBARKATION
EUROPEAN COMMAND
Office of the Commanding General

16 January 1950

SUBJECT: Letter of Commendation

TO: Capt A. H. Heindorf, ASN 0499465
TC Supply Depot
Headquarters
Bremerhaven Port of Embarkation
APO 69, US Army

"I wish to express my appreciation of a job well done in connection with your work as a member of the judging teams in the Bremerhaven phase of the EUCOM Supply Economy Competition. The schedule of inspections added to your normal duties required many extra hours of work. Your zeal and enthusiasm in fulfilling the mission of selecting the outstanding members among the units of this Command under these conditions reflect the highest standard of duty well performed.

/s/ Charles D. W. Canham
/t/ CHARLES D. W. CANHAM
Brigadier General, US Army
Commanding* (Def Ex A)

The accused was warned of his rights as a witness and elected to testify concerning Specification 1 of Charge I, and relative to his service and other matters in mitigation. He testified as follows:

"Q. Did you have any conversation with the gangway guard at about that time?

"A. Some, yes.

"Q. When was the first time you had a conversation with him?

"A. Just subsequent to talking to Mr. Lewis.

"Q. Just prior to having this conversation with the gangway guard, where were you?

"A. I was talking to Mr. Lewis on the deck.

"Q. And how did you get to speak to the gangway guard?

"A. Mr. Lewis told me what had happened and I walked over to the gangway guard.

"Q. What was said between you?

"A. The first thing I said to the gangway guard was, 'What is the trouble?' He replied that items could not be removed from the vessel without proper authority and at that time I replied, 'Yes, I am aware of that' and 'Excuse me a minute'.

"Q. Then what happened?

"A. Then I left him. That was the total of the conversation.

"Q. Was that the total conversation at that time?

"A. At that time, yes.

"Q. Did you see him again?

"A. Yes, in the cabin of Mr. Loeser.

"Q. Did anything occur between you and him at that time?

"A. Lieutenant Pierce had the issue slip in his hand and made a remark that these things were going to the Patch.

"Q. Lieutenant Pierce made that remark?

"A. Yes. The MP stepped up and interrupted and said, 'The Captain told me they were going to the Rose'.

"Q. Did you say anything?

"A. Yes, I promptly denied it because I knew I didn't say it.

"Q. Did you have any other conversation in that respect?

"A. Yes, I left the boat immediately after the MP and Lieutenant Pierce.

"Q. Where did you go?

"A. My car was parked a short distance from Lieutenant Pierce's car.

"Q. What happened then?

"A. I realized then I had antagonized the MP and had been pretty abrupt and I walked over to the door and opened the door of the car and Lieutenant Pierce and the MP were in the front seat of the car and I stated at that time that I was sorry and I did apologize to the MP and that with so many people talking, it was very easy to misunderstand what someone else said, and that's as near as I can recall the words I used.

"Q. Did you have any other conversation with the MP guard at

that time or was that the substance of the entire conversation with him? That is, relative to the transfer of supplies?

"A. Well there was.... when I brought the paper up to the MP....

* * *

"Q. Did you tell him at any time in response to any of his questions that fifty cartons of cigarettes were being removed from the ship to be transferred to another transport?

"A. No, I did not.

"Q. Captain, how long have you been in the Army?

"A. Twelve and one-half years active duty and twenty-one, altogether. Nine years in the National Guard.

"Q. How old are you?

"A. Forty-nine.

"Q. How much of that service was enlisted and how much commissioned?

"A. Approximately fourteen years enlisted and seven years and five months commissioned.

"Q. How long have you been in the European Command?

"A. Three years and three months.

"Q. Where was your service prior to that time?

"A. Prior to that time I was in Sixth Army Headquarters in San Francisco, as Supply Officer, Training Division, prior to that Post S-4, Lathrop, California at the reassignment point and prior to that P and C Officer at the Pasco Reassignment center. That's commissioned.

"Q. Have you ever been disciplined or ever had occasion to be disciplined for any matter in your military career?

"A. None.

"Q. Your record is clear in that respect?

"A. It is, absolutely." (R 81,82 and 83)

5. Discussion

In the interest of clarity the specifications and charges will be discussed in reverse order.

Specification, Charge II

The evidence shows that on 3 February 1950 the accused boarded the U.S. Army Transport General Sturgis, which was docked at Bremerhaven, Germany, and purchased 100 cartons of cigarettes from Edward H. Loeser,

Administrative Officer of that ship. On 4 February 1950, aided by the driver of his vehicle, he proceeded to transfer these cigarettes from the transport to his vehicle in two separate boxes which he furnished for that purpose. One of these boxes, containing 50 cartons of cigarettes, was intercepted by a guard stationed at the gangplank on the ship because its removal from the ship was not shown to have been authorized. Directives promulgated by the Commanding General, European Command, and published in Circular Number 68, Headquarters European Command, dated 25 April 1949, and in Circular Number 21 of the same headquarters, dated 12 September 1949, prohibit occupation personnel from importing or exporting cigarettes in a quantity in excess of 400 cigarettes or two cartons of cigarettes into or out of the United States occupied area of Germany without proper authority from the officials of the military government. The court took judicial notice of the foregoing circulars, copies of which are attached to the record of trial. The circulars, being directives of the Commanding General, European Command, became a part of the written military law of that command on the dates of their promulgation and the accused was chargeable with knowledge of their contents (CM 319858, Correlle, 69 BR 183,203, and cases cited therein). Since the circulars permit the importation or exportation of only two cartons or 400 cigarettes, it follows that the importation of cigarettes in excess of two cartons into the United States occupied area of Germany without proper authority would constitute a violation of these circulars (CM 329445, Benzette, 78 BR 37,40).

Although the evidence indicates that the accused purchased 100 cartons of cigarettes on board the Transport General Sturgis for his personal use within the European Command and that such purchase was made without lawful authority, proof of the specific number of cartons removed or attempted to be removed from the ship by the accused is limited to the 50 cartons of cigarettes intercepted by the guard on the gangplank of the ship. As to the 50 cartons of cigarettes so intercepted, the evidence shows clearly that the accused attempted to transfer them from the ship and, although he was thwarted in his effort, his overt attempt to effect such removal by false and deceitful means is, in the opinion of the Board of Review, an attempted violation of the alleged circulars.

It was alleged in this specification that the accused wrongfully violated the above circulars "by importing into Germany 100 cartons of cigarettes." The court in its findings of guilty of this specification excepted the word "importing" therefrom and substituted therefor the words "attempting to import." The reviewing authority approved only so much of the findings of guilty as involve findings that the accused did at the time and place alleged wrongfully violate the circulars "by attempting to import into Germany 50 cartons of cigarettes."

The findings as thus approved purport to hold that an attempted

importation of cigarettes constitutes a violation of the alleged circulars. The circulars, however, do not denounce attempts as violations thereof. Consequently, the findings, as approved by the reviewing authority, are not warranted. However, since the proof shows conclusively that the accused wrongfully attempted to commit an act denounced by the circulars we conclude that the evidence is legally sufficient to support findings of guilty of the lesser included offense of an attempt to violate such circular (MCM 1949, par 183c, Attempts). Accordingly, the Board of Review is of the opinion that the evidence is legally sufficient to support only so much of the specification as involves a finding that the accused did at Bremerhaven, Germany, on 4 February 1950, wrongfully attempt to violate Paragraph 8, Circular Number 68, Headquarters, European Command, dated 25 April 1949, and Article 1, Paragraph 4, Circular No. 21, Headquarters European Command, dated 12 September 1949, by attempting to import into Germany 50 cartons of cigarettes.

Specification 2, Charge I

In support of this specification the evidence shows that at the instance and request of the accused, Edward H. Loeser prepared an issue slip on WD AGO Form 446 of 1 March 1947, whereby it appeared that the United States Army Transport Sturgis was transferring 100 cartons of cigarettes to the Exchange Officer of the United States Army Transport General Patch. The evidence also shows that this issue slip was prepared at the request of the accused with intent to deceive the gangway guard on the General Sturgis in order to accomplish the unauthorized removal of the 100 cartons of cigarettes purchased by the accused from Mr. Loeser.

The evidence shows clearly that the cigarettes in question were not intended to be transferred from the Transport Sturgis to the Transport Patch and that the issue slip was deliberately made to circumvent the established regulations of lawful authority. This issue slip was therefore false and both Mr. Loeser and the accused knew it to be false. That such slip was prepared with an intent to deceive is amply shown by the fact that the accused presented it to Private Rice, the gangway guard aboard the General Sturgis, after the cigarettes were intercepted by the guard and after the accused was advised that their removal from the ship could not be permitted without proper authority from Port officials (CM 329503, Frith, 78 BR, 83, 90).

Specification 1, Charge I

In this specification it was charged that the accused on 4 February 1950 with intent to deceive the Military Police gangway guard of the United States Army Transport General Sturgis, Private Solon M. Rice, officially stated that 50 cartons of cigarettes which were being removed from the United States Army Transport General Sturgis were being transferred to another Army Transport, which statement was known by the accused

to be untrue.

Private Rice testified that after he had intercepted the box containing approximately "60 cartons" of cigarettes at the gangplank of the General Sturgis he asked the accused for the "paper work" authorizing the removal of the box from the ship. The accused stated that the supplies were for the "General Rose." Thereupon the accused asked the Post Exchange officer of the ship (Mr. Loeser) for the papers which would authorize the removal of the cigarettes from the ship. Mr. Loeser said, "Sure," and at that time the accused and Mr. Loeser "disappeared below the ship." In about five minutes the accused returned and presented to Private Rice a pink "issue slip," saying, "This is for the paper work in removing the package." This issue slip was the one discussed in Specification 2 of Charge I.

Lieutenant Pierce, as Officer of the Guard, confiscated the cigarettes and made notes concerning the incident. Lieutenant Pierce and Private Rice left the ship, and as they were seated in an automobile the accused came over and talked to Private Rice. He stated that "he wanted to apologize to Private Rice, and that when he first contacted Rice at the beginning of this incident, he may have said the cigarettes were for the 'General Rose,' but that he was excited and he did mean the 'Patch.'"

The accused denied that he told Private Rice that the cigarettes were being removed from the ship to another transport. He also testified that after leaving the transport, "I realized then I had antagonized the MP and had been pretty abrupt and I walked over to the door *** of the car *** and I stated at that time that I was sorry and I did apologize to the MP and that with so many people talking, it was very easy to misunderstand what someone else said ***." Notwithstanding such denial by the accused, however, the evidence is undisputed that the accused, in an effort to remove the cigarettes from the Transport Sturgis, gave Private Rice the "issue slip" which purported to authorize the transfer of 100 cartons of cigarettes from the Transport Sturgis to the Exchange Officer of the United States Army Transport General Patch. Furthermore, it is clearly shown that the issue slip was false and that the accused procured it to be made falsely in order to obtain the removal of the cigarettes for his own personal use and not for transfer to the Transport General Patch. Under such circumstances the presentation of the false issue slip to Private Rice was as effective to constitute an offense of making a false official statement as if the accused had orally uttered the false statements therein contained to the gangway guard. (CM 315736, Risoli, 65 BR 91,95; CM 270061, Sheridan, 45 BR 190.)

In the opinion of the Board of Review the evidence establishes that the accused made the false official statement as alleged in this specification.

The intent to deceive may be inferred from the circumstances. It was shown that Private Rice, in questioning the accused regarding his authority for the removal of the cigarettes, was performing his duties as military policeman. Consequently, the accused's presentation of a false statement to a military policeman in the line of and pertinent to such duty renders it an official statement. The making of a false official statement with intent to deceive is a violation of Article of War 95 (CM 280335, Alexander, 53 BR 177,180, and cases therein cited).

6. Department of the Army records show the accused to be 49 years of age and married. He graduated from grammar school. In civil life he was variously employed as a machine helper, a potter, a furnace cleaner, salesman and in advertising and sales promotion as well as a civilian employee of the Army. He served in the California National Guard from 17 March 1928 to 17 March 1929 and from 19 November 1932 to 27 December 1940. On 8 October 1942 he was commissioned a temporary first lieutenant, Army of the United States. On 16 May 1945 he was promoted to captain. He was selected for appointment to the grade of warrant officer (junior grade), Regular Army, on 15 November 1948. He is entitled to wear the American Theater ribbon, Army Commendation ribbon and World War II Victory medal. His efficiency reports show two "Superior" and three "Excellent" ratings for the period 1 July 1944 to 30 June 1947. His overall efficiency ratings are: 067 for the period 1 July 1947 to 15 September 1947; 060 for the period 16 September 1947 to 31 March 1948; 091 for the period 10 April 1948 to 30 September 1948; 113 for the period 10 October 1948 to 14 December 1948.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Charge I and the specifications thereunder, and legally sufficient to support only so much of the specification of Charge II as finds that the accused did at the time and place alleged wrongfully attempt to violate Paragraph 8, Circular Number 68, Headquarters European Command, dated 25 April 1949, and Article 1, Paragraph 4, Circular Number 21, Headquarters European Command, dated 12 September 1949, by attempting to import into Germany 50 cartons of cigarettes and legally sufficient to support the finding of guilty of Charge II and legally sufficient to sustain the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96 and is mandatory upon conviction of a violation of Article of War 95.

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

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

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

(196)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 340, 733

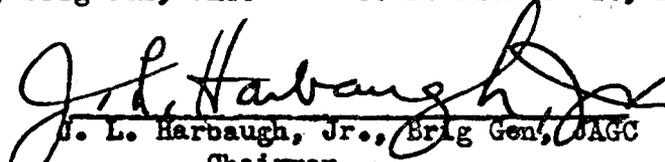
THE JUDICIAL COUNCIL

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

In the foregoing case of Captain Alfred H. Heindorf,
O-499465, Headquarters Company, 17th Transportation Major Port,
upon the concurrence of The Judge Advocate General, only so
much of the finding of guilty of the specification of Charge II
is approved as involves a finding that the accused did at the
place and time alleged wrongfully attempt to violate the
directives alleged by attempting to import into Germany fifty
cartons of cigarettes. The sentence is confirmed and will be
carried into execution. An appropriate guardhouse is designated
as the place of confinement.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

26 April 1950

I concur in the foregoing action.


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

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

(197)

APR 14 1950

JAGH CM 340886

U N I T E D S T A T E S	)	UNITED STATES ARMY FORCES ANTILLES
)	
v.	)	Trial by G.C.M., convened at
	)	Fort Buchanan, Puerto Rico,
Captain RAFAEL H. DOMINGUEZ	)	6,7 March 1950. Dismissal,
(O-387668), Medical Company,	)	total forfeitures after pro-
65th Infantry Regiment, Losey	)	mulgation, and confinement for
Field, Puerto Rico.	)	three and one-half (3½) years.

OPINION of the BOARD OF REVIEW
HILL, BARKIN, and CHURCHWELL
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 Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Captain Rafael H. Dominguez, Medical Company, 65th Infantry, Losey Field, Puerto Rico, did, at Losey Field, Puerto Rico, on or about 4 January 1950, with intent to do him bodily harm, commit an assault upon First Lieutenant Paul E. Mitchell by feloniously and willfully striking the said Lieutenant Mitchell with a pistol and his hand and kicking him with his foot.

Specification 2: In that Captain Rafael H. Dominguez, Medical Company, 65th Infantry, Losey Field, Puerto Rico, did, at Losey Field, Puerto Rico, on or about 4 January 1950, with intent to commit a felony, viz: murder, commit an assault upon First Lieutenant Paul E. Mitchell by feloniously and willfully pointing a dangerous weapon, to wit: a pistol, at him, the said Lieutenant Mitchell, and attempting to shoot him, the said Lieutenant Mitchell, with the said pistol.

The accused pleaded not guilty to the Charge and its Specifications. He was found guilty of Specification 2 of the Charge and the Charge.

He was found guilty of Specification 1 of the Charge, except the words "striking the said Lieutenant Mitchell with a pistol and his hand and kicking him with his foot," substituting therefor respectively the words: "striking at the said Lieutenant Mitchell with a pistol, and striking the said Lieutenant Mitchell with his hand and kicking him with his foot," of the excepted words, Not Guilty, of the substituted words, Guilty. 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 ten years. The reviewing authority approved the sentence, but reduced the period of confinement to three and one-half years, and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

The accused, Captain Rafael H. Dominguez (O-387668) MC, Commanding Officer, Medical Company, 65th Infantry Regiment, Losey Field, Puerto Rico, at approximately 0645 on 4 January 1950, went to Sergeant Colon's room and awakened him. Accused, crying and emotionally upset, told the sergeant that someone had killed his dog. Sergeant Colon dressed and went to the dispensary with him. There the accused, still sobbing, placed the dead dog in his car and left (R 11, Pros Ex 1). The accused then went to the Bachelor Officers' Quarters where he told Lieutenant Cassellas-Rojas that his (the accused's) dog had been purposely killed and asked the Lieutenant for a pistol, stating that he wanted to kill some dogs. The accused left when Lieutenant Cassellas-Rojas informed him that he did not have a pistol (R 12, Pros Ex 2). At about 0745 the accused went to the quarters of First Lieutenant Paul E. Mitchell, the victim of the assault, and asked for him, but was told by Mrs. Mitchell that her husband had gone to his office (R 23).

Lieutenant Mitchell testified that about 0740, 4 January 1950, he was sitting on the front seat behind the steering wheel of his car parked with the front end facing and almost touching the side of the Engineer Office at Losey Field, with the left side of his car about ten feet from the entrance door to the office (R 25,33, Pros Ex 3). The left front door was open and his feet were on the running board. On the front floor of the car beside him was a shotgun which he believed to be unloaded (R 25,26,30,65). The accused drove up speedily in a car, stopped abruptly, went over to Mitchell's car, threw his dead dog on Mitchell's lap and said to him "Kill my dog, will you" (R 24,25,26,30,35,41,65). Mitchell heaved the dog back, out of the car, telling accused that he did not kill his dog. He tried to reason with the accused but to no avail (R 37,31,40,41). The accused pointed a caliber .45 United

States Army pistol with his finger in the trigger guard at Mitchell's stomach, meanwhile working the slide of the pistol and shouting at Mitchell to get out of the car (R 26,27,41). The pistol did not fire, so the accused stepped forward about one half pace, grabbed the front of Mitchell's shirt and attempted to pull him out of the car, breaking several buttons on the front of Mitchell's shirt. He kicked Mitchell "skinning" his left shin in two places, causing it to bleed (R 26-28, 32,38,40,42). The accused, after making another futile attempt to fire the pistol, opened the left rear door of Mitchell's car, got into the back seat and in a crouching position behind Mitchell tried to strike him with the pistol, his finger "still on the trigger guard," but Mitchell warded off the blows with his arm (R 28,29,32,43,44). The accused then got out and went toward the rear end of the car and Mitchell jumped out of the left front side of the car and dashed to the Engineer Office. Just as he was in the doorway of the office Mitchell heard two or three shots fired (R 14,15,16,17,21,29,33,39,44,66). Mitchell hid behind a door in the Engineer Office. The accused entered the office carrying a pistol and a shotgun and went past the door where he was hiding whereupon Mitchell ran out of the office. About fifteen or twenty minutes later Mitchell saw the accused at Post Headquarters where the accused said to him "I will get you, you bastard" (R 16,38, 43,51).

Examination of Mitchell's car revealed that one bullet struck the outside of the door post between the front and rear doors on the right side and another struck the outside of the car near the rear end of the right side, about eighteen inches behind the rear door just above the fender. The bullet holes were in the general line to the doorway through which Mitchell went to get to the Engineer Office (R 22,31,33; Pros Ex 3).

Two civilian employees of the Post Engineer Office testified substantially as follows:

On the morning of 4 January 1950 at about 0745 someone was heard to say "You killed my dog, get out, I want to kill you." They observed the accused had a pistol in his hand, pointing it at Lieutenant Mitchell, at the same time he was kicking Mitchell and slapping him with his left hand and telling him to get out of the car. The accused then got in the back part of the car where he pulled Mitchell's hair. Then accused proceeded around the back of the car to the right side. Lieutenant Mitchell shouted, "Open the door," then ran to the Engineer Office. As Mitchell was leaving the car and heading for the office some shots were heard. The accused was asked to desist but said "This is not over yet. Leave me, he kill my dog, I am going to kill him" (R 62,69,73,74, 77,79,82).

Second Lieutenant Jose Vera, Jr., the provost marshal, in his stipulated testimony, stated that he saw the accused at the dispensary

at about 0745 the 4th of January. The accused was armed with a caliber .45 pistol and a 12-gauge shotgun and "appeared to be highly excited, nervous and emotionally upset" and stated to Lieutenant Vera that "Lieutenant Mitchell killed his dog and that he was going after him." The accused refused to hand over the weapons to Lieutenant Vera. Shortly thereafter Vera removed the shotgun and five 12-gauge shells from the accused's car, which was parked in front of Post Headquarters (R 48,59; Pros Ex 6).

Lieutenant Colonel George W. Childs, 65th Infantry, Losey Field, Puerto Rico, saw the accused on the morning of 4 January 1950, at Captain Renault's quarters where accused had been searching for Mitchell. Accused appeared very angry and was armed with a pistol. Childs ordered him to go to Post Headquarters where accused's pistol was taken from him. The pistol contained one live round in the chamber and three live rounds in the clip. At about 1400 hours the same day, Colonel Childs, the Post Commander, Mitchell and the accused, met in the Post Commander's office, where the accused was informed that Lieutenant Mitchell did not shoot his dog. The accused replied that he "might as well be hung for a sheep as a goat. I made a mistake once but I wont make it twice" (R 46,47,48,51,52).

The defense made a motion to dismiss Specification 1 (assault with intent to do bodily harm), on the ground that "the minor things alleged in Specification 1 of the Charge would be merged with the offense of intent to commit murder, one minor offense and another more serious offense, all part of the same transaction." The motion was denied (R 82,83,84).

b. For the defense.

The rights of the accused as a witness were fully explained to him by the defense counsel and he elected to remain silent (R 84,115).

Major Philip M. Reilly, MC, 326th Station Hospital, Losey Field, Puerto Rico, who is not a psychiatrist, testified that he saw the accused for five minutes on the morning of 4 January 1950 at approximately 0800 hours. At that time the accused was in a high state of emotion. Reilly asked the accused a question and received a reply which was not responsive. Reilly concluded that the accused at that time could not distinguish between right and wrong. He based this opinion on his observation of the accused's physical appearance at the time he saw him and the unresponsive reply he received to his question (R 55,56, 57,58).

Dr. Carlos J. Dalmau, MD, San Juan, Puerto Rico, having qualified as an expert on psychiatry, testified in substance as follows. He is

a psychiatrist at Rodriguez General Hospital. On 10 January 1950 he examined the accused at the request of Colonel Davidson who is chief of Medical Service, Rodriguez General Hospital. Dr. Dalmau requested and obtained a "case history" of the accused, which was taken by a psychiatric social worker (R 85,86). Dr. Dalmau's evaluation of accused's mental condition at the time of the alleged offense was that it is questionable whether the accused could distinguish between right and wrong, but definite that he could not adhere to the right. Dr. Dalmau stated "it is possible for a person to be able to distinguish right from wrong and yet be unable to adhere to the right," "Because he is motivated by unconscious impulses backed by an emotional reaction of such intensity that unfortunately the man has nothing to do with his emotional reactions, they cannot be controlled either intellectually or rationally" (R 91). The witness was then cross-examined by the prosecution as follows:

"Q. Do you, when you say that he could not adhere to the right, do you mean that he was acting under an irresistible impulse?
 A. By irresistible impulse you mean unconscious motivation, an impulse he could not control, yes it was irresistible." (R 92)

* * *

Q. Would you say that the irresistible impulse was caused solely by mental disease?
 A. Solely by mental derangement, yes," (R 95)

Dr. Dalmau's certificate relative to the examination of the accused dated 19 January 1950 stated:

"Psychiatric examination of Capt. Rafael H. Dominguez reveals the following findings:

"He presents an arrest in his emotional development at about an age of six years old. This emotional immaturity is characterized by childish attachment to objects and an inability to displace his love to mature love objects. The death of his mother about that age appears to be the determining factor of this arrest.

"He describes his relationships with his dog as if it were a human being; he talked to him and the dog cried or laughed; wherever he went the dog accompanied him. According to the father's statements he loved that dog more than he loved his father. This dog meant a displacement and fixation of his love drives. The moment the dog was killed he saw 'a deliberate, willful, malicious' attack to this love object. It is important at this point, that he unconsciously makes his father responsible for the death of his mother and that at the time of the death of the mother the patient kissed her and embraced her repeatedly, wondering why the father did not do the same thing.

"According to the statements of the patient his only purpose in taking the dog to Lt. Mitchell was to have him kiss the dog, in other words, to recognize in the dog a symbol of what it meant to him.

"The emotional reaction was of such an intensity that there are memory lacunae. There is a definite parallelism between the death of the mother and the death of this dog, except that at the latter his desire for revenge could be overtly manifested.

"1. At the present time the individual can distinguish right from wrong, can adhere to right and stand in his own defense.

"2. It is questionable whether at the time of the alleged offense he was able to distinguish right from wrong.

"3. At the time of the alleged offense he could not adhere to right.

DIAGNOSIS:

"Schizoid personality manifested by seclusiveness, blocking of interpersonal relationships and fixation of emotional attachments at a very immature level." (Def Ex A)

The stipulated testimony of Dr. R. Hernandez, MD, and the testimony of Dr. Luis M. Morales, MD, both of whom are qualified psychiatrists, was similar to that given by Dr. Dalmau (R 100,103,104,106-112; Def Exs B,C).

c. Rebuttal for the prosecution.

Prior to the trial a Board of Medical Officers was convened to examine into accused's mental condition in accordance with paragraph 111, Manual for Courts-Martial, 1949, and its report was received in evidence (R 115) as Prosecution Exhibit 7. The Board found:

"a. 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 act charged to distinguish right from wrong.'

"b. 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 act charged to adhere to the right.'

"c. That the accused does possess sufficient mental capacity 'intelligently to conduct or cooperate in his defense.'" (Pros Ex 7).

The Board considered the psychiatric reports submitted to it by defense witnesses, Dr. Carlos J. Dalmau, Dr. Luis M. Morales and Dr. R. Hernandez. Dr. Morales and Dr. Dalmau were present and testified before the Board. The Board also considered the report of psychiatric examination contained in the deposition of Colonel George E. Hesner, MC, Retired, a witness

for the prosecution. Colonel Hesner is superintendent of Corozal Hospital, Corozal, Canal Zone, and his medical specialty is neuro-psychiatry. He examined the accused almost daily from the 2nd of February 1950 until the 12th of February 1950. He states that the accused at the time of the incident was so far free from mental defect, derangement and disease as to be able to distinguish right from wrong and that he was able to adhere to the right (Pros Ex 8).

4. Discussion.

The court properly overruled a defense motion that Specification 1 be dismissed on the ground that "the minor things alleged in Specification 1 of the Charge would be merged with the offense of intent to commit murder." It is the duty of the court to make a finding upon each charge and specification submitted to it by the convening authority. The accused was found guilty under separate specifications of assault with intent to commit bodily harm, and assault with intent to commit murder. It may be contended that the two offenses charged arose out of the same transaction. However, the accused was in no wise prejudiced since it is clear that he stands punished for his crime only in its most important aspect (CM 122371 (1918); CM 129104 (1919) Dig Op JAG 1912-40, page 294; CM 321915, McCarson, 70 BR 411,418).

There is abundant evidence in the record of trial to establish beyond a reasonable doubt that the accused committed the offenses as alleged in the specifications. As to Specification 1 there is unrefuted evidence that the accused kicked Lieutenant Mitchell on the shins, hit him on the face and struck at him with a pistol with his finger in the trigger guard. The intent to do bodily harm may be inferred from the character and extent of the assault, which could reasonably and foreseeably accomplish no other result. As to Specification 2 it is equally well established that the accused pointed a caliber .45 pistol at Mitchell and attempted to shoot him. While at point-blank range and with his finger in the trigger guard the accused pointed the pistol at Mitchell's stomach and worked the slide. His intent to murder Mitchell can be inferred from these facts and, further, from the fact that the weapon was discharged two or three times in Mitchell's direction, as shown by the location of the bullet indentations on Mitchell's car. Moreover, the accused's determined and angry pursuit of Mitchell and his assault upon him, together with the statements made by accused to Mitchell and the others, clearly manifest such an intent.

5. Mental responsibility.

There remains for consideration the question whether the medical testimony adduced in this case creates reasonable doubt as to the accused's mental responsibility at the time of the offenses.

The legal standard of mental responsibility under military law is stated in the Manual for Courts-Martial 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." (MCM, 1949, Par. 110b)

The standard for determining mental responsibility in military law includes not only the concept involved in the traditional right and wrong test, but also the more liberal concept involved in the so-called irresistible impulse test. The first concept recognizes that a person without appreciation of rightness or wrongness of an act cannot have a criminal mind or formulate criminal intent. The second concept recognizes that, if a person, because of mental illness, is deprived of the power of choice or volition, he does not possess the mental attitude and freedom of choice essential to criminal responsibility (Par. 2, Technical Bulletin, Med 201, WD 1 Oct 45).

After a question has been raised as to the mental responsibility of an accused, the burden is upon the prosecution to prove beyond a reasonable doubt that he is mentally responsible, and if, upon a consideration of all the evidence, there is a reasonable doubt as to the sanity of the accused, he is entitled to an acquittal (CM 294675, Minnick, 26 BR (ETO) 11; CM 314876, Rollinson, 64 BR 233,242).

Three qualified psychiatrists testified for the defense that in their opinion the accused was not mentally responsible at the time he committed the offenses "because he was motivated by unconscious impulses backed by an emotional reaction." On the other hand, the Board of Officers appointed pursuant to Paragraph 111, Manual for Courts-Martial, 1949, reached the conclusion that accused at the time of the commission of the offense was so far free from mental defect as to distinguish right from wrong and to adhere to the right. Dr. George E. Hesner, MC, Retired, Superintendent of Corozal Hospital, Canal Zone, who has had more than thirty-one years experience as a psychiatrist in the military service, agreed with the conclusions of the Board of Medical Officers.

The defense testimony raises a question as to whether the accused was controlled by an irresistible impulse. In order to be a defense to a crime an irresistible impulse must be the result of true insanity, that is, a mental disease or disorder which completely robs the actor of his will (CM 319168, Poe, 68 BR 141,170,171; CM 271889, Barbera, 46 BR 212,215). There is no rule of evidence which requires that the testimony of expert witnesses on matters of mental accountability be accepted to the exclusion of other evidence, or denies the court the

right to consider circumstantial evidence in arriving at its verdict upon this question (CM 290035, Rude, 57 BR 57,61). Thus, in view of the direct conflict in the testimony of the experts it was proper for, and it must be assumed that the court did, consider all of the other evidence bearing upon the question of the sanity of the accused at the time of the commission of the offense. The evidence indicates that the accused is above the average in intelligence, has an excellent record as an Army doctor, and has specialized in psychiatry. He discovered that his dog was dead at about 0645 hours, and approximately one hour later he went looking for a gun. Shortly after the accused's attempt to kill Mitchell, the accused remarked to a witness "This is not over yet. Leave me, he kill my dog, I am going to kill him." He went to the quarters of Captain Renault in quest of Mitchell. Colonel Childs met the accused there and ordered him to go to Post Headquarters. The accused obeyed and proceeded there in his car. Upon arrival at the Headquarters the accused met Mitchell and said to him "I'll get you, you bastard." Later that day, approximately five hours after the assault, the accused, Lieutenant Mitchell and Colonel Childs were assembled in the Post Commander's office. The accused remarked to Lieutenant Mitchell "I understand the colonel says you did not shoot my dog." Lieutenant Mitchell answered that he tried to explain and reason with him that he did not kill his dog, whereupon the accused replied "Well, I might as well be hung for a sheep as a goat. I made a mistake once but I wont make it twice." These facts indicate that the accused conducted himself rationally and soberly. He had adequate time to reflect upon his course of conduct, nevertheless, he remained embittered, acrimonious and revengeful.

Upon careful consideration of all the evidence in the case, that relating to the circumstance surrounding the commission of the offenses in question, as well as the conflicting expert testimony relating to accused's mental accountability, we are of the opinion that the court was warranted in rejecting the testimony of the expert witnesses called by the defense and in arriving at the finding that accused was mentally responsible for his criminal act, which finding is included by necessary implication in the court's findings of guilty of the offenses charged (CM 252628, Earle, 34 BR 111,116).

6. In arriving at its opinion in this case the Board of Review has carefully considered the affidavit submitted on behalf of the defense, as well as the matters presented in oral argument by E. Campos del Toro, Esquire, before it in Washington, D.C., on 11 April 1950.

7. Records of the Department of the Army show that the accused is 31 years of age and is unmarried. He was graduated from the University of Puerto Rico in 1938 with a BS degree and from St. Louis University Medical School in 1942 where he received an MD degree. In civilian life

he was a neuropsychiatric examiner for the Veterans Administration. He was commissioned a second lieutenant, ORC, on 9 February 1940 and was successively promoted to grade of first lieutenant, captain, and major on 2 June 1942, 10 November 1944 and 22 May 1946, respectively. He entered on this present tour of extended active duty on 14 October 1948. His efficiency ratings have averaged "Excellent." There is no record of previous convictions.

8. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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, as modified by the reviewing authority, and to warrant confirmation of the sentence. A sentence to dismissal, total forfeitures after promulgation, and confinement at hard labor for three and one-half years is authorized upon conviction of an officer of violations of Article of War 93.

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

Robert Barker, J.A.G.C.

William H. Churchill, J.A.G.C.

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

JAGU CM 340886

2 Aug 1950

UNITED STATES)

UNITED STATES ARMY FORCES ANTILLES)

v.)

Trial by G.C.M., convened at Fort Buchanan, Puerto Rico, 6, 7 March 1950. Dismissal, total forfeitures after promulgation, and confinement for three and one-half years.)

Captain RAFAEL H. DOMINGUEZ,)
O-387668, Medical Company,)
65th Infantry Regiment, Losey)
Field, Puerto Rico)

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

1. Pursuant to Article of War 50d(2) the record of trial in the case of the officer named above and the opinion of the Board of Review have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty and was found guilty of assault upon First Lieutenant Paul E. Mitchell with intent to do bodily harm by feloniously and willfully striking at him with a pistol, striking him with his hand and kicking him with his foot (Specification 1), and assault upon Lieutenant Mitchell with intent to commit murder by feloniously and willfully pointing a dangerous weapon, a pistol, at him and attempting to shoot him with the pistol (Specification 2), both alleged to have been committed at Losey Field, Puerto Rico, on or about 4 January 1950, in violation of Article of War 93. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for ten years. The reviewing authority approved the sentence, but reduced the period of confinement to three and one-half years, and forwarded the record of trial for action under Article of War 48. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, as modified by the reviewing authority, and to warrant confirmation of the sentence as so modified.

3. The prosecution's evidence, which is stated in detail by the Board of Review in its opinion, shows in substance that on the morning of 4 January 1950, the accused was highly excited, nervous and emotionally upset because he believed that his dog had been intentionally killed by First Lieutenant Paul E. Mitchell. About 6:45 a.m., he asked an officer

for a pistol, stating he wanted to kill some dogs. Lieutenant Mitchell testified that at about 7:45 a.m., while he was sitting in his car which was parked about ten feet from the entrance to the Post Engineer Office, the accused accosted him. Mitchell was sitting behind the wheel facing to the left with his feet extending out of the open door on the driver's side and resting on the running board. There was a shotgun on the floor beside Mitchell. The accused threw his dead dog on Mitchell's lap, exclaiming, "Kill my dog, will you." Mitchell threw the dog out of the car, denying that he had killed it. The accused, who was very upset and excited, thereupon pointed a .45 caliber pistol at Mitchell's stomach, his finger "in the trigger guard," operated the slide once and shouted at Mitchell to get out of the car. The accused was talking constantly and repeated ten or twelve times his order to Mitchell to get out of the car. Mitchell said he would do so if the accused would put the pistol down. Despite the accused's repeated efforts to operate the slide, "the pistol did not operate, did not fire," so the accused then grabbed Mitchell, attempted to pull him from the car and kicked his shin, causing it to bleed.

A civilian employee of the Post Engineer Office, Miss Margarita Vidal, testified that at about 7:45 a.m. she overheard the altercation between the accused and Lieutenant Mitchell in front of the Post Engineer Office. Someone said, "You killed my dog, get out, I want to kill you." According to Mitchell, the accused, after again attempting to operate the slide of the pistol, entered the rear of Mitchell's car and attempted to strike him with the pistol. At this time the accused's finger was "on the trigger guard." Mitchell warded off the blows with his arm, jumped from the left of the car and dashed to the Engineer Office. When he reached the doorway, he heard two or three shots. There were about twenty persons in the immediate vicinity at this time. According to Miss Vidal, the accused shortly thereafter entered the office carrying a pistol and a 12-gauge shotgun and passed the door. When asked to desist, the accused said, "This is not over yet. Leave me, he killed my dog, I am going to kill him." Mitchell left his hiding place behind the door and fled from the office. Two bullet holes were discovered in the right side of Mitchell's car. Lieutenant Mitchell testified that one could see the entrance to the Engineer Office through the windows of his car.

A short time after the incident, the accused stated to an officer in the dispensary that Mitchell killed his dog and "he was going after him." At Post Headquarters, about fifteen or twenty minutes after the incident, the accused told Mitchell, "I will get you, you bastard." The pistol taken from the accused at about this time was found to contain one live round in the chamber and three in the clip. The shotgun found in the accused's car somewhat later contained five shells. When informed about 2 p.m., that Mitchell did not shoot his dog, the accused replied that he "might as well be hung for a sheep as a goat. I made the mistake once but I won't make it twice."

The accused elected to remain silent at the trial.

4. The Judicial Council concurs with the Board of Review in its conclusion that the record of trial is legally sufficient to support the findings of guilty as to Specification 1 of the Charge. It is observed that inasmuch as the specification contains no express or implied allegation that the pistol used in the assault was a dangerous weapon, instrument or thing, the offense of assault with intent to do bodily harm by means of such an instrument was not alleged (See CM 320174, Holland, 69 BR 251, 254).

The accused is charged in Specification 2 with an assault upon Lieutenant Mitchell with intent to commit murder by pointing a dangerous weapon, a pistol, at him and attempting to shoot him with the pistol. A simple assault is an attempt or offer with unlawful force or violence to do corporal hurt to another, and may be either an actual attempt or a putting of the other in reasonable fear of immediate bodily harm. A demonstration of violence, coupled with an apparent ability to inflict injury, so as to cause the victim reasonably to fear injury, constitutes an assault. Thus, pointing a pistol which the assailant knows to be unloaded at another may constitute an assault if the victim is aware of the attack and is reasonably put in fear. The same is true of drawing a pistol from a holster or pocket with an actual or apparent intent to use it, if the victim is reasonably caused apprehension (MCM 1949, par 180k, pages 244-245). The offense here alleged is an assault aggravated by the concurrence of a specific intent to murder, i.e., to kill a human being without legal justification or excuse and with malice aforethought, in other words, it is an attempt to murder (Ibid, pars 179a, 180k, pages 230, 246).

In order to prove the offense alleged it was necessary to establish beyond a reasonable doubt that the accused, at the time of the incident, intended to murder Mitchell (CM 236985, Douglas, 23 BR 203, 206). The inference of such intent should not be based solely upon the accused's statements, if his acts show a different intent (Ibid; CM 238972, Lowry, 25 BR 7, 12). Even a general felonious intent or a specific design to commit a felony other than murder is not sufficient (MCM 1949, par 180k, p 246; CM 236985, supra, p 206). Whether the pistol was loaded at the time of the assault or if not, whether the accused believed that it was, were highly relevant circumstances on the issue of the accused's intent (State v. Mitchell (1908), 139 Iowa 455, 116 NW 808, 810; CM 302854, Juhl, 59 BR 99, 102-105).

The Judicial Council entertains doubts whether the pistol used by the accused during the assault was in fact loaded at that time. The evidence that a pistol taken from the accused about twenty minutes after the assault contained three loaded shells in the clip and one in the chamber is not conclusive as to the condition of the pistol in the hands of the accused at the time of the assault. Moreover the action of the accused in continuously working or attempting to work the slide without

ejection of a shell is more consistent with an unloaded pistol than one that was loaded. The evidence that several shots were heard while Mitchell was running toward the entrance to the Engineer Office and two bullet holes were thereafter found in his car does not establish that the accused fired these shots. About twenty people were in the vicinity and none was called to testify that the accused fired the shots. Moreover there was no testimony that the bullet holes in the car were caused by bullets fired from the pistol taken from the accused. Also the pistol taken from the accused was not introduced in evidence and there was no testimony that it had recently been fired. Since the proof fails to establish that the accused fired these shots, any inference therefrom that the pistol was loaded during the preceding assault is unwarranted. The Council concludes that inasmuch as the proof fails to establish that the pistol was loaded during the assault, the allegation in Specification 2 that the pistol was a dangerous weapon is not sustained by the record, by reason of the fact that this specification does not allege any purported use of the pistol except as a firearm (CM 302854, Juhl, supra, p 102).

Assuming, however, that the pistol was loaded, or that the accused believed it to be loaded during the assault, substantial doubt still exists that the accused intended then and there to kill Lieutenant Mitchell. Early in the assault the accused operated the slide, but there is no clear evidence that thereafter he pulled or attempted to pull the trigger. Instead he continued to attempt to operate the slide while repeatedly ordering Mitchell to get out of the car. When Mitchell refused to leave the car unless the accused put the pistol down, the accused still made no attempt to fire the pistol, but tried to pull Mitchell out of the car and kicked him on the shin. If the accused intended to kill Mitchell while he was pointing the pistol at his stomach, why did he not attempt to fire the pistol instead of expending his energies both oral and physical in trying to get Mitchell out of the car? Based on all the evidence, the Judicial Council entertains a substantial doubt that the accused intended during the assault to kill Mitchell. Such being the case the Council concludes that the allegation of intent to murder was not satisfactorily proven.

The evidence shows, however, that the accused's action in pointing the pistol at Mitchell's stomach and working the slide, reasonably put Mitchell in fear and apprehension of injury. Such action thus constituted a simple assault, regardless of the accused's intent (MCM 1949, par 180k, pages 244-245; CM 302854, Juhl, supra, p 105).

This simple assault and the assault upon the same victim with intent to do bodily harm, alleged in Specification 1, constituted substantially one transaction (See CM 321915, McC Carson and Higgs, 70 BR 411, 419, and cases cited). Consequently the principle of unreasonable multiplication of charges (MCM 1949, par 27, p 20) is

applicable (Ibid). The term "unreasonable * * * connotes unreasonableness from the viewpoint of both the legality and the appropriateness of the punishment involved" (CM 196619, Goyette et al, 3 BR 27, 33). The sentence thus may not legally exceed the maximum applicable to the most important aspect of the transaction (CM 321915, McC Carson and Higgs, supra). It follows that the maximum permissible confinement is that for the assault with intent to do bodily harm (Specification 1), or one year (MCM 1949, par 117c, p 137).

5. Because of the conflict in the evidence as to the accused's mental responsibility, which is considered at length in the opinion of the Board of Review, The Judge Advocate General, on the suggestion of the Judicial Council, requested The Surgeon General that appropriate steps be taken to arrange for further observation and examination of the accused. Pursuant to this request, the accused was examined by Psychiatric Consultants to the Department of the Army at Rodriguez General Hospital from 13 to 18 June 1950, to determine his mental condition. A report of such examination, dated 18 June 1950, submitted to The Judge Advocate General through the Office of The Surgeon General, states that the accused was examined daily between the mentioned dates and given the most widely accepted tests for the evaluation of personality structure and function. The three Psychiatric Consultants are unanimously of the opinion that the accused was at the time of his offense 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, and also that the accused at the time of his trial possessed sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct and cooperate in his defense. The consultants also express the opinion that the accused, although not psychotic and although mentally competent and responsible, is suffering from a serious personality disorder, that he is psychiatrically vulnerable, that there is a distinct possibility that penal incarceration would prove to be definitely harmful to him, and that his personality disorder might change to a psychotic state. While he is not now a dangerous individual, incarceration would increase rather than diminish the likelihood of his becoming a danger to others. The accused was an excellent medical officer and rendered conscientious and valuable service to the Army. The consultants express the further opinion that punishment of an offender has very little, if any, deterrent effect in preventing crimes of passion, and recommend that the accused not be incarcerated.

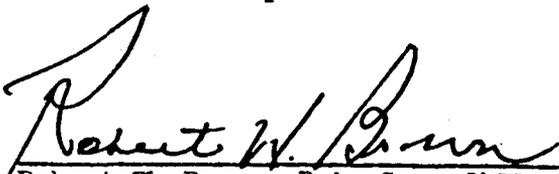
By letter dated 23 January [June] 1950, The Surgeon General of the Army incloses the mentioned report, and a memorandum dated 23 June 1950, signed by the Chief and Assistant Chief of the Psychiatry and Neurology Consultants Division of the Office of The Surgeon General, concurring in the findings and recommendations in the report. The Surgeon General states that after careful consideration of all available records in the case, including the report of the special board of Psychiatric Consultants

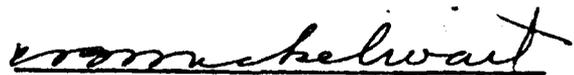
and the review by the Psycniatry Division of his office, he concurs substantially in the conclusions and recommendations of the Board of Psychiatric Consultants. He recommends, in view of the accused's personality disorder that serves in mitigation of the offense charged, that utmost clemency be extended.

The Judicial Council concurs in the opinion of the Board of Review, which is confirmed by the foregoing report, memorandum, and letter, that the accused was mentally responsible at the time of the assaults and possessed requisite mental capacity at the time of trial.

6. For the foregoing reasons, the Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specification 1 of the Charge and the Charge, and only so much of the finding of guilty of Specification 2 of the Charge as involves a finding that the accused did at the place and time alleged commit an assault upon the person alleged by wrongfully pointing a pistol at him, in violation of the 96th Article of War, and legally sufficient to support only so much of the sentence, as modified by the reviewing authority, as involves dismissal from the service, 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.

7. The Judicial Council concurs in the view of the Psychiatric Consultants, the Chief and Assistant Chief of the Psychiatry and Neurology Consultants Division, and The Surgeon General of the Army, that the mental condition of the accused at the time of the offenses is a mitigating factor so far as the sentence is concerned. Mitigation of the sentence is a matter for action by The Judge Advocate General, acting under the direction of the Secretary of the Army (AW 51a). Such being the case, the Judicial Council recommends the remission of the unexecuted portion of the sentence to confinement.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC

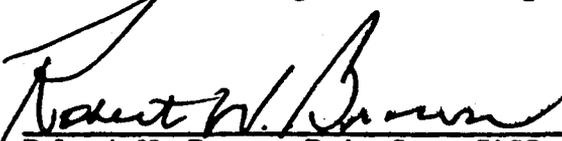

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

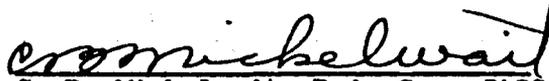
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

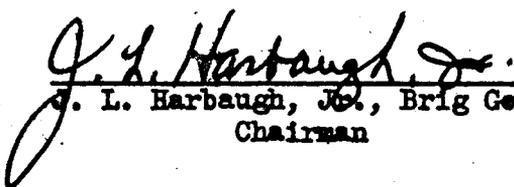
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Captain Rafael H. Dominguez, O-387668, Medical Company, 65th Infantry Regiment, Losey Field, Puerto Rico, upon the concurrence of The Judge Advocate General only so much of the finding of guilty of Specification 2 of the Charge is approved as involves a finding that the accused did at the place and time alleged commit an assault upon the person alleged by wrongfully pointing a pistol at him, in violation of the 96th Article of War. Upon the concurrence of The Judge Advocate General, only so much of the sentence, as modified by the reviewing authority, as involves dismissal from the service, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for one year is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

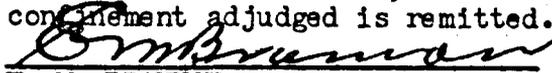

Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC

2 Aug 1950


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

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


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

23 Cur Act 1950



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

JAGI CM 340943

MAY 1 1 1950

U N I T E D S T A T E S	)	SIGNAL CORPS CENTER AND FORT MONMOUTH
)	
v.	)	Trial by G. C. M., convened at
	)	Fort Monmouth, New Jersey, 5, 6
Sergeant WILLIAM J. D. RUICK, JR.	)	and 12 December 1949. As to
(RA 14306062), and Recruit	)	accused RUICK, JR.: Dishonorable
NORBERT D. JOLICOEUR	)	discharge (suspended), total
(RA 16234944), both Assigned	)	forfeitures after promulgation,
Company A, 9400 Technical	)	and confinement for two (2) years.
Service Unit, Signal Corps,	)	As to accused JOLICOEUR:
Signal Training Regiment,	)	Dishonorable discharge (suspended),
Fort Monmouth, New Jersey.	)	total forfeitures after promulgation,
	)	and confinement for one (1) year.
	)	BOTH: Branch United States
	)	Disciplinary Barracks.

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

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

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

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

Specification 1: In that Sergeant William J. D. Ruick, Junior, and Recruit (then Private First Class) Norbert D. Jolicoeur, both assigned Company A, 9400 Technical Service Unit, Signal Corps, Signal Training Regiment, Fort Monmouth, New Jersey, acting jointly and pursuant to a common intent, did, in conjunction with Recruit (Then Private) James V. Camodeca, on or about 6 June 1949, at Fort Monmouth, New Jersey, feloniously steal one motor vehicle, to wit: A DeSota Sedan, year 1939, of the value of more than fifty dollars (\$50.00), the property of Private Sterling A. Siefert.

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Specification 2: Finding of not guilty.

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

Specification 1: In that Sergeant William J. D. Ruick, Junior, and Recruit (then Private First Class) Norbert D. Jolicoeur, both assigned Company A, 9400 Technical Service Unit, Signal Corps, Signal Training Regiment, Fort Monmouth, New Jersey, being in possession of a motor vehicle, to wit: a DeSota Sedan, year 1939, property of Private Sterling A. Siefer, the said motor vehicle then having been lately before feloniously stolen, taken and carried away, acting jointly and in pursuance of a common intent, did, in conjunction with Recruit (then Private) James V. Camodeca, on or about 6 June 1949, wrongfully drive, operate and transport the said motor vehicle from the State of New Jersey through various states of the United States, namely, New York, Pennsylvania, Ohio, Indiana, Illinois and into the State of Missouri, then well knowing the said motor vehicle to have been so feloniously stolen, taken and carried away.

Specification 2: In that Sergeant William J. D. Ruick, Junior, and Recruit (then Private First Class) Norbert D. Jolicoeur, both assigned Company A, 9400 Technical Service Unit, Signal Corps, Signal Training Regiment, Fort Monmouth, New Jersey, acting jointly and with a common intent, did, in conjunction with Recruit (then Private) James V. Camodeca, on or about 6 June 1949, with intent to defraud willfully, unlawfully, and feloniously utter as true and genuine a certain check in words and figures as follows:

ALLENHURST NATIONAL BANK AND TRUST COMPANY
FORT MONMOUTH AGENCY

ALLENHURST, N.J. June 6 1949 No. 34

PAY TO THE
ORDER OF Norbert Jolicoeur \$ 25.00

Twenty-five dollars - - - - - 00/xx DOLLARS

/s/ J. D. Ruick Jr.

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 /s/ Norbert Jolicoeur
 Co A ATR
 /s/ Sam D. Baer

a writing of a public nature which might operate to the prejudice of another, which said check was as they, the said Sergeant William J. D. Ruick, Junior, and Recruit (then Private First Class) Norbert D. Jolicoeur well knew falsely made and forged.

Each accused pleaded not guilty to all Charges and Specifications. Each accused was found not guilty of Specification 2 of Charge I, guilty of Specification 1 of Charge I except the words "feloniously steal," substituting therefor the words "wrongfully and unlawfully take and use" and adding at the end of the specification the words "with the intent to deprive the said owner temporarily of his property," of the excepted words not guilty, of the substituted words and the additional words guilty. Each accused was found not guilty of Charge I, but guilty of a violation of the 96th Article of War. Each accused was found guilty of Charge II, guilty of Specification 1, except the words "lately before feloniously stolen" substituting therefor the words "wrongfully and unlawfully," and except the words "feloniously stolen," substituting therefor the words "wrongfully and unlawfully," of the excepted words not guilty, of the substituted words guilty, and guilty of Specification 2 of the Charge. No evidence of previous convictions was introduced as to either accused. The accused Ruick 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 (2) years. The accused Jolicoeur 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 one (1) year. The reviewing authority approved the findings and the sentence as to each accused but suspended the execution of the dishonorable discharge as to each accused until the soldier's release from confinement, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, or elsewhere as the Secretary of the Army may direct as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50g.

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3. The record of trial is legally sufficient to support the findings of guilty of Specification 1 of Charge I and Charge I, Specification 1 of Charge II and Charge II, and the sentence as to each accused. The only question requiring consideration is whether the evidence adduced at the trial is legally sufficient to support the findings of guilty of Specification 2 of Charge II as to each accused.

4. The evidence pertinent to the findings of guilty of Specification 2 of Charge II is summarized as follows:

a. For the prosecution.

The two accused are persons subject to military law and on 6 June 1949 were assigned to Company "A", 9400 Technical Service Unit-Signal Corps, Signal Training Regiment, Fort Monmouth, New Jersey (Pros. Exs. 1 & 2; R. 10). On 6 June 1949, accused Ruick and Jolicoeur, together with Recruit James V. Camodeca, drove from Fort Monmouth to Long Branch, New Jersey (R. 19). The three soldiers desired to secure funds to finance a journey to St. Louis, Missouri. While the three were sitting in an automobile in front of "Schroeder's Bar," accused Ruick removed a check book from his pocket, handed it to Camodeca, and asked Camodeca to make out a check payable to accused Jolicoeur for \$25.00 (R. 19). This was not an order (R. 26). Camodeca signed the check in the name of "J. D. Ruick Jr" as drawer. Camodeca identified a check introduced into evidence as the check which he had drafted (Pros. Ex. 5; R. 19, 20). Recruit Camodeca further testified that he signed the check because:

"He didn't have sufficient funds in the bank to cover that check and if I wrote it out for \$25.00 payable to Jolicoeur, which he cashed, if the check bounced he can claim it to be forgery and wouldn't have to make it good" (R. 20).

Camodeca accompanied Jolicoeur into "Campbells Bar," saw Sam D. Baer, the bartender, cash the check and give Jolicoeur \$25.00, and observed Jolicoeur hand the \$25.00 to accused Ruick after they returned to the car (R. 20). The witness denied that in the past he had signed other peoples' names to documents (R. 25).

Mrs. Clara B. Vogel, of the Allenhurst National Bank and Trust Company, testified that accused Ruick, during the period 31 May - 16 June 1949, had a checking account at the bank where she was employed as assistant cashier. She identified a duplicate bank statement for that period which was introduced into evidence (Pros. Ex. 6; R. 29). At the close of business on 6 June 1949, Ruick's account showed a balance of \$17.53. The check identified as Prosecution Exhibit 5 was presented for payment 9 June 1949, on which date Ruick's account showed a balance of \$2.59. The check was returned because of insufficient funds, and Ruick's account was debited \$1.00 as a service charge. She did not

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personally check the signature on the instrument. The witness testified that she did not believe that Ruick was personally notified of the overdraft (R. 30).

b. For the defense.

Accused Ruick, after having been duly apprised of his rights, elected to become a witness in his own behalf (R. 52). He testified that on or about 8 June 1949 he and Jolicoeur were conversing, at which time:

"* * * the subject of money came about and he remarks in one way or another that he wished he had the additional money that I had given him in New Jersey. I remarked to him, I didn't know that I had given him the money and he told me of the check. Well, on various occasions I have given Jolicoeur checks and I wasn't sure to which one he was referring, but the more we dickers back and forth about it, the more I realized that it was not a check that I wrote and as he specified the time that he received it, I told him I had never written any such check whatsoever. We then went back down town to the Woodbine Hotel to find out if Camodeca was still there to question him on this check to see if he had written it, because Jolicoeur told me he had received it from Camodeca. Camodeca was not in the hotel, he had checked out and of course where he went from there I do not know * * *" (R. 54).

The first time that the witness stated that he had seen the check identified as Prosecution Exhibit 5 was 1 September 1949 at 1400 hours, at which time it was shown to him by a CID agent (R. 57). He did not know whether the check came from his check book because he did not have the book. The book was kept in the drawer of his desk in his cadre room. He had never given permission for anyone to sign his name to any document, and had no idea who signed the check (R. 55, 57, 66). He testified that the signature on the check did not resemble his signature (R. 67). Ruick further testified that he had known accused Jolicoeur since June or July, 1948, and that Jolicoeur had cashed at least two of Ruick's checks in Campbells Bar during this period of time (R. 63).

Accused Jolicoeur, after having been duly apprised of his rights, elected to become a witness in his own behalf (R. 69). He testified as to the events of 6 June 1949 that:

"* * * I just went to Campbell's Bar and had a few beers and while I was in there, Camodeca came in with this check and he told me he had gotten it from Sgt Ruick, and since Ruick did owe me the money and we had planned on leaving the Post, he was wanting the \$25.00, so I accepted the check and the story that he got it from Ruick to pay me, so I could pay him that money, so when we left we'd be all squared up" (R. 70).

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He gave the money to Camodeca (R. 73, 78). On 8 June 1949, the witness told Ruick about this transaction, and was informed by Ruick that he (Ruick) had never written the check. Ruick appeared to be surprised when told about the check (R. 72). Jolicoeur admitted having cashed two or three checks for Ruick in Campbells Bar during the year preceding the present incident. He had seen Ruick's signature several times but did not question the signature on the check given him by Camodeca (R. 73, 76).

Recruit Camodeca was recalled as a witness for the defense and denied that Jolicoeur owed him money on 6 June 1949 or that Jolicoeur gave him or loaned him the \$25.00 (R. 92). Further, he reiterated that he was told by Ruick to draft the check and saw Jolicoeur hand the money to accused Ruick. He had been told by Ruick to enter the number "34" on the check (R. 98). The witness did not know it was wrong at the time to write a check and sign somebody else's name to it "when the owner was present and knowing that I was doing it" (R. 99).

c. For the court.

Mrs. Vogel, cashier of the Allenhurst National Bank and Trust Company, was recalled as a witness for the court. She testified that the check involved was known as a "convenience check." These checks are purchased for \$1.00 for a book of ten checks by the customer at the bank, and the name of the purchaser is entered in the front of the book (R. 100). For a person to obtain a book of these "convenience checks," it would be necessary that he have an account in the bank or else purchase one for someone else that has an account (R. 101).

5. Each accused was found guilty of a violation of the 96th Article of War in that they uttered as true and genuine a certain described check which they well knew was falsely made and forged. Each accused was found not guilty of a specification charged under Article of War 93 alleging the forgery of the check in question. Finding each accused not guilty of forgery but guilty of uttering a forged instrument is not a fatal variance. "While both may arise out of the same transaction, the offenses of forgery and uttering are separate" (CM 120113; Dig. Ops. 1912-40, sec. 451 (25), page 319).

Concerning the offense of uttering a forged instrument, the Manual for Courts-Martial, 1949 (par. 183c, page 259) enumerates five elements of proof necessary to sustain a finding of guilty:

"Proof.--(a) That as alleged in the specification, a certain paper was falsely made or falsely altered; (b) that such writing was of a nature which would, if genuine, apparently impose a legal liability on another, or change his legal liability to his prejudice; (c) that the accused, as alleged in the specification, uttered the paper as true and genuine; (d) that the accused, when so doing, knew

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said paper to have been falsely made or falsely altered, as alleged in the specification; and (e) facts and circumstances indicating the intent of the accused to defraud or prejudice the right of another."

There was competent evidence that the drafting and uttering of the check were portions of a pattern to secure funds to finance a cross-country junket. Ruick furnished the blank check and the idea; Camodeca, although not tried at the time of this trial, the drafting, which included the utilization of Ruick's name as drawer; Jolicoeur accomplished the passing. To rebut this testimony of the prosecution, Ruick professed complete innocence of the plot until enlightened by Jolicoeur two days after the offense was allegedly committed. Jolicoeur admitted indorsing the check after being given the check by Camodeca, receiving value therefor which amount he turned over to Camodeca, but denied knowledge of the instrument's falsity. Thus, a controverted issue of fact was created which was determined against the accused in the first instance, at least by the court (CM 234711, Sandlin, 21 BR 131; 137; CM 320308, Harnack, 69 BR 323, 329; CM 334323, Reigler, 1 BR-JC 161, 167). It is obvious that in finding both accused guilty of uttering, the court was convinced beyond a reasonable doubt that Ruick and Jolicoeur were both principals in the offense.

That the instrument involved was drawn against insufficient funds and was designed to operate to the prejudice of another is undeniable. Nevertheless, the evidence fails to show that the instrument was "falsely made," an essential element of the offense of uttering a forged instrument. In construing this matter, the courts require more than mere misstatements and ulterior motives. The term "falsely made" with reference to forgery refers to the paper itself as being false, and not to the truth or falsity of its statements nor to the tenor of the writing or the facts stated therein. A false statement of fact in an instrument which is itself genuine, by which another person is deceived and defrauded, is not forgery (De Rose v. People, 64 Colo. 332, LRA 1918c, 1193, 171 Pac. 359). The Boards of Review have had occasion to distinguish between "false instruments" and "falsely made instruments" and stated that "whereas falsely made or forged instruments are false, all false instruments are not necessarily falsely made" (CM 323022, Walker, 72 BR 5, 7-9).

If Ruick would not have been guilty of forgery, assuming he had personally drawn the instrument, does the act of Camodeca in drawing the instrument at the request of Ruick and in his presence alter the result? The Board of Review believes that the effect is the same. It is obvious that Ruick was present aiding, inciting, countenancing, and encouraging the preparation of the instrument. The proximity of the parties was such that the act of Camodeca must be considered as the act of Ruick and vice versa. It follows that the case falls within the rule which holds that the genuine making of an instrument for the purpose of defrauding does not constitute forgery. Since the evidence fails to show that the check was falsely

JAGI CM 340943

made, the specification alleging uttering of a forged instrument on the part of accused Ruick must fall. It follows, also, that the conviction of accused Jolicoeur, a principal in the same transaction, is not sustained by the evidence.

6. 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 as to each accused of Specification 2 of Charge II, legally sufficient to support the findings of guilty as to each accused of Specification 1 of Charge I and Charge I, and Specification 1 of Charge II and Charge II, and legally sufficient to support the sentence.

Robert E. Joseph, J. A. G. C.

Harold F. McDonnell, J. A. G. C.

John J. Taylor, J. A. G. C.

JAGI CM 340943

1st Ind

24 MAY 1950

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

TO: Commanding General, Signal Corps Center and Fort Monmouth,
Fort Monmouth, New Jersey

1. In the case of Sergeant William J. D. Ruick, Jr. (RA 14306062), and Recruit Norbert D. Jolicoeur (RA 16284944), both Assigned Company A, 9400 Technical Service Unit, Signal Corps, Signal Training Regiment, Fort Monmouth, New Jersey, 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 as to each accused of Specification 2 of Charge II, legally sufficient to support the findings of guilty as to each accused of Specification 1 of Charge I and Charge I, and Specification 1 of Charge II and Charge II, and legally sufficient to support the sentence as to each accused. Under Article of War 50g this holding and my concurrence vacates the finding of guilty as to each accused of Specification 2 of Charge II.

2. It is requested that you publish a general court-martial order in accordance with said holding and this indorsement, restoring all rights, privileges and property of which accused have been deprived by virtue of the finding of guilty as to each accused of Specification 2 of Charge II 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 340943)

2 Incls

1. Record of trial
2. Draft of GCMO



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

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

APR 27 1950

JAGH CM 340989

U N I T E D S T A T E S	)	KOBE BASE
)	
v.	)	Trial by G.C.M., convened at
	)	Kobe, Honshu, Japan, 9,10,13,
Private First Class JAMES H.	)	14 March 1950. Dishonorable
BANKS (RA 18302225), 710th	)	discharge, total forfeitures
Military Police Company, APO	)	after promulgation, and confine-
317.	)	ment for fifty (50) years.
	)	Federal Institution.

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

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

Specification: In that Private First Class James H. Banks, 710th Military Police Company, APO 317, did, at Kobe, Honshu, Japan, on or about 3 September 1949, forcibly and feloniously, against her will, have carnal knowledge of Kimiko Oguro, a Japanese female.

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

Specification 1: In that Private First Class James H. Banks, 710th Military Police Company, APO 317, did, at Kobe, Honshu, Japan, between 24 September 1949 and 3 December 1949 with intent to conceal and suppress evidence tending to show that he the said Private First Class James H. Banks had committed a felony, to wit: Rape of Kimiko Oguro, did wrongfully, unlawfully and feloniously, obstruct the orderly administration of justice by having Shoichiro Nakata, Japanese male, deliver to Kimiko Oguro various sums of Japanese currency of a total amount of Forty-one thousand (41,000) Yen for her support while hiding from United States Military Authorities.

Specification 2: In that Private First Class James H. Banks, 710th Military Police Company, APO 317, did, at Kobe, Honshu, Japan, between 24 September 1949 and 30 September 1949, with intent to conceal and suppress evidence tending to show that he had committed a felony, to wit: Rape of Kimiko Oguro, obstruct the orderly administration of justice by directing Toshiko Ohishi to tell Kimiko Ogura to flee to the country and hide herself until his trial was over and to also tell Kimiko Oguro that he would pay her expenses while she was in hiding, and that if she (Kimiko Oguro) failed to go he would have her taken by a Korean.

The accused 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 fifty years. The reviewing authority approved the sentence, designated a United States penitentiary, reformatory, or other such institution as the place of confinement, the prisoner to be committed to the custody of the Attorney General, or his designated representative, for classification, treatment, and service of sentence of confinement, and pursuant to Article of War 50e withheld the order directing execution of the sentence.

3. Evidence.

a. For the prosecution.

Specification 1, Charge I.

On the morning of 2 or 3 September 1949, between 0000 and 0030 hours, Private First Class James H. Banks of the 710th Military Police Company, the accused, requested permission from the desk sergeant to go on a one man patrol to pick up an "AWOL" on Dock Avenue in Kobe, Honshu, Japan. Permission was refused and accused returned to his organization (R 9-10). At "midnight; one o'clock" on the night of 2-3 September the accused came to the house of a Japanese girl in Ozaka City and requested that she have sexual relations with him. She refused because he was on duty (R 12-13). At about 0230 hours on the same night a "colored MP" met three Japanese girls near a billiard parlor in Kobe and asked them where they were going. So they would not be mistaken for prostitutes they told him they lived nearby, and took him into the house with the "billiard room" where they lived. The nephew of the proprietor tried to explain who they were. The soldier told the three girls to come with him to MP Operations. Then, to two of them, he said "You are small - no good" and to the big one "You are okay." At the sound of footsteps outside, the MP went out and the girls closed the door. One of them "peeped" and saw

him talking to two other girls outside (R 14-16,19,27). The "colored MP" was identified as the accused by the three Japanese girls (R 17,23,25).

At about 0200 hours, 3 September 1949, two Japanese girls, Kimiko Oguro (the victim) and Kaoru Oguro were on their way to the dock in Kobe to meet Kimiko's sister, Hiroko, who was arriving from Shikoku by ship, when they were stopped by a colored soldier who came out of a "billiard shop." He told them they were "pom pom" girls (prostitutes). They went to a police box nearby where the soldier attempted to use the telephone. Then "we were taken out down by the Motomachi main street" to a small alley where Kaoru was told to wait. The soldier and Kimiko wandered through the alley. She "thought there was something funny about it, but this man had the pistol on him" and she could not run away from him. They came to a place where a house was under construction (R 30-31,69,72). Her testimony from this point follows:

"The soldier told me to go into this home under construction so I refused first, but this soldier was furious looking at me, dragged me into this home which was under construction. I tried to resist from going into this home which is under construction, but my powers were overran by the soldier's strength and I was dragged into this home. As soon as I was dragged into this home, the soldier put his arm around my back and the soldier hugged me with very big strength so I called for help in Japanese - 'Tasukete kurai!' The first help I called for was because of my fear I couldn't speak out loud so I was intending to call for help, but the soldier with his strength insisted on me and kissed me. As my hand - my arm was grabbed by the soldier and I couldn't resist, so I struggled with my might - with my neck (indicating). The more I resisted the more the soldier put strength in me and I was kissed again. After being kissed the soldier tucked his leg under my leg and pushed me down on the ground. I do not recall how I fell down as I was so excited. After laying down on the ground I do not recall it too clearly, but I was about to go unconscious when the soldier tried to take my pants off. As I never expected things like this to happen so I tried my best to protect with my hand my private parts. As soon as I put my hand to cover my private part the soldier came right over me riding me. After the soldier coming right over me I don't remember exactly which hand it was, but with his finger he tried to play with my private parts. I tried my best to resist from the soldier during things like that. Then the soldier put out his penis and stuck it into my private parts. So for the last time I tried my best to put the soldier's private parts away from my private part. So in the course of this resistance I have felt the soldier's penis on about two to three occasions. I tried to stop the soldier from sticking his penis into my private parts and there was a struggle with me and the soldier. Although I

tried my best to resist, but I was overwhelmed by the soldier's strength. While we were in the course of struggling I felt something went into my private parts. So I started again to resist with my hands, but I couldn't reach the soldier with my short arm. Soon after I felt something went into my private part, I had a hell of a pain and I was trying to resist again. I felt as if I was stabbed by a sword or some knife. I felt that I was going to die from a pain like that. Every time the - when the soldier started putting his strength in it, tried to push on me, I repeated my pain, then the soldier told me 'Moe skoshi.'" (R 31)

She was crying from the pain. After about five minutes the soldier got up and wiped his "private parts" on some paper, and while she was standing there she felt something under her thigh and discovered it was blood. She was weeping, and "gazing at the soldier almost senseless." He gave her some money which she threw on the ground. He picked it up and left. Kimiko had never had sexual intercourse before this incident (R 31-32,39).

Kazushi Koreyasu, a Japanese policeman, was on duty at the Motomachi police box in Kobe City at about 0230 hours on 3 September when an MP "with an arm band on" and two girls came to his station. At about 0240 the same morning he saw one of the girls (Kaoru) and then at a separate place saw the other (Kimiko). Kimiko was standing near the "house under construction". She was greatly excited, crying, fixing her skirt, and appeared to be in an hysterical condition. He noticed bloodstains on her skirt. She said she had been raped some minutes before in the "building which was under construction." He did not see the soldier again that night but could recognize him if he were to see him again. He identified the accused in court as the soldier who had appeared earlier at the police box with the two girls (R 48-52, Pros Ex 10).

Captain John A. Van Susteren, MC, 8th Station Hospital, was first qualified as an expert, and then testified, that at some time very close to "2:30 in the morning," "about the early part of September" he examined a Japanese girl whom he later identified as Kimiko Oguro. She had a ruptured hymen which was oozing blood. She was not menstruating. There was no semen or spermatozoa (R 79,80,81).

The skirt, blouse and slip worn by Kimiko Oguro on the night of the incident were taken from her the next morning and were received in evidence, without objection, as Prosecution Exhibits 3, 4 and 5 (R 92-93,102). A laboratory report admitted in evidence as Prosecution Exhibit 2 (R 100) indicated that all garments tested positive for human blood and the blouse and slip tested positive for seminal fluid. On 3 September 1949, in the presence of the accused, one pair of trousers and one pair

of shorts were taken from the wall locker of the accused, one pair of trousers was taken from his laundry bag and one pair of shorts was taken from his person. They were identified by the agent who took them and were admitted in evidence over the objection of the accused as Prosecution Exhibits 6, 7, 8 and 9 (R 88,91-92,103). Both pairs of trousers tested negative for blood and positive for seminal fluid. One pair of shorts tested positive for blood, negative for seminal fluid and the other shorts were negative for both (Pros Ex 2).

At about 1100 hours, 3 September 1949, the accused after being warned of his rights, made a statement which was received in evidence without objection (R 89, Pros Ex 1). He stated that at approximately 2400 hours, 2 September 1949, he went in search of an AWOL. He saw three girls in front of a billiard parlor and, becoming suspicious, entered the billiard parlor but found no soldiers there. The proprietor told him the girls worked there so he left. About five yards away he met two girls and one asked him for a cigarette. She asked him if he had a girl friend and he asked her to "have an intercourse" with him. She said she was menstruating and showed him some blood. She wanted money but he had no Japanese money with him. She continued to "clinch" his arm, wanted him to walk with her, and told her girl friend to wait on the corner. He wanted to go back to operations and she agreed to wait for him to come back. He did not have intercourse with her but did with a girl known as Ruby earlier in the evening. He arrived back at operations about 0230, 3 September 1949 (Pros Ex 1).

At approximately 1500 hours 3 September 1949, the accused and CID investigator Harold Woods, Jr., went to the scene of the alleged incident. They went through an alley and entered an unfinished building. There were spots which appeared to be blood on the floor and the accused said "Yes, that is where the girl I was with fell down." When asked if he knew how the spots got there he said "Yes, the girl sat down there and that was the place where she placed her finger into her organs and showed me blood" (R 90). On 12 September 1949, the accused saw Kimiko Oguro and told Agent Woods she was the girl he was with at the scene previously visited by Agent Woods and the accused (R 93-94).

Specifications 1 and 2, Charge II.

Sometime in September 1949 the accused talked to Toshiko Oishi, through an interpreter, Miyoko Fukuda. He asked Fukuda to tell Toshiko he wanted her (Toshiko) to go to a girl who was working in a Chinese restaurant and tell her that he would give her enough money to hide for three months and if she would not he might give the money to a Korean and she would "stay no more." Fukuda interpreted exactly the words of the accused to Toshiko. Toshiko talked to Kimiko Oguro on 24 September 1949 about her rape case and told her that it would be better for her to disappear for three or four months and all of her expenses would be "looked after" (R 104-105,106-107,111-112).

On about 24 September 1949 accused told Soichiro Nakata that he, the accused, was under investigation on a rape case and that if the girl, Oguro, would stay in hiding for approximately three months he would pay her 150,000 yen, and asked him to pass the message to the girl. Nakata delivered the message and on five different occasions he delivered to Kimiko Oguro sums of money totalling 41,500 yen which he had obtained from the accused. He took Kimiko to her first place of hiding in Takatori and later took her from there to Toyonaka. The money was for her living and for "his apology." The last payment was made on 3 December 1949 (R 115-118,122,123-124).

b. For the defense.

A clerk from the office of the harbor master at Kobe City testified that the Azu-maru had arrived from Tokushima at 0515 hours, 3 September 1949, and that the name of Hiroko Oguro was not on the passenger list. He only had the records of ships of the Kansai Steamship Line coming to the central pier and had checked only the ship of that Line coming from Tokushima. He would not know about passenger lists of ships of other companies, and craft under nineteen tons would not report to the harbor master (R 129-130,131,132,133).

First Lieutenant Sigurd Sivertson, Medical Officer, 8th Station Hospital, testified that on 16 November 1949 a smear was taken from the prostate gland of the accused, and that it would be possible for a person suffering from prostate trouble to have an excretion of blood from the penis. It might be passed with the urine or might be noticed in the morning upon rising (R 137).

About midnight on 3 September 1949, the desk sergeant of the "209th MPs" told the accused to "go up yonder and pick up an AWOL." About 0630 or 0700 "that morning" the desk sergeant told a driver to pick up the accused on Dock Avenue. He did not see the accused "no where around" so he left Dock Avenue and "pulled back to the Operation." (R 139)

The accused, after having been duly apprised of his rights, elected to testify under oath. He stated that during the early morning hours of 3 September 1949 he met Kimiko Oguro on Pennsylvania Avenue and talked to her. She said she had missed her train at Motomachi Station and was worried about getting home. He took her to a police box where he attempted to call about a jeep that was supposed to pick him up. After leaving the police box she talked to him again about money she needed to catch a taxi. He told her he had no Japanese money but would take her to the Motomachi Hotel where she and her friend could spend the night but she was afraid and did not want to go. He started back to Operations through an alley and she followed him. He told her to wait and he would come back for her but she wanted to go to Operations with him. She told

him she had to get home in four hours and the taxi would be 2000 yen. She "faked a cry again" and said she was afraid to stand there. He asked her if she would like to be his girl friend and she said she was scared of GI's, and had never associated with them. He noticed they were leaning against a tall fence and it fell back. She indicated she had to use the latrine, went inside the fence and after one or two minutes, he noticed she was sitting with her head between her legs and looked as if she were going to cry. She started up and sat back on a piece of concrete and he asked her about having intercourse. She showed him a ball of paper or cotton to prove that she was menstruating so he told her to wait and he would go to camp, put up his pistol, and come back and take her to the Motomachi Hotel. She agreed, stood up there for two or three minutes, and made believe she was crying. He did not have or attempt to have intercourse with her (R 143-146).

4. Accused has been found guilty of rape as alleged in the Specification of Charge I.

"Rape is the unlawful carnal knowledge of a woman by force and without her consent.

* * *

"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.

"Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and if a woman fails to take such measures to frustrate the execution of a man's design as she is able to take and are called for by the circumstances, the inference may be drawn that she did in fact consent." (Par. 179b, MCM 1949).

The evidence shows that the accused "dragged" Kimiko into the unfinished building; as accused embraced her she cried for help and "struggled with her might" but could not overcome the soldier's "very big strength;" she was pushed to the ground and was so afraid and excited that she was about to "go unconscious;" she tried to protect her "private part" with her hand, tried her best to prevent accused from playing with her "private parts" and to "put the soldier's private parts away from her private part;" during the course of the "struggle" she felt something in her "private part" and felt like she "was stabbed with a sword or some knife" and "was going to die from a pain like that."

The prosecutrix was a foreign national of an occupied country and accused was not only a member of the occupying force but was an armed military policeman. These facts serve to explain her overwrought mental condition which prevented further outcries and more effective physical

resistance. "Where, in fact, the victim is overcome by fear her resistance is unnecessary to sustain a charge of rape" (CM 333860, Haynes and Lussmyer, 81 BR 375,384-385, citing CM 240674, Rinke, 26 BR 91,96). Her resistance was commensurate with the circumstances in which she found herself (CM 266302, Brown, 43 BR 221,228) and the court was justified in finding that it was sufficient to establish lack of consent.

The identity of the accused was established beyond doubt by the evidence introduced by the prosecution and by the sworn testimony of the accused admitting that he was with the prosecutrix at the time and place of the alleged incident.

Evidence was introduced tending to prove absence of spermatozoa from the organs of the prosecutrix. Since internal emission is not an element of the offense (Par. 179b, MCM, 1949), this evidence is of value only to the extent that it might tend to rebut the affirmative evidence of penetration. It must be assumed that the court gave due weight to this evidence in arriving at its finding of guilty.

Ample evidence was presented by the prosecution, without objection, to support all of the allegations of Specifications 1 and 2 of Charge II and the defense offered no evidence on these specifications. Since the finding of guilty of the Specification of Charge I is sufficient to support the sentence it is unnecessary to discuss the question as to whether the Specifications under Charge II are but different aspects of the same offense.

In reply to a question by the Law Member as to whether the accused understood "prior to going to trial" that he had a right, if he made a request in writing, to have enlisted men on the court, the accused stated "No, Sir, I didn't know that, Sir." The Law Member then asked: "Will you state to the court at this time whether or not it is your desire to have enlisted men sit on the court?" Accused replied "No, Sir." After the first reply it would have been desirable for the Law Member to have advised the accused fully as to this right and to have instructed him to confer with counsel before making his decision. The questions asked, however, were sufficient to apprise the accused of his rights and his unequivocal reply to the effect that he did not desire enlisted men upon the court was sufficient to satisfy the statutory requirements(A.W. 4). Failure of defense counsel to apprise an accused of this right prior to trial (cf Par. 45b, MCM 1949) is not a fatal error if, as in this case, the accused is afforded an opportunity to make an election before arraignment.

5. Accused is 23 years of age, single, and states that he has one child. He "graduated" from grade school and attended "Central M. Hi," Bogalusa, Louisiana, until June 1947. He was employed as a driver from

August 1945 to April 1947 and his highest salary was \$27.00 per week. He enlisted from New Orleans, Louisiana, on 28 July 1947, for a period of three years. His present tour of duty in Japan extends from January 1948. The highest grade attained was private first class and he has no awards or decorations. His rating for efficiency was "Satisfactory" and for character "Poor."

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to confinement at hard labor for fifty 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.

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

Robert Barker, J.A.G.C.

William H. Churchill, J.A.G.C.

(234)

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

APR 27 1950

Board of Review

CM 340989

U N I T E D S T A T E S)
v.)
Private First Class JAMES)
H. BANKS (RA 18302225),)
710th Military Police Com-)
pany, APO 317.)

KOBE BASE
Trial by G.C.M. , convened at
Kobe, Honshu, Japan, 9,10,13,14
March 1950. Dishonorable discharge,
total forfeitures after promulgation,
and confinement for fifty (50) years.
Federal Institution.

HOLDING by the BOARD OF REVIEW
HILL, BARKIN, and CHURCHWELL
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 .

C. P. Hill, J.A.G.C.
Robert Barkin, J.A.G.C.
William Churchwell, J.A.G.C.

1st Indorsement

Dept. of Army, J.A.G.C.
Kobe Base, APO 317, c/o Postmaster, San Francisco, California

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

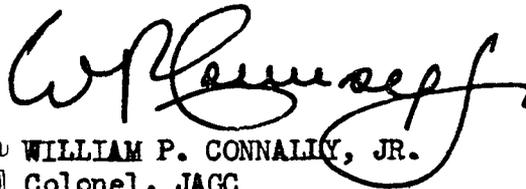
1. In the case of Private First Class James H. Banks (RA 18302225),
710th Military Police Company, APO 317,

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 340989).

FOR THE JUDGE ADVOCATE GENERAL:



RECORDED



H.Q.K.B.

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

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

CSJAGV CM 338303

14 FEB 1950

U N I T E D S T A T E S	)	FORT JACKSON, SOUTH CAROLINA
)	
v.	)	Trial by G.C.M., convened at
Corporal ELMO F. PIERCE	)	Fort Jackson, South Carolina,
(RA 18105583), Headquarters	)	19 August 1949. Dishonorable
Company Section 2, 3431 Area	)	discharge (suspended), total
Service Unit, Fort Jackson,	)	forfeitures after promulgation
South Carolina.	)	and confinement for one (1)
	)	year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
GUTHRIE, EISANT and OEDING
Officers of the Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Corporal Elmo F. Pierce, Headquarters Company Section 2, 3431 Area Service Unit, then Sergeant Elmo F. Pierce, Reception Center Detachment, 1857th SCU, War Department Personnel Center, did at Fort Sam Houston, Texas, on or about 3 February 1946, desert the service of the United States, and did remain absent in desertion until he was apprehended at Rock Hill, South Carolina on or about 29 April 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 to become due after the date of the order directing execution of the sentence and to be confined at hard labor for two and one-half years. The reviewing authority approved the sentence but reduced the period of confinement to one year, suspended the execution of the dishonorable discharge until the soldier's release from confinement, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement, and ordered the execution of the sentence as thus modified. The result of the trial was promulgated in General Court-Martial Orders Number 98,

DEJAW CL 338303

Headquarters Fort Jackson, South Carolina, dated 10 September 1949.

3. The prosecution introduced as Exhibit 1 a deposition of Laurice Held, taken at Miami, Florida, on 12 August 1949. Mr. Held testified that he was in the military service in February of 1946 and that on or about 7 February he was a First Lieutenant, stationed with the War Department Personnel Center, Fort Sam Houston, Texas, as Chief of Military Personnel. He identified a document, introduced in evidence as Prosecution's Exhibit 1a, as a photostatic copy of a morning report of the Reception Center Detachment, 1857th SCU, DML, dated 7 February 1946, which consisted of four pages. Each page of this exhibit bears the official seal of the Adjutant General's Office. Page four of the morning report proper bears the following pertinent entry:

"86 EM Dy to AMOL (List atchd Incl #6)".

A list, attached to the morning report, dated 7 February 1946, consisting of two pages and marked Inclosure 1, lists the accused's name and at the end of the list there is a notation:

"Above 86 EM Dy to AMOL".

Both the morning report and the list bear the purported signature of "Laurice Held," First Lieutenant AUS, followed by the initials "J.C." This signature appeared on the first page of the attached list, but not on the second page where the entry pertaining to the accused appeared.

Mr. Held further testified by deposition that he was not the commanding officer of the Reception Center Detachment, 1857th SCU DML, that he did not sign the morning report and did not remember who the "J.C.", whose initials appeared under the purported signature, might be. However, he believed they were the initials of a warrant officer or enlisted man who was probably the chief of the morning report section and that such person was authorized by Held to sign morning reports "per the usual procedure that existed prior to my appointment on this tour of duty." This was a "custom of the organization" and it was a regularly accepted procedure in the organization of long standing. The fact that the list was marked Inclosure 1, whereas the morning report refers to Inclosure 6, was probably a clerical error and similarly the signature on the first page of the attached list instead of the second page was also a clerical error. In answer to the fifth cross interrogatory, which asked the witness to explain in detail the organization and operation of the reporting unit, Held replied in part:

"to the best of my knowledge, the Reception Center was utilized for enlistees as initial organization, to be processed into the Army. I feel that the enclosed document listed as 'Prosecution Exhibit for Identification Purposes Only' is really a photostatic copy of a morning report for the Reception Station. Why the heading is incorrect, I do not know, however, the Reception Station

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was responsible for the handling of personnel returning from overseas for processing and reassignment;***. The Morning Report Section of this Reception Station handled thousands of men daily, and this duty was very tedious and exacting; ***the Chief of the Morning Report Section was in complete charge of the preparation and accuracy of such morning reports. It is quite possible that due to the heavy turn-over of personnel that the men whose names appear on pages 3 and 4 of the enclosed document, could have very easily been transferred to separation centers for discharge, or, could have been re-assigned and through some administrative error were listed on the rolls of the reception station as MCL. My position as Chief, Military Personnel, did not permit me to accurately examine each and every morning report prepared in the War Department Personnel Center, and to have complete and thorough knowledge required for authentication. Since it was my responsibility to authenticate all morning reports, I continued the practice that was in effect when I was first assigned, June 1945, to rely on the information furnished me on the morning report by the Chiefs of the various Morning Report Sections as being accurate; and they in turn, were authorized to affix my signature to such morning reports."

The photostatic copy of the morning report (and inclosures) was offered and accepted in evidence, over the objections of the defense, not as an official record but as a business entry under the provisions of paragraph 130c, Manual for Courts-Martial, 1949, and 28 USC 695 (1940 Ed) - 28 USC 1732 (1948 Ed). By his vigorous and comprehensive objection the defense counsel preserved every objection based on the best evidence rule, or improper authentication, which might have been waived by failure to object. Without touching on the merit of all of the objections, the Board considered only these questions: whether the original of the document was admissible as a business entry, and if so, whether a copy would be admissible over objection.

4. The basis for the admissibility of the document relied on by the prosecution, the law member and the staff judge advocate was the business entry exception to the hearsay rule as expressed in paragraph 130c, Manual for Courts-Martial, 1949 and 28 USC 1732 (1948 Ed). The manual provides in relevant part:

"Any writing or record, whether in the form of an entry in a book, or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event if made in the regular course of any business and if it was the regular course of such business to make such memorandum or record at the time of the act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

* * *

"An entry made in the usual course of business is admissible even though it was not made or kept pursuant to any law or regulation. Tally sheets used by a post warehouse as a convenient business method of keeping account of military stores passing through it have been held admissible although no regulation, directive or order required that the tally sheets be made or kept."

The last subparagraph of 130c, supra, clearly makes admissible business entries which are made without the sanction of regulations. Thus if the list attached to the morning report was a convenient memorandum, kept in accordance with local usage to furnish information upon which an official entry might be made, it would be clearly admissible. The fact that such a memorandum, kept according to business practice, was later used improperly in the preparation of an irregular morning report would not affect the admissibility of the memorandum. In the Board's opinion Mr. Held's testimony sufficiently indicates that the entries appearing on the original document were made in the regular course of business by personnel whose proper duty it was to prepare the form in the Morning Report Section of the Headquarters. Accordingly, the original of the document could, on the basis of Held's testimony, be regarded as competent evidence of the facts therein recited (CM 312023, Schirmer, 61 B R 335).

There is ample authority in the Manual for Courts-Martial for the reception in evidence of copies of official records without accounting for the original (See par 129a, par 129b, pp 163, 164, MCM, 1949). There is, however, no authority for the admissibility of copies of business entries without accounting for the original:

"A business entry is properly authenticated by proof that it came from the custody of and was made by or deposited in an office whose business it was to record the act, transaction, occurrence, or event set forth in the entry." (par 130c, p 167, MCM, 1949)

"***whenever a business entry is properly authenticated by the testimony of a witness taken on deposition, a copy of the business entry, identified as such by the witness, may be substituted for the original. The copy will accompany and be part of the deposition and may be received in evidence equally with the original." (par 131a, p 170, MCM, 1949)

The foregoing provision is clearly a rule of convenience with respect to depositions, but it does not relax the rule of authentication of business entries or make it possible to authenticate by deposition a document which could not be authenticated in open court. It merely provides that when the deponent identifies an original, a copy also identified as such may be attached to the deposition. It is clear from Mr. Held's testimony that the original list was not exhibited to him. As a general rule secondary evidence of business entries is admissible only if acceptable under the best evidence rule (Irving Shoe Company v Degan, 93 F 2d 711; United States v Kaibney, 155 F 2d 795; Block's Case, 7 Ct. Cl. 706 (1871));

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Burroughs v United States, 4 Ct. Cl. 555 (1868); United States v Johnson, 72 F 2d 614, 617 (CCA 8, 1934)).

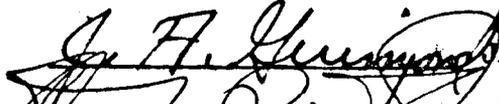
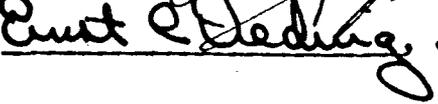
The present statutory authority for the admissibility of copies of government writings is contained in 28 USC 1733, which provides:

"(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

"(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof."

From an examination of the cases cited above it appears that the Federal Courts have consistently construed similar words in the statutes which preceded 28 USC 1733 as pertaining only to official records. The Court of Claims held that the words "documents" and "papers" cannot be held to mean every document or paper on file, but only such as were made by an officer or agent of the Government in the course of his official duty. Official documents, duly certified, need no further proof, but other documents, though on file, do not by the mere fact of certification, become so authenticated as to entitle them to be read in evidence. In the absence of waiver of objection based on the best evidence rule, by failure to object, it does not appear that the copy in the instant case was admissible without accounting for the unavailability of the original. Consequently, it follows that proof of the accused's initial absence without leave was not established, and without such proof an essential element of the offense charged is lacking.

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.

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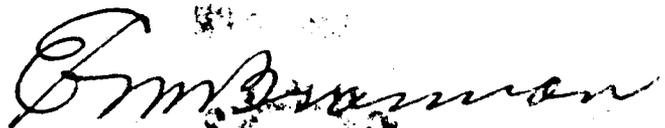
JAGO, Department of the Army, Washington 25, D. C.
TO: Commanding General, Fort Jackson, South Carolina.

1. In the case of Corporal Elmo F. Pierce (RA 18105583), Headquarters Company Section 2, 3431 Area Service Unit, Fort Jackson, South Carolina, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under Article of War 50e(3) this holding and my concurrence 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. You are authorized to direct a rehearing. Should you determine so to do, a statement to that effect should be added to the general court-martial order, when issued.

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

(CM 338303).



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

Incls:

Record of trial
Draft GCMO

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

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CSJAGH CM 338668

9 November 1949

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

25TH INFANTRY DIVISION

v.)

Private CHARLES H. O'DANIEL,)
RA 14303166, and Recruit)
MELVIN C. MARTIN, RA 19294743,)
both of Heavy Mortar Company,)
27th Infantry Regiment, APO)
25, Unit 1.)

) Trial by G.C.M., convened at Osaka,
) Honshu, Japan, APO 25, 25,26 August
) and 1 September 1949. O'Daniel:
) Dishonorable discharge, total for-
) feitures after promulgation, and
) confinement for twenty (20) years.
) Federal Reformatory, El Reno,
) Oklahoma. Martin: Dishonorable
) discharge, total forfeitures after
) promulgation, and confinement for
) life.

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 soldiers named above, and, as to the accused Martin, submits this, its opinion, to the Judicial Council and The Judge Advocate General. (By separate holding the Board of Review has held the record of trial legally sufficient to support the findings of guilty and the sentence as to the accused O'Daniel).

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

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

Specification: In that Recruit Melvin C. Martin, Heavy Mortar Company, 27th Infantry, and Private Charles H. O'Daniel, Heavy Mortar Company, 27th Infantry, acting jointly and in pursuance of a common intent, did at Sakai City, Honshu, Japan, on or about 4 July 1949, feloniously, willfully, and unlawfully kill Heikei Ichizu by kicking him on the chest and abdomen with their feet.

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

Specification: In that Recruit Melvin C. Martin, Heavy Mortar Company, 27th Infantry Regiment, APO 25, did, at Yata-mura,

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Osaka Prefecture, Honshu, Japan, on or about 20 July 1949, forcibly and feloniously, against her will, have carnal knowledge of Kiyoko Kamino.

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

Specification: In that Recruit Melvin C. Martin, Heavy Mortar Company, 27th Infantry Regiment, APO 25, did, in conjunction with Private Charles H. O'Daniel, Heavy Mortar Company, 27th Infantry Regiment, APO 25, at Yata-mura, Osaka Prefecture, Honshu, Japan, on or about 20 July 1949, by force and violence and putting her in fear, feloniously steal from the presence of Kudama Kamino five thousand (5,000) yen, value of about \$13.88, and one bicycle, value of about \$5.00, of a total value of about \$18.88, the property of Kudama Kamino.

He pleaded not guilty to all Charges and Specifications. He was found guilty of all Charges and Specifications, except the words in the Specification of Charge I, "and Private Charles H. O'Daniel, Heavy Mortar Company, 27th Infantry, acting jointly and in pursuance of a common intent," of the excepted words not guilty. Evidence was introduced of one previous conviction by summary court-martial for wrongfully introducing whiskey into quarters. 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 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.

a. For the prosecution.

(The various Japanese witnesses in their testimony refer to the accused Martin and his co-accused, O'Daniel, a member of accused's organization, by physical characteristics rather than by name. For the sake of convenience, where the context permits we will refer to Martin as the accused and to O'Daniel by name.)

Accused is a member of the Heavy Mortar Company, 27th Infantry Regiment, 25th Infantry Division (R 16).

At about 11:00 o'clock in the evening of 4 July 1949, in response to a call, Ayaka Yamanaka and Sumiko Fujiwara, "pompom girls," entered the candy shop of Mrs. Akie Kuroda, at #27, Higashi Asakayama, which

was located about 50 meters from the Asakayama Railroad Station in Sakai City (R 47,49,69,79). Among others, there were present at the time, the accused, O'Daniel, Mrs. Kuroda, and a Korean called Ichizu, who was drinking sake. (R 47,49,71,80) Mrs. Kuroda asked the girls to take accused and his companion, O'Daniel, out. The Korean said that the soldiers were "very nice people" and told the girls to "play" with them. The Korean also told Mrs. Kuroda that he would obtain some cigarettes from the soldiers and give them to her. The two girls left Mrs. Kuroda's place with accused and O'Daniel, and the Korean followed them. When the group reached the first railway crossing, or underpass, about 5 to 9 meters from Mrs. Kuroda's place, one of the two soldiers asked the girls to sell some cigarettes for them. The Korean offered to sell the cigarettes and tried to take them from the soldiers. The soldiers evidently did not understand what the Korean had said and so Sumiko Fujiwara explained the Korean's offer. The soldiers were, however, unwilling to give up the cigarettes unless they were paid (R 70,71,76, 80). There was no more discussion concerning cigarettes, but, instead, the Korean asked Sumiko to procure a girl for him. Ayaka, the other prostitute, told him it would be impossible to get a girl at that late hour and advised him to go home. Accused made a motion as if to strike the Korean, but the two girls intervened. Accused's menacing attitude did not deter the Korean who continued to follow along and to importune the two girls to get him "a girl." He was very drunk and he raised his hand as if to strike one of the soldiers, but the latter grabbed his hand and the Korean fell. At Sumiko's suggestion, accused offered the Korean money, apparently to get rid of him, but the latter refused to accept it. Ayaka told him that she would go "to Kanoaka" and get a girl for him, and that he should wait until she returned. Accused seized the Korean's hand and started to walk with him as the remainder of the group moved away. When the girls and O'Daniel reached "the first guide post," Sumiko noticed that the Korean had fallen. After the girls and O'Daniel had turned the guide post and crossed a little bridge, accused was out of sight. The girls and O'Daniel entered a teahouse, and after remaining there for seven or eight minutes, left and came to the second guide post. O'Daniel then returned to the bridge to await the accused. The latter soon came running to join the girls. He was breathing hard as though "he had been doing some heavy work" (R 70,71,72,76,80, 81).

Mrs. Kuroda was unable to identify accused as being one of the two soldiers whom the "pompom girls" and Ichizu accompanied from her place on the night of 4 July and, as to O'Daniel, she merely testified that he had the same kind of hair as one of the soldiers (R 47). Sumiko Fujiwara was unable to fix the time of the foregoing incidents more definitely than "sometime in July." Initially, in her testimony, she was unable to identify the accused although she did identify O'Daniel (R 69). Later,

she identified accused as the person whom she saw make a motion to strike the Korean and as the person in whose company she last saw the Korean alive (R 71). Upon cross-examination she admitted that the fact that accused was sitting next to O'Daniel in the courtroom was the reason why she identified accused (R 75). She also admitted that at one pretrial lineup she failed to identify accused, but she claimed that at another lineup she did identify him (R 78-79). Ayaka Yamanaka definitely identified accused and O'Daniel as the two soldiers with whom she and Sumiko left Mrs. Kuroda's place with the Korean and whom she subsequently observed in altercation with the Korean. She further placed the date of the incidents as 4 July (R 79-80). Upon cross-examination she admitted that at one pretrial lineup she was unable to identify the accused but she claimed that at the time accused was wearing a bandage on his face. She testified that at another lineup at Sugimoto Camp a week later, she did identify accused (R 83).

Mrs. Misue Murata testified that at approximately 9:30 in the evening of 4 July 1949, accompanied by Manjiro Ikeda, she passed through the Asakayama Station underpass about 50 meters from Mrs. Kuroda's place, and she observed an occupation soldier kicking a man. The soldier motioned for her to go away and she ran into Mrs. Kuroda's place. Mrs. Murata identified accused as the occupation soldier involved. She admitted on cross-examination that she had identified accused at the Sugimoto Prison after Ikeda had pointed him out (R 84,85).

At 10:25 a.m., 5 July, Nogiwa Taizo, a policeman in the Sakai City Police Department, was on duty in the police box at the Asakayama Railroad Station when he received information that the body of a dead Korean was floating in the river. He went to the river and found a corpse at a point which he estimated was about 30 meters east of the railroad station (R 51-53). Yoshino Fukuzo, a police lieutenant, also received a report concerning the discovery of the corpse and went to the Saijo River where he met Policeman Nogiwa. Yoshino estimated that the corpse was located at a point in the river about 100 meters east of Asakayama Railroad Station. The corpse was clothed in a dark, dull green shirt and khaki pants. There was a belt about $1\frac{1}{4}$ " in width around the neck of the corpse (R 54,55).

The same day, "about 11:30", at a point in the river "about 80 meters" east of the Asakayama Station, Heitetsu Ichizu viewed a corpse which he identified as being that of his brother, Heikei Ichizu. Present at the time were seven or eight policemen, and later "an occupation person" and an interpreter. Heitetsu had previously seen his brother on the morning of 4 July at which time he was alive and healthy and free from wounds on his body (R 64-66). Upon cross-examination Heitetsu

admitted that he had suspected that Mrs. Kuroda's brother had murdered Heikei and that a few days earlier he, Heitetsu, had fought with Mrs. Kuroda's brother (R 65).

At about 3:00 o'clock in the afternoon of 5 July, in response to a request by the prosecuting attorney, Doctor Tokuzo Omura went to the river near the Asakayama Railroad Station and, at a point in the river about "300 to 400 meters" east of the station, saw a corpse. When the corpse was lifted out of the river Doctor Omura noticed a three inch belt looped loosely around the neck of the corpse (R 58). Doctor Omura testified that Mrs. Kuroda was among those present when the corpse was taken from the water (R 61-62). Mrs. Kuroda testified that the body was that of the Korean whom she had last seen the previous evening leaving her place of business with two "pompom girls" and two soldiers (R 50-51). The same afternoon Sumiko Fujiwara observed a corpse in the river some distance east of the Asakayama Station. She identified the corpse as the Korean who accompanied her when she left Mrs. Kuroda's place the previous evening (R 73).

Doctor Omura had the corpse taken to the Sakai Station where he subsequently performed an autopsy upon the body (R 58). Among others present at the station at or about the time of the autopsy were Yoshino, the police lieutenant, and Heitetsu Ichizu (R 55,66). Doctor Tokuzo Omura testified that he was graduated from the Osaka Medical College in 1922, and since that time had performed over 2,000 autopsies. In the course of the autopsy he found the following wounds: A wound approximately one inch in length on the right crown of the head; a wound on the forehead next to the hairline; wounds approximately one inch in length over each eyebrow; a wound over the right cheekbone, another extending down from the nose toward the lip, and a very small wound on the chin. These wounds were caused by "hitting something or something hitting it." Under the lower lip there was considerable blood. The right elbow was out of joint. Blood was observed underneath the skin below the right ear. Doctor Omura found that the deceased had 18 broken bones in the chest and rib area. The right side of the heart had been "squashed" by pressure from bone. The gall bladder was "displaced" and "squashed." In the area of the right side of the back there were five or six internal wounds all of which were bleeding. There was no water in the deceased's lungs. Doctor Omura commenced the autopsy at 5:00 o'clock and finished at 7:00 o'clock. He estimated that death had occurred 19 to 20 hours before 7:00 o'clock. As to the cause of death he testified: "Death was caused by the heart being burst, and the gall bladder squashed, and the wounds around here (indicating his back), so it could be any one of those wounds." Based upon his experience he was of the opinion that the injuries in the

chest area were caused "by a heavy instrument or something heavy squashing down many times," and the wound in the back was caused by a kick (R 57-61).

Upon examination by the court, Doctor Omura testified that there were no indications that death was the result of strangulation and that in his opinion the belt found around the neck of the deceased was placed there after death. Doctor Omura also testified that to his knowledge no other bodies were found in the river on 5 July and that he had performed but one autopsy on that date (R 63).

Jack M. Philpott, "CID" agent, identified Prosecution Exhibit 2 as a statement which accused wrote in Philpott's presence on the evening of 7 July 1949 at "Headquarters, 21st CID, Osaka." At the inception of the interview which resulted in the statement, Philpott advised accused of his rights under the 24th Article of War. Philpott had previously received a statement from O'Daniel and he showed it to accused to induce him to make a statement. Accused remarked that since Philpott knew all about the case he might as well tell Philpott about it. Accused then made an oral statement and, when Philpott inquired if accused cared to put the statement in writing, accused assented. After accused had started writing his statement, he asked Philpott how it would look "if he didn't talk to anybody about this." Philpott responded that in his opinion "it would be bad for him." There was no further conversation along this line and accused continued to write. After the statement was completed Philpott had the accused sign each page and initial places which he had scratched out. Accused was then taken to Lieutenant Kirkland. Lieutenant Kirkland inquired of accused if the 24th Article of War had been read and explained to him and if he understood it. After receiving accused's affirmative answer, Lieutenant Kirkland handed the statement to accused and had him read it back. Accused signed the statement, Philpott and Agent Peterson witnessed it, and the oath was administered to accused by Lieutenant Kirkland. Philpott did not deem it necessary to confine accused and, therefore, took him back to his organization and turned him over to the first sergeant (R 39-43,46).

In his statement, accused related that at about 2230 hours, 4 July, he and O'Daniel left camp by the back way and headed for the outskirts of Sakai City. It took them about 45 minutes to reach the tea shop across the river where they met "the man that died." Accused tried to sell a carton of "butts." The sale did not materialize so accused and his companion explained to "the Jap" that they wanted women. Pretty soon "the Jap women" came in. Accused and O'Daniel stayed 15 minutes longer trying unsuccessfully to dispose of the "butts." The girls told

accused and O'Daniel to come with them. Then "the Jap" and the girls started arguing. After the argument had continued for about ten minutes accused asked what was the matter. One of the girls responded that "the Jap" wanted to sleep with one of them. Accused told "the Jap" to "go soak his head" and took off after the girls with "the Jap" following. "The Jap" caught up with the group under the underpass and started arguing with the girls again. They waited for twenty minutes for "the Jap" to go away but instead he persisted in trying "to get the butts and to get O'Daniel's girl to go to bed with him." Although O'Daniel threatened to hit him he still would not leave. Finally, accused took him by the shirt collar and threw him against the wall. Accused had intended to hit him "when he bounced back" but did not do so when the man merely slumped to the ground. Accused and his companions continued on their way but it soon became apparent that "the Jap" was again following them. Accused told O'Daniel to stay with the girls and then turned back to chase him off. Accused believed that when he got back to "the Jap," O'Daniel and the girls were out of sight. When accused was about eight yards from "the Jap," the latter pulled a wooden shoe off his "rite" foot and "was thinking about using it on [accused]." Accused, when he had turned back, had merely intended "slapping [the Jap] around a little bit," but when "the Jap" pulled his shoe off, it made accused even more angry. Accused kicked the shoe out of "the Jap's" hand, and then hit him with his (accused's) right hand, knocking "the Jap" against the railroad bank. When he "bounced back" accused grabbed "the Jap's" right hand and threw him over his (accused's) back breaking "the Jap's" arm. When "the Jap" landed on the ground his head was toward accused. Accused jumped on him and started kicking him. Accused kicked "the Jap" across the road and after the last kick he fell into the stream below. Accused returned to where O'Daniel was awaiting him and they accompanied the girls to a "hoas" where they remained for about two hours and then started back to camp. En route, accused said to O'Daniel, "Let's go see if I killed him." They went to where "the Jap" "fell off" but could not see him. They walked down the river seeking a place to cross, but being unsuccessful retraced their steps and crossed on the bridge. After walking down and up the bank they heard a noise. They finally located "the Jap" leaning against the bank. Accused walked to the middle of the stream and stood watching him. When "the Jap" became aware of the accused's presence he "lurched away" from the wall, started upstream, and disappeared in the shadows. Accused and O'Daniel returned to camp (Pros Ex 2; R 46).

At about 2235 hours 20 July 1949, Private First Class William D. Speck, who was on guard duty "at the 27th Infantry" detected accused and O'Daniel trying to cut their way through a fence. They were dressed in fatigues and had strips of mattress covers wrapped around their bodies underneath their fatigue jackets. Accused and O'Daniel admitted

they were trying to get through the fence and added that they intended to sell a mattress cover. Speck turned them back to the barracks (R 120-121). Approximately a half hour later, Kasai Hisao, a civilian guard, observed accused and O'Daniel leaving the regimental area (R 118).

Sometime around midnight the same night Kodama Kamino, her son, Yoshio, 18 years of age, and her daughter, Kiyoko, 12 years of age, who resided in a house located at #41 Aza Kareki, Yata-mura, Naka Kawachigun, Osaka Prefecture, were aroused by a voice calling "Konbanwa" from outside. Shortly thereafter the door of the house was kicked in and two American soldiers entered. One soldier was armed with a club and the other with a bayonet; and both were masked. On the belt of one of the soldiers, "the blond headed one," were strips of heavy cotton cloth which were used to bind and gag the occupants of the house. Then the daughter, Kiyoko, was taken into an adjoining closet (R 86-88, 95-96, 100-102). The dark-haired soldier came in, had her remove her clothing, and inserted his penis into her vagina (R 96, 97). The other soldier guarded the mother and brother (R 88-102). Kiyoko "made out to cry" but the soldier "muffled" her mouth and hit her on the head. After he finished he and his companion moved around the house opening drawers. The dark-haired soldier returned to Kiyoko and again inserted his penis into her vagina. After he had finished and left, the one with reddish hair came in. When Kiyoko said, "it hurts, it hurts," he rubbed her back and went out. The dark-haired soldier, however, repeated his performance. During her ordeal, Kiyoko cried out many times, "It hurts, pardon me, please leave me alone" and told him to stop. On the first occasion the dark-haired one remained with Kiyoko for over an hour. The mattress and sheet upon which Kiyoko was lying were bloody (R 96-98). The two soldiers finally left at about 0430 in the morning taking a bicycle and about 5000 yen which they found while they were rummaging around the house. Mrs. Kamino did not consent to the taking of the bicycle and money. The property was never recovered (R 107).

Kasai Hisao was still on guard at 0450 hours, 21 July, when he observed O'Daniel return to Camp. He called for the guard but no one came. O'Daniel pulled out approximately 5000 yen and offered 1000 yen to Hisao who refused it. Hisao went to operations to report the incident. Accused came in at 0510 hours and was apprehended by Hisao who turned him over to the "G.I. Guard" (R 118, 119). The 27th Regiment is approximately two miles from the Kamino house (R 119).

The record reflects that O'Daniel has blonde hair and that accused has dark hair (R 99). Kiyoko identified accused as the soldier who attacked her. She failed to identify O'Daniel as accused's companion

but instead she identified a spectator at the trial (R 96). The mother testified that O'Daniel looked similar to one of the two soldiers but she failed to identify accused (R 106). The son, Yoshio, definitely identified accused and O'Daniel as the two persons who entered his mother's house at or about midnight on 20 July (R 87). Prior to trial Yoshio informed the "CID" that he believed he could identify the two soldiers but insisted that he could do it easier if the participants in the lineup were masked. A lineup was held under the condition he specified. Prior to viewing the persons in the lineup he was told not to point to anyone but to leave the room where the lineup was held and then tell the "CID" so that it could be ascertained if he had identified the correct person. Yoshio went through the lineup, identified accused and O'Daniel, left the room, and informed the "CID" of his identification (R 91-93).

Doctor Kinue Koyama testified that she was a graduate of Osaka Girls' Medical College and had been in practice for nine years treating women for the most part. She examined Kiyoko Kamino at 0600 hours 21 July 1949. As a result of her examination she found the following:

Kiyoko "had wounds on her body, and on the major labia. She was bleeding from the major labia where there was a large wound two centimeters long and one centimeter in depth. It was torn toward the rectum as though pulled apart. I took a tab from the vagina and examined it. I was frightened at the beginning when I saw this wound. There was a black and blue bruise puffed up underneath the right eye, and it was hurting her, and there was a wound in back behind the right lung, and this also was swollen up. * * It was puffed up * *. * * About the size of an adult's fist." (R 108)

There were ten small wounds around the vagina, and one large wound extending toward the rectum. Doctor Koyama drew a picture to illustrate the latter wound, and the picture indicated a V-shaped tear in the vagina with the apex of the V extending almost to the rectum. The area of the wound was bleeding. This bleeding continued for about two weeks. Doctor Koyama was of the opinion that the injury was done by the penis of a male and that extreme force was used. The examination also disclosed the presence of male spermatozoa. On 23 July Doctor Koyama tested Kiyoko's blood for type and determined it to be Type "B" (R 108-111). It was stipulated that accused has Type "O" blood.

On the afternoon of 21 July, "CID Agent" George Peterson examined the contents of accused's wall locker and picked up a set of fatigues bearing the legend "M 4743." Accused, who was present, admitted ownership. There was a trench knife and strips of mattress covering in the

locker. Peterson also secured the shorts which accused was wearing and a handkerchief which was lying on accused's bed. The handkerchief was knotted in such a fashion that it could be used as a mask. Peterson took the trousers and shorts to the laboratory in Osaka. The trousers and shorts were examined by Takeshi Tsujimoto to whom they were given by Peterson (R 112-115). As a result of tests performed by Tsujimoto he found the presence of human blood of "B" type on both the shorts and trousers (R 115-116).

b. For the defense.

Accused elected to testify "on matters other than that concerned in the specifications and charges" (R 123). He stated that he was born 13 February 1933 and enlisted in the Army on 8 April 1948 at the age of 15 years and 2 months. At the time he was in the ninth grade of school. When he enlisted he was given a paper which he had his mother sign, although he had claimed he was eighteen years of age. His mother signed the paper and after it was notarized accused took it back to the recruiting officer (R 124-125a).

4. Accused has been found guilty of the voluntary manslaughter of Heikei Ichizu at the time and place alleged (Spec, Chg I). The evidence shows that on the night of 4 July 1949, a Korean called Ichizu left the tea shop of a Mrs. Kuroda located near the Asakayama Station in Sakai City in the company of accused, another soldier named O'Daniel, and two "pompom girls". Ostensibly, Ichizu went along for the purpose of collecting the fee due Mrs. Kuroda for securing the services of the two "pompom girls" for the soldiers. Ichizu tried unsuccessfully to obtain a carton of cigarettes from the soldiers and then asked one of the two girls to accompany him. It is apparent, therefore, that Ichizu's conduct was irksome to the soldiers and, from their testimony, also to the two girls. Nevertheless, the Korean continued his importunities until the accused left his companions and turned back to dispose of the Korean. Accused disappeared and returned sometime later out of breath and giving the appearance of one who had been working hard. The following day the body of a dead Korean was found in a river in close proximity to the Asakayama Railroad Station. It was identified by Mrs. Kuroda as being Ichizu, the Korean, who had left her place the previous evening in the company of the two "pompom girls" and the two soldiers. Sumiko Fujiwara, one of the two "pompom girls", also viewed a body in the river near the Asakayama Station on 5 July, and identified it as that of the Korean whom she had last seen with accused on the previous evening.

Heitetsu Ichizu, on 5 July, viewed a body in the river near the Asakayama Station and identified it as the body of his brother Heikei. Heitetsu accompanied the body to the Sakai Station where an autopsy was

performed by Doctor Tokuzo Omura. His autopsy disclosed numerous lacerations on and about the head, eighteen broken bones in the chest rib area, a "squashed" heart caused by pressure from a bone, a squashed displaced gall bladder, and numerous internal injuries. Doctor Omura testified that, "Death was caused by the heart being burst, and the gall bladder squashed, and the wounds around here (indicating back.)" He was of the opinion that the injuries in the chest area were caused by a heavy instrument or something heavy "squashing" down many times, and the injuries in the back area by a kick. The circumstances shown by the evidence conclusively establish that the body upon which Doctor Omura performed his autopsy on 5 July was Heikei Ichizu, the same person who left Mrs. Kuroda's place the preceding night with accused, O'Daniel, and the two "pompom girls," and who was last seen alive with the accused. The testimony of Doctor Omura establishes that Ichizu's death was by virtue of homicide. The circumstantial evidence, which points to the accused as Ichizu's slayer, is confirmed by accused's pretrial statement, the voluntary character of which was not contested. Accused's statement is in substantial accord with the testimony of Sumiko Fujiwara and Ayaka Yamanaka, the "pompom girls," relating the events up to the time accused and the deceased passed from their view. Accused's statement continues that when he approached his adversary the latter drew a wooden shoe from his foot and menaced accused with it. Accused kicked the shoe from his hand. Accused had originally intended merely to slap the Korean around a bit but, now greatly angered, he delivered a blow with his right hand against the Korean knocking the latter up against a wall. The blow was delivered with such force that the Korean bounced back, whereupon, accused seized the Korean's right hand and threw him over his back in such fashion that the Korean's arm was broken. The deceased landed on the ground and accused jumped on him and started kicking him. He kicked him across the road and into the river. Viewed against the background of the medical testimony it would appear that accused understated the ferocity of his attack. The evidence and accused's pretrial statement conclusively show that the death of Heikei Ichizu was caused by accused's vicious assault upon him.

Although accused was charged with and found guilty of voluntary manslaughter, the evidence in fact establishes murder. "Murder is the unlawful killing of a human being with malice aforethought" (MCM, 1949, par. 179).

From the record it is clear that the homicide was unlawful, i.e., without legal justification or excuse. The only possible legal excuse for the killing in this case is self-defense and this is but suggested. Accused's pretrial statement which offers the suggestion also negatives it. The statement shows that after the deceased menaced accused with a wooden shoe, accused disarmed him with a kick and, then, after rendering the deceased helpless and defenseless, accused delivered a series

of kicks to deceased's body which terminated in the deceased being kicked into the river. It is also clear from the statement that accused at no time felt other than complete mastery of the situation and that he never felt any apprehension whatever by virtue of any act of deceased. In the absence of any reasonable grounds upon which accused could believe that the killing was necessary to save his life or to prevent great bodily harm to himself, accused may not avail himself of the doctrine of self-defense to justify the homicide (MCM, 1949, par. 179, p.230; CM 322487, Dinkins, 71 BR 185,193-194).

The evidence which establishes malice aforethought is equally clear. The numerous and vicious blows and kicks inflicted by accused upon the person of the practically helpless and defenseless victim in the manner and under the circumstances disclosed by the record, when considered in the light of the results thereof as shown by the medical testimony, were obviously acts likely to result in death or great bodily harm. In the complete absence of any showing of legal provocation, the malice aforethought requisite in murder, was thereby conclusively established.

Since the evidence establishes the offense of murder, voluntary manslaughter is necessarily proved (CM 222737, Gilbert, 13 BR 313,315). Voluntary manslaughter is lesser and included in murder and although the evidence in this case legally sustains the latter, a finding of guilty of the former is not legally precluded (CM 280661, Terro, 53 BR 285,290-291).

Accused was also found guilty of rape and robbery (Spec, Add. Chg I and Spec, Add Chg II). The evidence shows that at about midnight on the night of 20-21 July 1949, accused and his companion O'Daniel, armed with improvised weapons, broke into the house of Kodama Kamino. They carried strips of heavy cotton with which they bound Kodama, her son Yoshio, 18 years of age, and her daughter, Kiyoko, 12 years of age. While O'Daniel guarded the mother and son, accused took Kiyoko to an adjoining closet, inserted his penis into her vagina, and remained with her for about an hour. On two other occasions during their stay of approximately four hours in the house accused similarly violated Kiyoko. Medical examination the following day disclosed numerous lacerations in and about Kiyoko's vagina and a tear in the vagina extending almost to the rectum. During her intermittent ordeal, Kiyoko cried out from pain and, in Japanese, called upon accused to stop. She was struck by accused on such occasions.

"Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1949, par. 179b). The competent evidence

of record sustains every element of the offense. Although Kiyoko was never questioned specifically on the subject of consent, and, although the record is silent as to the degree of resistance, if any, that she offered, it is apparent from the facts and circumstances of the case that there was in fact no consent by this 12 year old victim to the brutish violation of her person by accused. The record does show that in the middle of the night the child's home was forcibly entered by accused and his companion, both masked and armed; that before accused's intentions were manifest, the child's hands were bound, and that she was forcibly taken from the presence of her mother and brother to an adjoining closet and there her vagina was penetrated by the penis of accused with such force and violence that her vagina sustained a tear and numerous lacerations. Under these circumstances the court could find that if in fact the child did not resist, she was bereft of her powers of resistance by the uninhibited savagery of accused exhibited in the manner and under the circumstances stated. In such case resistance is not a prerequisite to rape (CM 240674, Rinke, 26 BR 91,96,104-107; CM 333860, Haynes, 81 BR 375,384-385). The finding of guilty of rape is warranted by the evidence.

The evidence also shows that after terrorizing the household, the accused and his companion, O'Daniel, departed, taking with them a bicycle and 5,000 yen, the property of Mrs. Kamino. "Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation." (MCM, 1949, par. 180f). We deem it immaterial whether the intimidation visited upon the victim of the robbery was for the purpose of robbery or incidental to the rape, or for both purposes. It suffices to say that the property taken in this case was taken from the presence of Mrs. Kamino while she was understandably intimidated by the conduct of accused. We note that specific testimony concerning the apprehension felt by the victim was not adduced but here, as with the issue of consent in the charge of rape, the circumstances conclusively show that the victim of the robbery was in a state of great apprehension due to the conduct of accused and his companion (CM 259160, Cannon, 38 BR 255,264,265; CM 255335, Beshorse, et al, 50 BR 73,84). Whether accused was the leader in the robbery or merely an aider and abettor therein by virtue of his conduct which contributed to it, is immaterial. In either case his criminal liability is that of a principal. Although no evidence was adduced as to the specific value of the property taken, the court undoubtedly took notice that the yen and the bicycle possessed some property value (CM 235258, Smith, 21 BR 355,366). The finding of guilty of robbery is fully sustained by the evidence.

5. There was testimony by the accused that he fraudulently enlisted in the Army when he was less than sixteen years of age. At the time he committed the offenses upon which he was tried he had attained an age in excess of sixteen years. The fact that accused

may have enlisted in the Army at an age when he was statutorily ineligible for enlistment does not defeat the jurisdiction of the court (MCM, 1949, par. 189 III; Dig. Ops. JAG 1912-40, sec. 359(3); CM 187175, Gemuso, et al., 1 BR 7,11-12). This is particularly true where, as here, accused remained in the Army after attaining his 16th birthday (MCM, 1949, par. 189 II 1).

6. Records of the Army show that accused is 19 years and 11 months of age, whereas his testimony, if true, shows his age as 16 years and 8 months of age. He enlisted in the Army on 8 April 1948 while in the ninth grade of school. He had one previous conviction by summary court-martial for introducing whiskey into quarters. His commanding officer has characterized the quality of his prior military service as good.

7. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during 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. A sentence to confinement at hard labor for life 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 offenses of manslaughter, rape, and robbery, recognized as offenses of a civil nature and so punishable by penitentiary confinement for more than one year by Title 18, U.S.C., Section 1112; Title 18, U.S.C., Section 2031; and Title 18, U.S.C., Section 2111, respectively.

Robert J. Glannon, J.A.G.C.

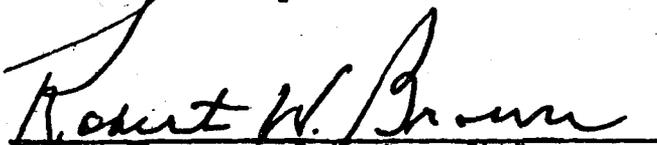
Charles J. Berkowitz, J.A.G.C.

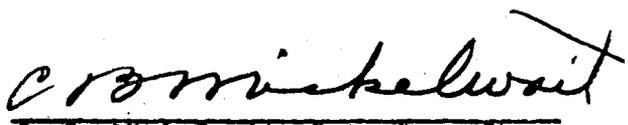
Joe Lynch, J.A.G.C.

THE JUDICIAL COUNCIL

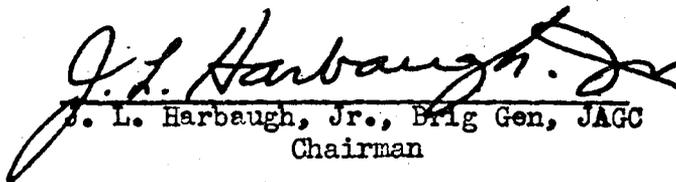
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Recruit Melvin C. Martin,
RA 19294743, Heavy Mortar Company, 27th Infantry Regiment,
APO 25, Unit 1, upon the concurrence of The Judge Advocate
General the sentence is confirmed and will be carried into
execution. A United States penitentiary, reformatory,
or other such institution, as determined by the Attorney
General or his designated representative, is designated
as the place of confinement.

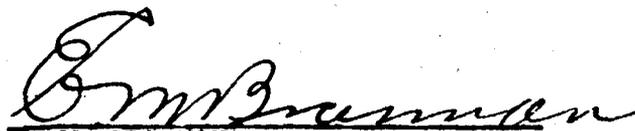

Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC

13 March 1950


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

I concur in the foregoing action.


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

16 March 1950

(GCMO 23. March 28. 1950)



and by means thereof did fraudulently obtain from the Aztec Lounge \$15.00 in lawful money of the United States, he, the said Major Alexander H. Lucas, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of Carmel, Carmel-by-the-Sea, California for the payment of said check.

NOTE: Specifications 2 to 5, inclusive, are identical with Specification 1 except as to dates, amounts, person to whom the check was uttered and the drawee bank as follows:

<u>Spec.</u>	<u>Date</u>	<u>Amount</u>	<u>Check Uttered To</u>	<u>Drawee Bank</u>
2	19 Aug 1949	\$15.00	Aztec Lounge	Bank of Carmel
3	10 Sep 1949	\$15.00	Robert T. Van Ostrand	Del Monte-Freemont Branch, Bank of America
4	11 Sep 1949	\$10.00	Robert T. Van Ostrand	Del Monte-Freemont Branch, Bank of America
5	13 Sep 1949	\$10.00	Robert T. Van Ostrand	Del Monte-Freemont Branch, Bank of America

CHARGE II: Violation of the 61st Article of War

Specification: In that Major Alexander H. Lucas, Jr. ***, did, without proper leave absent himself from his organization at Presidio of Monterey, California from about 13 September 1949 to about 21 September 1949.

He pleaded not guilty to Charge I and the specifications thereunder and guilty to Charge II and its specification. He was found guilty of Specifications 1 through 4 of Charge I except the words "with," "fraudulently," and "then well knowing that he did not have and not intending that he should have" in each specification, substituting therefor the words, respectively, "without," "unlawfully" and "not having" in each specification, guilty of Specification 5, Charge I, guilty of Charge I, and guilty of Charge II and its 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. In view of the opinion hereinafter expressed, the evidence relating to Specifications 1 through 4, inclusive, of Charge I will not be set forth herein.

4. Evidence for the Prosecution

a. Specification 5, Charge I

On the morning of 13 September 1949 Lieutenant Colonel Brown,

executive officer of the Army Language School, Presidio of Monterey, California, received a telephone call from Mr. Ward, manager of the Del Monte-Freemont Branch of the Bank of America, at Seaside, California. Following this telephone conversation Colonel Brown ordered the accused to report to him at 11:00 a.m. on 13 September 1949. The accused reported as directed and Colonel Brown told the accused to go to the Del Monte Branch of the Bank of America and see Mr. Ward "in regard to the matter that had been discussed with me by Mr. Ward. I further directed Major Lucas to report to my office at 4 o'clock on the afternoon of the 13th of September." The accused did not talk to Mr. Ward on 13 September 1949 (R 49-51,58).

Robert T. Van Ostrand operates the "Smoke Shop" on Ocean Avenue, Carmel, California. About 2:30 p.m., 13 September 1949, the accused "made" a check on the Del Monte-Freemont Branch, Bank of America, Seaside, California, in the sum of \$10.00 and requested Mr. Van Ostrand to cash the check. Mr. Van Ostrand took the check and gave the accused \$10.00. Mr. Van Ostrand gave this check to a wholesale distributor in payment on his account. The check was returned to him by the wholesale company. He surrendered this check to Mr. Duffy, an investigator for the Government. On 27 September 1949 the provost marshal gave Mr. Van Ostrand \$10.00 as "payment of this check." The check was introduced in evidence, without objection, as Prosecution Exhibit 6 (R 34, 53-57,59).

William F. Ward, manager of the Del Monte-Freemont Branch of the Bank of America, Seaside, California, identified the check introduced as Prosecution Exhibit 6 as a check in the sum of \$10.00 drawn on his bank and "signed by Alexander H. Lucas, Jr." This check was presented for payment by the Monterey County Trust and Savings Bank, Carmel Branch, on 16 September 1949. Payment was refused because there were insufficient funds in the accused's account for payment of the check. On 13 September 1949 there was on deposit in the accused's account with his bank the sum of \$2.74. On 16 September 1949 there was \$1.74 on deposit in the accused's bank account (R 40,58,59).

b. Specification and Charge II

Captain Ernest D. McDonald, Infantry, testified that he was the commanding officer of Company A, Army Student Detachment, Army Language School, Presidio of Monterey, California. Company A is a student detachment and all language students regardless of rank are assigned to his company. On 13 September 1949 the accused was a member of Company A (R 12).

A duly authenticated extract copy of the morning report of Company A, Army Student Detachment, Army Language School, for 15 September 1949, was received in evidence as Prosecution Exhibit 1 without objection. This morning report shows in part:

"Lucas Alexander H (CAC) O25204 Maj
Asgd dy to AWOL as of 1400 hrs 13 Sep 49"

It was stipulated that the accused returned to military control at Reno, Nevada, on 21 September 1949 (R 13,14, Pros Ex 1).

5. Evidence for the Defense

The defense offered no evidence. The accused was advised as to his rights as a witness and he elected to make the following unsworn statement through counsel:

"I was a commissioned officer during 1937 and 1938 and again in 1940 to present date. My Regular Army Commission is dated 1941. My efficiency reports during my entire period of service have been either 'Excellent' or 'Superior.' I have held positions of great responsibility in the Army on various occasions. The positions I speak of were as follows: The Operations Division of the War Department General Staff; I worked there at the peak of the war when security was at a premium; I was authorized to handle 'Top Secret' Documents, 'Most Secret' Documents, and later, 'Eyes Only' Documents, that is documents for only the Secretary of War and The President, and messages as they came to the Operations Division Classified Message Center. This work, which was in part schooling, was rewarded by a special certificate, which was presented personally to me by General George C. Marshall, who was then Chief of Staff of the United States Army. After my overseas service, I was reassigned to the same type of duty on the War Department General Staff. I had access to all files of the Operations Division Classified Message Center. For the last five years, 90 per cent of my duties required that I be detailed in the General Staff Corps. I also served on the General Staff in Theater Headquarters overseas. I value my Regular Army Commission very highly. I worked and studied hard to obtain it at a time when competition was keen and applicants were plentiful. I have completed and/or received credit for all Army Schools pertaining to my Branch up to and including the Command and General Staff School which I completed in 1943. I am married and have three children. My acts as to going AWOL were brought on by the severe mental strain because of financial obligations coupled with the intense concentration necessary for the course at the Army Language School. This is not presented as an excuse for absence, but simply in extenuation of the offenses charged. As previously advised by the law member, I fully understand that a sworn statement, subject to cross-examination, would certainly be given more weight than an oral statement through

my counsel; however, due to my present extreme nervous condition which was brought on by the above-mentioned severe mental strain, I am compelled to make such a choice. The foregoing statement is true in every respect." (R 65-66)

6. Discussion

Specification 5, Charge I

The accused was charged in this specification with intent to defraud, wrongfully and unlawfully making and uttering a certain check and by means thereof did fraudulently obtain its face value in cash, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for the payment of said check in violation of Article of War 96.

The evidence in support of this allegation shows that on the morning of 13 September the accused was ordered by his commanding officer to go to the Del Monte-Freemont Branch of the Bank of America and contact Mr. Ward, the bank manager. He did not contact Mr. Ward. About 2:30 p.m. the accused was in the Smoke Shop in Carmel, California. He made and cashed a check in the sum of \$10.00. This check was drawn on the Del Monte-Freemont Branch of the Bank of America. On 13 September 1949 his account in the drawee bank was \$2.74. This check was presented to the drawee bank for payment on 16 September 1949, at which time payment was refused because of insufficient funds. On 16 September 1949 the accused had on deposit in the drawee bank the sum of \$1.74. The intent to defraud may be implied from the fact that the check was dishonored because of lack of funds on deposit in the accused's account in the drawee bank (CM 245507, Payne, 29 BR 189; CM 284149, Brown, 55 BR 261,272; CM 283726, Bowles, 55 BR 125,131). Other factors in this case which tend to establish the intent to defraud on the part of the accused are: (a) the fact that on the day and prior to the time the check was issued the accused was ordered to contact the manager of the bank where he carried his checking account, which order he did not obey; (b) immediately after receiving this order he went absent without leave and remained absent for eight days; (c) that part of his unsworn statement to the effect that he was having financial difficulties.

The Board of Review is of the opinion that the finding of guilty of this specification is amply sustained by the evidence.

The Specification and Charge II

The accused's plea of guilty of absence without leave for the period 13 September 1949 to 21 September 1949 and the uncontradicted evidence of

the prosecution relating thereto is sufficient to establish his guilt of this offense in violation of Article of War 61. No further discussion of this offense is required (CM 236359, Tindall, 22 BR 389; CM 315165, Palmer, 64 BR 365,366).

Specifications 1 through 4, Charge I

In each of these specifications it was alleged that accused did, with intent to defraud, wrongfully and unlawfully make and utter a certain check and by means thereof fraudulently obtained from the payee the face amount of the check, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for its payment. By exceptions and substitutions in each specification the court found the accused guilty except the words "with," "fraudulently," and "then well knowing that he did not have and not intending that he should have," substituting therefor the words, respectively, "without," "unlawfully" and "not having"; of the excepted words, not guilty, and of the substituted words, guilty. Accordingly, by negating the allegation imputing an intent to defraud and by excepting from the alleged offenses the words imputing fraudulent motive, knowledge and intent, in connection with the making of the checks, the court changed the alleged offenses in each instance to that of wrongfully and unlawfully making and uttering a check and unlawfully obtaining its proceeds without having sufficient funds in the drawee bank for payment of such check.

In view of the nature of the offense charged, it is necessary to determine whether the substituted findings constitute an offense which is lesser than and necessarily included in that charged.

Concerning the subject of lesser included offenses the Manual for Courts-Martial provides, in pertinent part, as follows:

"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 78c).

In applying the above test for determining lesser included offenses it is important to note that the findings as modified do not add any material new words to the specifications. Each original specification contained the averment that the accused at the time he issued the checks did so "then well knowing that he did not have and not intending that he should have sufficient funds in the (drawee bank) for the payment of said

check." The foregoing averment contains the words "that he did not have *** sufficient funds in the (drawee bank) for the payment of said check." Because these words are actually contained within the specifications as originally drawn it might be argued that the offenses of which the accused was found guilty meet the test for determining lesser included offenses of those charged. These words, however, should not be considered apart from the other words in the specifications which condemn the fraudulent intent and knowledge of the accused and when they are considered apart from such other words they describe offenses different than the ones alleged in these specifications. In other words, the averments in the specifications which are pleaded only to show adjectively the fraudulent intent and scienter of the accused would thereby become the substantive offense. However, it is not within the power of the court to find an accused guilty of an offense which is any way open to an interpretation that might otherwise denounce acts with which he was not confronted upon his arraignment (CM 323728, Wester, 72 BR 383,384). Thus, the Manual for Courts-Martial in providing for the modification of offenses charged states the basic rule governing the finding of lesser included offenses by "exceptions and substitutions" as follows:

"Exceptions and Substitutions - One or more words or figures may be excepted and, where necessary, others substituted, provided that the facts so found constitute an offense by the accused which is punishable by the court, and provided that such action does not change the nature and identity of any offense charged in the specification or increase the amount of punishment that might be imposed for any such offense. ***" (MCM 1949, par 78c; underscoring supplied.)

In the specifications under consideration the accused was charged with fraudulently making and uttering certain checks with intent to defraud and by means thereof obtaining from the payees the face value of the checks, then well knowing that he did not have and not intending that he should have sufficient funds in the drawee banks for the payment of said checks. These specifications allege the offenses commonly referred to as making checks with insufficient funds with intent to defraud. The gravamen of these offenses is the intent to defraud (CM 336515, Stewart and cases cited therein).

In CM 302125, Keller, 60 BR 345, the Board of Review said:

"The essence of the fraud is that the checks relied upon were of no value. Whether they were worthless because drawn against no account or against an empty account is relevant only in so far as the amount of proof of intent to defraud is concerned. ***" (Underscoring supplied.)

In CM 283726, Bowles, 55 BR 125, The Board of Review said:

"Because the checks set out in Specifications 6,7,8,9,10 and 11 were drawn at a time when a sufficiency of funds existed for their payment the reviewing authority, upon the recommendation of the Staff Judge Advocate, excepted the words 'with intent to defraud' and 'fraudulently.' Since the finding of fraud was necessarily based on the allegation of blameworthy knowledge and purpose and since the reviewing authority apparently found neither element, it appears that the words on which the alleged fraud was bottomed, to-wit, 'then well knowing that he did not have and not intending that he should have sufficient funds in the [drawee bank] for the payment of said check', should also be excepted from the findings of guilty. ***" (Underscoring supplied.)

In the instant case the court found that at the time the accused made and uttered the checks under discussion he did not have an intent to defraud; that he did not have any knowledge that his bank account was insufficient to pay the checks, and inferentially that he intended to have money in the bank for their payment. Nevertheless the court found him guilty of issuing the checks at a time when he did not have sufficient funds on deposit to pay the checks. This finding eliminated the gravamen of the offenses originally charged and substituted therefor findings of guilty of certain words in the specifications which were relevant to the offenses charged only in proving the intent to defraud as alleged.

It follows that if the acts of accused, in issuing the checks against his bank account at a time when he did not have sufficient funds on deposit to pay the checks so issued, were wrongful, they were wrongful for reasons other than the reasons (i.e., the intent to defraud) set forth in the original specifications. This wrongfulness being something other than originally alleged, it adds a material element of proof not required in proving the original specification (CM 337997, Beard). Under such circumstances the findings of guilty as made by the court changes the nature and identity of the offenses originally charged and the acts of which the accused were found guilty are not lesser included in the offenses originally charged.

7. Department of the Army records show that the accused is 33 years of age, married, and has two children. He completed high school at McClellanville, South Carolina, in 1932. He was graduated from The Citadel, Charleston, South Carolina, with a Bachelor of Science degree in 1937 and commissioned a second lieutenant in the Coast Artillery Corps (Reserve) the same year. In civilian life he was a surveyor. He served on active duty from 6 July 1937 to 27 June 1938 and from 1 September 1940 to the present time. On 30 August 1940 he was promoted to first lieutenant, Coast Artillery-Reserve. He was promoted to captain (AUS) on 3 August 1942 and to major (AUS) on 22 January 1945. He was commissioned a second lieutenant, Regular Army, on 5 October 1942 and promoted to first lieutenant, Regular Army, on 7 December 1944. His efficiency ratings

average "Low Excellent" from 6 July 1937 to 30 September 1941; "Superior" from 1 July 1944 to 30 June 1947 (average - 5.5). His overall efficiency ratings as reflected by pertinent records are as follows:

1 July 1947 to 21 October 1947	- 086
22 October 1947 to 18 April 1948	- 067
2 June 1948 to 17 July 1948	- 110
18 July 1948 to 31 October 1948	- 114
1 November 1948 to 25 April 1949	- 108

He served in the Pacific Theater from 8 July 1944 to 8 October 1945. He has been awarded the American Defense Service Medal, the American Theater Medal, the Asiatic-Pacific Theater Medal, World War II Victory Medal, Glider Wings and the Navy Unit Commendation Ribbon, and was awarded two battle stars for the Western Pacific and Mandated Island Campaigns.

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 insufficient to support the findings of guilty of Specifications 1 to 4, inclusive, of Charge I, legally sufficient to support the findings of guilty of Specification 5, Charge I, and Charge I, legally sufficient to support the findings of guilty of Charge II and its specification, legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Articles of War 96 and 61.

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

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

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

(268)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CSJAGU CM 338736

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

In the foregoing case of Major Alexander Hume Lucas, Jr., 025204, Company A, Army Language School, Presidio of Monterey, California, upon the concurrence of The Judge Advocate General the finding of guilty of Specifications 1, 2, 3 and 4 of Charge I are disapproved. The sentence is confirmed but commuted to a reprimand and forfeiture of One Hundred Dollars (\$100.00) pay per month for six months. As thus commuted the sentence will be carried into execution.

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

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

Franklin P. Shaw
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

Specification 2: (Finding of guilty disapproved by reviewing authority).

Specification 3: In that Recruit Russel F. Jones, 534th Military Police Service Company, did, at or near Stuttgart-Zuffenhausen, Germany, on or about 1 May 1949, with intent to do him bodily harm, commit an assault upon Gustav Pfusser, an Industrial Policeman, by threatening him with a dangerous weapon, to-wit: a carbine.

Specifications 4 and 5: (Findings of not guilty).

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

Specification 1: In that Recruit Russel F. Jones, 534th Military Police Service Company, did, at or near Stuttgart-Feuerbach, Germany, on or about 1 May 1949, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill Alois Miltenberger, Industrial Policeman, a human being, by shooting him with a carbine.

Specification 2: In that Recruit Russel F. Jones, 534th Military Police Service Company, did, at or near Stuttgart-Feuerbach, Germany, on or about 1 May 1949, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Ruth M. Semm, a German National, a human being, by shooting her with a carbine.

Specification 3: In that Recruit Russel F. Jones, 534th Military Police Service Company, did, at or near Stuttgart-Bad Cannstatt, Germany, on or about 1 May 1949, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill Fritz Nehring, a German National, a human being, by shooting him with a carbine.

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

Specification 1: In that Recruit Russel F. Jones, 534th Military Police Service Company, was, at or near Stuttgart-Zuffenhausen, Germany, on or about 1 May 1949, drunk and disorderly in uniform in a public place to-wit: the Billy Club.

Specification 2: In that Recruit Russel F. Jones, 534th Military Police Service Company, was, at or near Stuttgart-Zuffenhausen, Germany, on or about 1 May 1949, drunk and disorderly in uniform in a public place, to-wit: in front of the 534th Military Police Service Company Headquarters.

He pleaded guilty to the Additional Charge and its specifications and not guilty to all other charges and specifications. He was found guilty of Charge I and its specification, guilty of Specifications 1, 2 and 3 of Charge II and Charge II, not guilty of Specifications 4 and 5 of Charge II, guilty of Charge III and its specifications except the words "and with premeditation" in each specification, and guilty of the Additional Charge and its specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority might direct for the term of his natural life. The reviewing authority disapproved the finding of guilty of Specification 2 of Charge II, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence

No reference will be made to evidence concerning matters of which the accused was acquitted or concerning which the finding of guilty was disapproved by the reviewing authority.

For the Prosecution

In the spring of the year 1949 the 534th Military Police Detachment, United States Army, was stationed at Zuffenhausen, Germany, as a part of the occupation forces, United States Army, Europe. Accused, a member of this detachment, was relieved from his duty at 1700 hours 30 April 1949, and proceeded to his quarters. He then repaired to the "Billy Club," an amusement center for enlisted men of his unit, arriving there at some time after 1800 hours. Here he proceeded to imbibe various intoxicants, including whiskey, gin and beer, over a considerable period of time, all the while engaging other members of his unit in conversation (R 94,447, 466; Pros Ex 12). By 2100 hours "he was pretty well drunk up" (R 448). Just before midnight, two soldiers of the "534th M.P.s," who had been at the "Billy Club" with girls, started to take their companions home. Outside the entrance to the club, accused approached the group and insisted on escorting one of the girls. The ensuing argument quickly degenerated into a fist fight between accused and Private First Class Turner. The fisticuffs were shortlived as Turner knocked accused to the ground with his fist and in so doing drew blood from his face or ear. The principals in this involvement then went their separate ways at the request of Corporal Cody who had witnessed the incident (R 100-110, 154).

Corporal Cole, another member of accused's organization, finished his motor patrol duty shortly after midnight of 30 April 1949. He parked "M.P. jeep No 14", which was permanently assigned to him as driver, inside the detachment area, turned in his weapons and equipment and proceeded to the "Billy Club." He observed the accused, drunk, standing

at the bar in the company of other soldiers. After a few drinks, accused suggested, colloquially, that they go out and have a good time. Cole declined the invitation and retired (R 94-100, Pros Exs 5,10).

Between 0200 and 0230 hours, 1 May, Sergeant Majersky heard "a little commotion" near the 534th Military Police Headquarters. He found accused near the unit gate in a belligerent attitude. As accused appeared to have been drinking, the sergeant told him to go to bed. Mouthing epithets, accused "lunged" at Majersky. The sergeant achieved a "head lock" or a "half Nelson" on accused and walked him up the barrack stairs to his bed. Accused quieted down and said, "Please don't turn me in." Majersky laid him on his bed, took off his shoes, and then left him, apparently asleep (R 110-115,154).

In "the early morning hours" the same day, accused entered the "534th arms room" and asked the company armorer for a weapon. Accused was in full uniform, but appeared to have been drinking. Corporal Davis, the armorer, became suspicious and checked the company duty roster. Finding that accused was not scheduled for duty at that time, Cole refused to give him a weapon (R 116; Pros Ex 10).

At 0255 hours, 1 May, accused appropriated "MP Jeep No. 14" (the vehicle assigned to Corporal Cole) and drove it to the gate of the 534th Military Police Detachment. Here he was stopped by Gustav Pfosser, the gate guard, who required him to sign the vehicle roster which contains a record of the "bumper number," driver, time of day and date of all vehicles entering or leaving the area. Corporal Ping, the charge of quarters, and Corporal Burke, having heard an automobile being driven within the unit compound, started for the gate to investigate. As they approached, accused signed Pfosser's roster and drove through the gate toward Stuttgart, ignoring Ping's shouts. Accused was not on duty and had no authority to use jeep Number 14 (R 95, 117-120, 130-132, 148-150; Pros Ex 5).

Karl Fischer, duty officer for the 522nd Labor Supervision Company, posted Alois Miltenberger, an industrial policeman attached to the unit, as a security guard at the Army quartermaster gasoline filling station in Stuttgart, Germany, at 0100 hours, 1 May 1949. Incident to this duty, Fischer issued U.S. Army carbine Number 583053 and five rounds of ammunition to Miltenberger. The carbine and ammunition were drawn from regular Army supply channels for this purpose.

The Quartermaster gas station is two and four-tenths miles from the 534th Military Police Headquarters in Zuffenhausen. At 0300 hours the same morning, Fischer checked the guard and found Miltenberger still on duty at the filling station (R 120-130, 402,403; Pros Exs 3,4,34).

About 0306 hours, an American jeep was driven into the gas station

where Miltenberger was posted. Various people residing in the vicinity then heard loud voices, a noise "like a board breaking," a scream and a shot. The jeep was then driven out of the station toward Bad Canstatt. About two minutes later, the jeep returned. A soldier dismounted and began to search around the ground of the filling station. He picked up "some object," reentered the jeep, and again drove away toward Bad Canstatt (R 140-148, 156-159).

When the jeep had gone, neighbors and passersby who had heard the disturbance went to the gas station where they found Miltenberger lying on the ground. He was moaning and blood was issuing from his mouth. A passing taxicab was hailed and the moaning Miltenberger laid in the back seat. The driver immediately proceeded to a nearby hospital where he put the then silent passenger under the care of medical personnel. On the seat of the taxi, where Miltenberger had been placed, a piece of copper and a piece of lead were found. These the taxi driver turned over to a doctor at the hospital who in turn gave them to the police. Miltenberger was pronounced dead upon his arrival at the hospital (R 159-168, 174-184; Pros Exs 3,6,7,9).

An autopsy performed on 2 May 1949 upon the body of Miltenberger revealed:

"*** Male corps 180 cm long. Nutritious and vigorous condition good. *** In the right centered axillar line, 120 cm above the sole of the foot, a circular wound is found *** In the left centered axillar line, approximately in line with the 6th rib, a pear shaped wound is seen, its tip pointing downwards. ***

"*** Opinion

"Section reveals a gun-shot wound. Entrance of the shot as described *** a wound on the right side. The shot channel runs through the right half of the diaphragm (midriff) hitting the front surface of the right kidney on a tangent. The bullet on its course, penetrated the pancreas and the left half of the diagonal colon. The shot channel then runs through the diaphragm-half, the left 8th rib, and departs from the body *** . Death was caused by internal hemorrhage. ***" (R 323,324; Pros Ex 27).

Leonid Rawoew, Gertrude Knorrek and Ruth Semm were returning home from a dance the night of 30 April-1 May 1949. Wending their way along Brueckenstrasse in Bad Canstatt, they reached a spot one and four-tenths miles from the Stuttgart Quartermaster filling station at about 0315 hours. At this point they were accosted by a soldier, identified by Miss Knorrek as the accused, who had driven up in a jeep which stopped abreast of the

trio. He requested Miss Senn to enter the jeep. When she refused, accused shot her with a carbine. Miss Senn fell to the ground and bloody foam formed on her lips (R 228-238, 251; Pros Exs 13,14,15).

An autopsy performed upon the body of Ruth Senn on 2 May 1949 reads in pertinent part:

"*** Section revealed a gunshot wound through the chest. *** The shot channel leads through the fourth rib at fingers width laterally from the cartilage-bone-border, through the lingula of the upper lobe of the left lung, through the pericard ***. The bullet furrowed a narrow channel in the left ventricle close to the auricle border ***. From here the shot channel leads through the upper part of the left lower lobe to the left side of the 6th chest vertebra, smashed through the curvature and squashed the marrow of the spine. *** The gunshot injury was the cause of death due to internal hemorrhage. *** death must have been instantaneous, because there was no strong aspiration of blood." (R 324, Pros Ex 29).

During the ensuing police investigation, "fragments of ammunition" were found on the sidewalk where Miss Senn had fallen (R 266-270; Pros Exs 13,24).

About 0325 hours, 1 May 1949, Fritz Nehring and Helene Troester were walking along Brueckenstrasse in Bad Canstatt. At the junction of Haldenstrasse and Brueckenstrasse (a short distance from where Ruth Senn was killed) an American soldier drove up in a military police jeep, stopped, and addressed them in German. Before they could answer, the soldier raised a gun and shot Nehring. As Nehring slumped to the street, Miss Troester fled in the direction opposite the one the jeep was facing, calling for help. The soldier put the vehicle in reverse gear and chased her down Brueckenstrasse. When several other people appeared, however, he drove away in forward gear (R 247,248,257,259,304-310; Pros Exs 13,19).

Fritz Nehring was taken to a Red Cross hospital where he was pronounced dead by Doctor Lachenmaun. On 2 May 1949, Doctor Hermann Scheerer performed an autopsy on the body of Nehring. He found:

"*** Autopsy revealed a shot through the heart with an extended hemorrhage in the pericard whereby a heart tamponae resulted. This was the cause of death. Furthermore the aorta was torn closely above the hiatus oesophagus. The bullet furthermore penetrated the 10th chest vertebra diagonally from the front to the left sideways and below the 10th rib which lower edge was slightly touched and left the body ***." (R 310-314, 321-325; Pros Ex 30).

Metal fragments found at the scene of Nehring's demise were introduced into evidence as Prosecution Exhibit 25 (R 271; Pros Ex 26).

Approximately an hour after accused had left his unit in Jeep Number 14 he returned to his unit where Gustav Pfosser, the gate guard, saw him again. In the words of Pfosser, the following occurred:

"A. Jones came running around the corner with a carbine held in front of him and approaching me. He thrust the carbine, like this, into my stomach. Whereupon I presumed he wanted something from me.

"Q. Go ahead and testify what you did, not what you thought.

"A. I pushed the carbine to the side with the right hand and at the same time, I was struck with his carbine on my head.

"Q. All right. What happened then - go ahead.

"A. And Jones wanted to reach for my carbine. I can't state what happened exactly. It was a matter of seconds. Whereupon I shouted and screamed and Jones became afraid and ran away.

"Q. Where did he run when he ran away?

"A. Away from the barracks; outside. I ran after him and I had his carbine and I can't say whether it fell down from my hand or whether it fell to the ground. I do not recall that. He ran around the corner of the fence, whereupon I heard a vehicle start and already it drove with terrific speed away in the direction of Rheist Strasse Highway. ***" (R 150,151).

The carbine dropped by accused in his scuffle with Pfosser was U.S. Government carbine Number 583053, the same weapon which had been issued to industrial policeman Miltenberger (R 122,134,135; Pros Ex 4). Ballistics tests were conducted with this carbine and the metal fragments found at the scene of each of the above described homicides. In the opinion of the testing technician, all the pieces of metal were fragments of ammunition fired from carbine Number 583053 (R 390-400; Pros Exs 4,7,24,25,35,36,37,38,40).

About daylight on 1 May 1949, military police jeep Number 14 was found in a ditch along the road from Stuttgart to Schweiberdingen, upwards of five miles from the 534th Military Police Headquarters (R 96, 366-373; Pros Exs 21,22,34). Later that morning Agents John P. Fus and Harold W. Rathjen of the 32nd Military Police Criminal Investigation Division, and Lieutenant William R. Homiller who had been looking for the accused "most of the night" found him on a street in the town of Moeglingen about four miles by main road from the ditch where "jeep No. 14" was abandoned. As they approached accused he said, "I am Jones," and "If those three people die, I am in a lot of trouble." Agent Fus immediately warned him of his

rights under the 24th Article of War as did Lieutenant Homiller. The party then drove toward Stuttgart. During the trip, accused was asked if he would object to stopping at the morgue, which was on the way to the police station, to "view the bodies of the victims." Accused acquiesced. At the morgue, he identified the bodies of Miltenberger, Senn and Nehring as the persons he "shot" (R 203-223, Pros Ex 34). Later, at the military police station, accused made a voluntary sworn statement after again having been warned of his rights. This statement was introduced as Prosecution Exhibit No. 12 without objection, and it reads in relevant part as follows:

"*** I was assigned to the 534th Military Police Co. My duties with this unit consisted of roving patrol, walking patrol, interior guard, radio operator, Charge of Quarters. I have been the radio operator for the 534th MP Headquarters, for the past two months.

"I was on duty at Headquarters from 0800 hours to 1700 hours, 30 April 1949. After this tour of duty, I went back to the Company where I took a shave. From there, I went to the Billy Club which is located in the same Kaserne as my unit. I got there at about 1900 hours. I drank whiskey and beer as a chaser until about 2330 hours, then I went up to my room and got my Mp equipment consisting of a sand brown belt, holster, MP brazzard, and my club. After dressing myself with this equipment, I went down stairs and saw one of our unit jeeps parked in front of the building. I figures Id go for a joy ride so I got in the jeep and drove to the gate where the I.P Guard stopped and checked me. He asked me where I was going and I told him that I was going to work. He marked down the number of my jeep and I signed out.

"For some reason or other, that I cant explain, I stopped at the EES Gas Station in Feuerbach. I stopped the jeep, got out, and started talking to the I.P. who showed me around the gas station. When he showed me around to the back of the station, I swatted him across the puss with the club I carried. After he went down, I got his carbine and shot him through his right side, while he was lying on his left side, holding his face. I did not aim at any particular portion of his body, I just pointed the gun at him and pulled the triger. After I hit the guard across the face with my club and got his carbine, I had to take off the safty, pull back the lever and inject a cartridge because there was none in the chamber.

"I left the I.P. lying by the gas station in Feuerbach and drove up to MP Headquarters where I parked, got out of the jeep, and stood in front of headquarters for a while where I saw everybody going nuts and Im watching them. I was standing by the entrance with the I.Ps. carbine in my hands for about an hour without

anybody recognizing me. I talked with a couple of girls for a while, then when I saw all the guys on duty, getting in the jeeps, I got in the jeep I was driving and drove off and went back to the gas station where I shot the I.P. Guard. There was nobody around, the guard was lying there just as I left him. I picked up the club that I hit him with, which broke in two pieces, and took off again.

"From the gas station, I went to Bad Canstatt. When I got there I saw two girls walking with a German. This was about three blocks from the Wilhelma Theater. I drove up to them and stopped the jeep. I told one of the girls to get in the jeep. After telling her about three times, to get in the jeep, I fired a shot at her when she backed away from me. I fired the shot at her with the same carbine that I took from the I.P. guard I shot at the Gas station. ***

"*** I drove around the area for about ten or fifteen minutes. I slowed down to turn a corner, *** I took off like a bat out of hell. I rounded a corner and about a hundred yards further, I saw a German civilian walking along. I drove up beside him on the left side of the road. I think he recognized me or connected me with the shooting of the girl a little while earlier because he started shouting. I guess he was hollering for help, anyway, I picked up the carbine again, and shot the German through the chest. He was standing by the left side of my jeep and about three feet from me when I shot him. I didn't have to aim at the German, because I had the carbine lying across my left arm and he was so close to me, all I had to do was pull the trigger with the trigger finger of my right hand. I did not have any conversation with this German and I don't know why I shot him, I guess it was because I was nervous from the other shootings and all.

"I took off from Bad Canstatt then and went to my Kaserne in Zuffenhausen. When I got to the gate, after parking the jeep against the wall of the Kaserne, I guess the I.P. at the gate recognized me because he started talking to the second I.P. guard who started for his carbine. Just then, the other I.P. clamped his arm around the barrel of my carbine, that I was still carrying. I saw that the other I.P. was going for his carbine so I didn't feel like sticking around to fight for mine. I took off for my jeep and drove away. I don't know of any reason why the I.P. did not take a shot at me while I was running for my jeep.

"I left Zuffenhausen on Route 10 toward Vaihingen-Enz. About 5 miles after leaving Zuffenhausen on Rute 10, there is a detour.

"*** I got back on the main road again and about two blocks away, I lost control of the jeep when I reached for my hat. It was swaying from one side of the road to the other, finally, I hit the curb and drove into the ditch. The steering wheel hit me in the stomach and kind of knocked the wind out of me so I rested there for a few minutes but when I saw a motorcycle approaching so I took off on foot, leaving the jeep where it fell into the ditch. Out in the fields, about four or five hundred yards from the jeep, I stopped and took off my Military Police belt and holster and threw them away.

"I walked for about a mile or a mile and a half after I threw away my belt and holster and found a shed with plows and stuff like that in it. I went up on the loft where I fell asleep for a couple of hours. I slept to about 1045, left the shed and walked around the town, Moeglingen, for a while, then I was picked up by the CID. Just before I was picked up, I told a German woman to call the Police. I made up my mind to give myself up. I have no explanation to make concerning the three people I shot, I can only blame it on the amount of Whisky and beer I consumed at the club.

"In the presence of Agent Fus, Rathjen, and Lt HOMILLER I recognized the bodies of the two German men and the one German girl that I shot. I recognized them at the Prauge Friedhof, in Stuttgart, on 1 May 1949.

*

*

*

/s/ Russell F. Jones
(Signature)

"(Subscribed and sworn) to before me this 1st day of May 1949, at Stuttgart, Germany.

Signed: Lester J. Zulkn - Capt CMP
(Summary Court Officer)"

The value of a one-quarter ton 4x4 Army truck was established as being \$1051 (R 546).

For the Defense

The only evidence adduced by the defense concerning the merits of the case was (a) the testimony of four witnesses to the effect that on the night of 30 April - 1 May 1949, the accused consumed large quantities of whiskey, gin and beer at the "Billy Club" and was definitely drunk that evening, and (b) the testimony of a German national that at about

1045 hours, 1 May 1949, the accused approached him in the town of Moeglingen and asked for the police (R 437, 446-449, 465-470).

The accused was advised of his rights as a witness by the law member and he elected to remain silent (R 545,546).

4. Mental Responsibility of Accused

Prior to the trial, a Board of Medical Officers was convened to examine into accused's mental condition in accordance with paragraph 111, Manual for Courts-Martial, 1949. The Board found:

"1. Recruit Russell F. Jones is now and was at the time of the alleged offense so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to distinguish right from wrong.

"2. Recruit Russell F. Jones is now and was at the time of the alleged offense so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to adhere to the right.

"3. Recruit Russell F. Jones possesses sufficient mental capacity to understand the nature of the proceedings and intelligently to conduct and cooperate in his own defense."

The defense put the mental responsibility of the accused in issue by calling as witnesses five qualified psychiatrists, all of whom testified that in their opinion the accused was unable to adhere to the right at the time of the commission of the offenses alleged. These opinions were based on personal examination of the accused, the testimony of defense witnesses who recalled peculiar actions of accused, particularly when drinking, and depositions of accused's wife, mother-in-law, foster father, cousin and aunt, which related that accused was an illegitimate child, had an unhappy early home life, had been sentenced to reform school for larceny, had frequently suffered from severe headaches and had committed unusual acts when intoxicated which he could not remember when sober (R 47-57, 275-300, 431-434, 435-447, 472-488, 499-524, 525-528; Def Exs A,B,C,D,E). A study of the data made available to the defense psychiatrists led them all to the conclusion that accused was "a psychopathic personality with schizoid traits" who, when he became intoxicated on the evening of 30 April, entered a "clouded or twilight or confusion state" and while in that state was unable to distinguish right from wrong and unable to adhere to the right.

The prosecution also put in evidence opinions of five qualified psychiatrists. They based their opinions on the same information available to the defense. They agreed that the accused was a "psychopathic personality with schizoid traits," but were of the opinion that in spite

of this and his intoxication, accused could, at the time of the acts charged, distinguish right from wrong, and although his ability to adhere to the right was impaired or diminished, nevertheless he had the ability to adhere to the right at that time (R 58-93, 338-349, 534-545; Pros Ex 1).

At the close of its case, the defense made a motion for a finding of not guilty as to all charges and specifications to which accused had pleaded not guilty, "by reasons of insanity." This motion was denied (R 554).

In CM 319168, Poe, 68 BR 141,172, the Board of Review said:

"The distinction between the complete defense of insanity which has been caused by excessive drinking and the mitigating circumstance 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). It can hardly be contended in the instant case that deceased, by any act of hers, provoked the fatal assault made upon her by accused or that the purported, delusory provocation existing only in accused's mind would in any sense be sufficient to mitigate murder to manslaughter (Wharton's Criminal Law, 12th Ed., sec. 54; CM 204790, Hayes, supra)."

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. Where it appears from the evidence, as in the instant case, that accused was capable of retaining in his memory a recollection of the details surrounding his perpetration of the robbery, assault and homicides, that he had the ability to perform acts requiring a high degree of coordination before, during and after the commission of the crimes such as driving a jeep, the loading and firing of a carbine, and that he realized the enormity of his offenses and the jeopardy in which they placed him, as shown by his flight from the scene of his misdeeds, we can but concur in the implied finding of the court that accused was not so intoxicated as to

be unable to harbor malice prepense in his mind (CM 274678, Ellis, 47 BR 271, 286; CM 294675, Minnick, 26 BR (ETO) 11,21; CM 319168, Poe, supra).

It has been held that notwithstanding the opinions of psychiatrists, which are of course proper matter for court consideration, it is the duty of the court to consider the facts in evidence in the light of its own knowledge of human motives and behavior under certain conditions. In the instant case, ten doctors, some of whom are internationally known psychiatrists, gave the court the benefit of their knowledge and experience. They testified at length over a period of several days. The conclusions of half of these men were diametrically opposed to the conclusions of the other half. Five experts were of the opinion that at the time of the acts alleged, although his ability to adhere to the right was impaired through voluntary intoxication, the accused was legally sane, while five other experts clung to the opinion that the accused was not mentally responsible in the legal sense. The court had before it all the evidence, and observed all the witnesses and the accused. By its action on the motion and by its findings the court inherently found that accused was not affected by any mental disease or derangement to such an extent that he was unable, concerning the particular acts charged, to distinguish right from wrong and to adhere to the right. From our examination of the evidence and in view of uniform holdings that an impaired ability to adhere to the right, or a partial irresponsibility, is no defense to crime, we conclude that there is no reason to disturb the court's findings (CM 319287, Phinezy, 68 BR 221, 228; CM 320805, Hamilton, 70 BR 191,195, and cases therein cited).

5. Discussion

As to all Charges and Specifications

The evidence shows that on the night of 30 April - 1 May 1949, between 1900 and 0001 hours, the accused was drinking intoxicating liquors at the "Billy Club," an enlisted men's club of the 534th Military Police Detachment. Becoming drunk, he then was embroiled in two disorders and was finally forcibly put to bed. Later, he took a company jeep without authority and proceeded to inflict himself upon the unsuspecting citizens of the City of Stuttgart, Germany. After stealing a carbine by violence, he killed three people in cold blood, attacked a guard and ended his vicious course of conduct when the vehicle he was driving plunged into a ditch. Direct evidence plus the full voluntary confession of the accused proves beyond peradventure of doubt that he was the perpetrator of each of the crimes charged.

Charge I and its Specification

Accused was convicted of the misapplication of a motor vehicle, property of the United States, in violation of the 94th Article of War. The

evidence clearly shows that accused, without authority, willfully took and applied to his own use a "jeep" belonging to the United States, furnished and intended for the military service thereof, of a value of about one thousand fifty-one dollars, at the time, place and in the manner alleged. The offense was properly charged and proved (MCM 1949, par 181h).

Specification 1, Charge II

"Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation ***. It is not necessary that the person from whom the property is taken be the actual owner - it is enough if he has a possession or custody that is good against the taker. ***" (MCM 1949, par 180f).

The court found accused guilty of the robbery of a carbine from Alois Miltenberger, an industrial policeman. The carbine was property of the United States, and had been duly issued to Miltenberger for use during his assigned tour of guard duty. Thus he had a possession good as against the accused. The evidence clearly establishes that accused stole the carbine from Miltenberger at the time and place alleged, by use of violence, aptly, if luridly, described by the accused himself when he said: "I swatted him across the puss with the club I carried."

Specification 3, Charge II

Accused was also convicted of assault with intent to do bodily harm with a dangerous weapon upon Gustav Pfosser, another industrial policeman.

"*** An assault is an attempt or offer with unlawful force or violence to do a corporal hurt to another. *** Weapons and other objects are dangerous when they are used in such a manner that they are likely to produce death, or great bodily harm ***" (MCM 1949, par 180k, 1).

The proof shows that Pfosser was on guard duty at the 534th Military Police Detachment on 1 May 1949. At about 0400 hours that morning, accused rushed at him brandishing a carbine which he thrust into his victim's stomach. When the frightened Pfosser attempted to defend himself, accused struck him on the head with the weapon. From the foregoing, the court could reach no other conclusion but that of the guilt of the accused under this specification.

Charge III and its Specifications

The evidence clearly establishes that the accused committed the three homicides alleged in these specifications at the times and places and upon the victims alleged. The accused was found guilty as charged except the words "and with premeditation."

"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, ***" (MCM 1949, par 179a).

The record affirmatively shows that accused committed three murders as found beyond all reasonable doubt. The brutality of the unprovoked attacks shows unmistakably that the vicious conduct flowed from an evil heart bent on mischief whether that mischief was the assaulting of German people or the theft of their property or both. The law presumes malice from such cruel and deliberate acts manifesting an utter disregard for human life (CM 330963, Armistead, 79 BR 201,230).

Additional Charge and its Specifications

The competent evidence of record reveals that the accused was drunk and disorderly at the times and places alleged. This, coupled with accused's pleas of guilty, presents no question for discussion of the court's findings of guilty.

6. The record shows that the accused is twenty-two years of age and married. Prior to his current enlistment he had one year, two months and twenty-two days service with the Army. He enlisted in the Regular Army on 28 November 1947 for five years.

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

Carlos E. McAfee, J.A.G.C.
Joseph L. Bush, J.A.G.C.
Roger W. Currier, J.A.G.C.

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

JAGU CM 338934

24 MAY 1950

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

v.)

Recruit RUSSEL FRANCIS JONES,)
RA 31507186, 534th Military)
Police Service Company)

UNITED STATES ARMY, EUROPE

Trial by G.C.M., convened at
Ludwigsburg, Germany, 22-26,
29-31 August and 1-2, 6-9
September 1949. Dishonorable
discharge, total forfeitures
after promulgation, and con-
finement for life.

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

1. Pursuant to Article of War 50d(2) the record of trial in the case of the soldier named above and the opinion of the Board of Review have been submitted to the Judicial Council which submits this, its opinion, to The Judge Advocate General.

2. Upon trial by general court-martial the accused was found guilty of three unpremeditated murders, robbery, assault with intent to do bodily harm with a dangerous weapon, misapplication of a Government vehicle, and being drunk and disorderly in public, all in the vicinity of Stuttgart, Germany, on or about 1 May 1949, in violation of Articles of War 92, 93, 94, and 96. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority, along with other action here immaterial, approved the sentence and forwarded the record of trial for action under Article of War 48. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof.

3. The Judicial Council finds the evidence to be substantially as stated by the Board of Review in paragraphs 3 and 4 of its opinion. The Council concurs with the Board of Review in its conclusion that

the record of trial supports the findings of guilty (as approved by the reviewing authority) and the sentence, unless, as hereinafter discussed, the evidence does not establish the accused's mental responsibility at the time of the alleged offenses.

The evidence on this issue shows that a board of medical officers, convened prior to the trial, found the accused mentally responsible at that time. At the trial five qualified psychiatrists testified for the defense that in their opinion the accused was unable to adhere to the right at the time of the alleged offenses. These opinions were based upon personal examination of the accused, testimony of defense witnesses as to his peculiar actions, particularly when drinking, and depositions indicating that he was an illegitimate child, had an unhappy early home life, was sentenced to reform school for larceny, suffered from frequent headaches and committed unusual acts when drinking which he could not remember when sober. The defense psychiatrists concluded that the accused was "a psychopathic personality with schizoid traits" who, when he became intoxicated on the evening before the alleged offenses, entered a "clouded or twilight or confusion state," in which he was unable both to distinguish right from wrong and to adhere to the right.

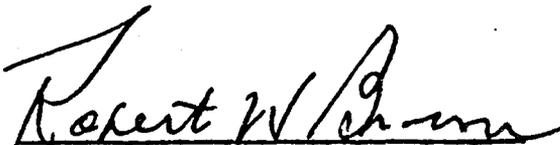
The prosecution introduced the testimony of five qualified psychiatrists, whose opinions were based upon the information available to the defense. These witnesses agreed that the accused was a "psychopathic personality with schizoid traits," but were of the opinion that in spite of these traits and his intoxication he could at the time of the acts charged distinguish right from wrong, and that he had the ability, although impaired or diminished, to adhere to the right at that time.

4. Counsel for the accused argued, during the appellate review of the case, that the weight of the evidence supported the conclusion that the accused was suffering from "temporary insanity" as a result of "pathological intoxication" at the time of the alleged offenses. He referred to the accused's unfavorable origin and frustrated early life, his criminal record prior to entering the Army and poor record in the Army, and his "borderline mentality." Counsel urged that the accused never should have been accepted for service in the Army and that had he not been, he might not have committed the alleged offenses. Counsel expressed the opinion that under similar circumstances a civilian court might well have found the accused "not guilty by reason of insanity," after which the accused would have been examined and, if appropriate, committed to an institution for care and cure. On the basis of the foregoing, counsel argued that the findings of guilty should be disapproved or, in the alternative, that the sentence should be substantially mitigated, in view of the extenuating factors in the case.

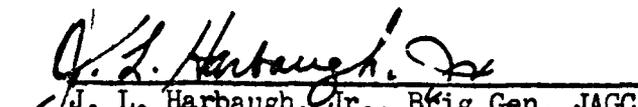
The Judicial Council has given full consideration to the above arguments as well as to the testimony of the defense witnesses on the issue of mental responsibility. In view of the settled rule that a defect of character, will power, or behavior does not necessarily indicate insanity even though it may demonstrate a diminution or impairment in ability to adhere to the right, the Council is of the opinion that the record of trial supports the conclusion inherent in the court's findings that the accused was mentally responsible both at the time of the alleged offenses and at the time of trial (MCM, 1949, par 110b, p 121; CM 319287, Phinezy, 68 BR 221, 228, and cases cited therein; CM 320805, Hamilton, 70 BR 191, 195, and cases cited therein; see also Holloway v. United States (CACD, 1945), 148 F. 2d 665, cert. den., 334 U.S. 852).

5. Notwithstanding the conclusion arrived at above on the record of trial, the Judicial Council has caused the record of trial and allied papers to be transmitted to the Office of The Surgeon General, Psychiatry and Neurology Consultants Division, for a further report upon the accused's mental responsibility. That division has submitted a memorandum, dated 24 March 1950, stating that, after examination of the record of trial, it is concluded that the accused was at the time of the alleged offenses so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right. The opinion is also expressed that the accused at the time of the trial possessed sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense.

6. For the reasons stated, the Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and legally sufficient to support the sentence and to warrant confirmation thereof. Confinement for life in a penitentiary is authorized upon conviction of the offense of unpremeditated murder (AW 42; AW 92; 18 U.S.C. 1111).


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

CM 338,934

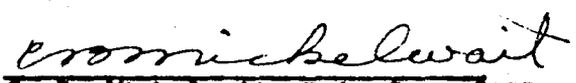
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

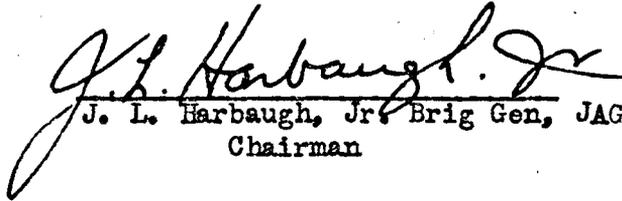
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Recruit Russel Francis Jones,
RA 31507186, 534th Military Police Service Company, upon the
concurrence of The Judge Advocate General the sentence is
confirmed and will be carried into execution. A United States
Penitentiary is designated as the place of confinement.

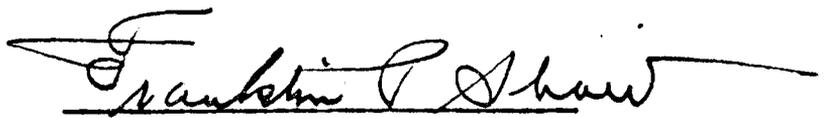

Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC

24 May 1950


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

I concur in the foregoing action.


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

24 May 1950

(GCMO 44, June 7, 1950).



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

CSJAGV CM 338993

7 MAR 1950

U N I T E D S T A T E S	)	YOKOHAMA COMMAND
)	
v.	)	Trial by G.C.M., convened at
Private WALLACE P. PELKEY	)	Headquarters Yokohama Command,
(RA 11176954), Detachment	)	APO 503, 26 September 1949, 3, 4
"B", Yokohama Engineer	)	and 5 October 1949. Bad conduct
Depot, APO 503.	)	discharge, total forfeitures
	)	after promulgation and confinement
	)	for one (1) year. Disciplinary
	)	Barracks.

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

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50e.
2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 94th Article of War.

Specification 1: In that Private Wallace P Pelkey, Detachment "B", Yokohama Engineer Depot, APO 503, did, at or in the vicinity of Yokohama, Honshu, Japan, on or about 20 July 1949, knowingly and without proper authority, dispose of by turning over to Katsumasa Saito and Umekichi Kawahara, Japanese Nationals, fifty (50) ingots of tin, weighing approximately one-hundred (100) pounds each, the value of about, one-thousand-four-hundred dollars (\$1,400.00), property of the United States, intended for the military service thereof.

He pleaded not guilty to and was found guilty of the Specification and the Charge and was sentenced to be discharged from the service with a bad conduct discharge, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to confinement at hard labor for one year (one previous conviction considered). The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50e.

3. The prosecution based its case primarily upon the testimony of four Japanese witnesses. Two of them were admitted conspirators in the theft of the property concerned, the third was the driver of the truck on which the stolen tin was transported and may or may not have been involved in the larceny, and the fourth was the warehouse gate guard. Generally speaking the period of time involved in the case was from 0900 to 1200 on 20 July 1949, with the critical period being from 1040 to 1140.

Umekichi Kawahara, one of the Japanese witnesses for the prosecution directly involved in the unauthorized taking of the tin from the warehouse area, testified generally that on 20 July 1949 he worked in "Area P", knew the accused and identified him in court; on the morning of 20 July 1949, and also prior thereto, the accused had approached him and discussed with him the "selling of tin", Saito had been present when the accused talked about the tin and that the accused had said to them "Find someone for me who will buy tin."; that with the accused's assistance he was able to leave the warehouse area on 20 July 1949 without his pass, and with Saito found a buyer and completed negotiations for the sale of the tin; the accused did not speak to the buyer (R11, 12, 13, 18, 21, 22, 99, 100); that "It was agreed that we would load the tin on the truck, drive the truck to the Yokohama Central Station,***and we would transport it from there to Itakura's house."; the "goods" were loaded "on the vehicle [in the P-3 warehouse, an Eighth Army installation] and transported to Osawa's house"; "many people were there" and "took part" when the tin was loaded on the truck, including the accused, Japanese Nationals and other soldiers; the witness and the Japanese Nationals were working under Pelkey's direction at the time; that four or five days prior to this incident he had seen the tin in the P-5 warehouse; when the tin was loaded the accused was there, "not right on the spot,***not on the vehicle", but "somewhat separate", about "one or two ken" [one ken equals 1.98 yards] away (R14, 16, 19, 20, 98); when the truck left the warehouse area Saito, the accused, the truck driver, and the witness were on the truck and the accused rode the truck as far as the Yokohama Station; the guard at the gate, Irizawa, stopped the truck "for a little while" and then permitted it to go on; when the accused left the truck he said, "I think the guard took the number of the vehicle when it left the area. That is not very good"; after the accused left the truck the three Japanese contacted a fourth Japanese who "told us what to do and where to unload it", and they took the truck "to Osawa's house and unloaded" the fifty ingots of tin; that he knew the tin was stolen and his and Saito's share of the loot was 25,000 yen, and the remainder was to go to the accused; and that he had known Pelkey for approximately six months prior to 20 July and Pelkey had given him coca-cola, ice cream, and various types of pastries (R15, 16, 17, 19, 21).

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Upon recall as a witness for the court, Kawahara testified concerning the time element in this case as follows:

Q Where were these ingots the first time you saw them on the morning of 20 July 1949?

A I did not see them that morning. I saw them just prior to loading.

Q At what time was that?

A A little before eleven.

Q When did you finish loading?

A A little before eleven.

Q What time did the truck leave warehouse P-3 after it was loaded?

A A little before eleven.

Q It left P-3 warehouse at a little before eleven; is that right?

A That is right.

Q How do you know it was that time?

A I saw the clock at the Yokohama Station when I got there.

Q What time did you return again to the Yokohama Engineer Depot?

A I did not return.

Q Did you go to Tsurumi with the truck?

A I did.

Q When did you get off the truck?

A Between 11:30 and 11:50; sometime around that time.

* * *

Q How long did it take to load the truck?

A Maybe ten minutes; sometime around that time.
(Underscoring supplied) (R98, 99).

Katsumasa Saito, the other Japanese witness for the prosecution directly connected with the theft of the tin, in his testimony confirmed in all material respects the testimony of Kawahara (R22-31, 102-104). With respect to the time element in this case this witness testified

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as follows:

Q After you contacted this party, did you go back to the P-3 warehouse?

A I did.

Q What did you do then?

A The goods were loaded on the truck about 10:40.

* * *

Q What happened after you loaded the truck?

A We left the area a little before eleven.

* * *

Q What time did you finish loading the truck?

A At approximately forty minutes after ten.

Q What time did you leave P-3 warehouse in the truck?

A About 10:50.

* * *

Q How do you know it was 10:50 when you left P-3 warehouse area?

A Because I had a watch.

(Underscoring supplied)(R24, 102, 103).

The driver of the truck Yutaka Hirukawa, testified generally that he did not know the name of the accused but pointed to him in court; that he saw him on 20 July 1949 inside the P-3 warehouse when the witness was sitting in his truck; that some metal was loaded on the vehicle on 20 July 1949 and "taken out"; that after the loading was approximately half completed the accused came to the driver's seat of the truck, and that after the loading was completed the two laborers and the accused got on the truck which left the warehouse, stopped at the gate where the guard looked into the body of the vehicle and permitted it to pass through, and the truck with its passengers then proceeded to the Yokohama Station where the accused got off the vehicle after speaking to Kawahara and Saito; that the truck thereafter picked up another Japanese and proceeded to Tsurumi to Osawa's house where the vehicle was unloaded (R42, 43); that he got back to the warehouse area from delivering the tin at a little before 1200 on 20 July 1949 and told Saito after 1200 on the same date that the guard was checking on the taking of the tin from the warehouse (R46); that the accused directed him to drive "to the P.X. in front of

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the Yokohama Central Station"; that it was customary to allow trucks through the gate "without checking our sheets if there is a soldier on the vehicle"; that he cannot explain why he took orders from the Japanese to drive to Tsurumi except that he had "made several trips on business to the Tsurumi area with the Japanese laborers"; that the accused knew what was loaded on the truck and that the initial orders came from the accused until he got off the truck, after which he (the witness) "took orders from the laborer" (R48); that he did not see the accused around the truck until it was half loaded when he came to the assistant driver's seat; and that at the time there were no other soldiers around (R49).

With respect to identifying the accused at the pre-trial investigation of this case the witness testified on cross-examination:

Q Now do you remember that you signed a statement on the 1st of September before a Major in the Army, who was investigating this case?

A I remember.

Q And do you remember that when you were asked to point out the soldier, by the Major, the soldier who got into the truck with you, that you pointed to someone else besides Pelkey, the accused?

A I remember that.

* * *

Q Well now as a matter of fact, right now, are you sure that this is the soldier that was with you that day?

A No mistake.

Q But when you were before Major McCulley you pointed to the other soldier; isn't that correct?

A I made a mistake at that time.

Q After you pointed to the wrong soldier did somebody tell you who the soldier was that was in trouble, that the man you pointed to was not the soldier who was in trouble?

A No.

Q Then when you pointed to the wrong soldier, did you tell the Major then without anybody saying anything to you, "I am sorry, I picked out the wrong man. It is the other man"?

A That is right.

Q Now how was the soldier dressed who was with you in the truck?

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A On the 1st of September, sir?

Q No, on the 20th of July.

A A green uniform. I guess it is known as fatigue clothes.

Q And how was the first soldier that you pointed out to on the 1st of September, dressed?

A The type of uniform that this soldier is now wearing. At that time Pelkey had on green fatigues.

Q And what was the other soldier that you pointed to first, wearing?

A A uniform that is worn to leave the camp.

Q And what kind of clothing was Pelkey wearing on September 1st?

A The same type of uniform that he had on on the 20th of July.
A green uniform.

Q And yet you picked out the other soldier first who was wearing this color (indicating) uniform, sun-tans; is that right?

A First I pointed out someone who was wearing the type of uniform you are now wearing.

Q And then although Pelkey was wearing fatigue clothes at the hearing on the 1st of September and the soldier who was on the truck with you on the 20th of July was wearing green clothes, you nevertheless first picked out the other soldier who was wearing sun-tans, and told the Major that he was the man that was with you on the 20th of July; is that correct?

A That is right. I was sitting at the end of the room behind a typewriter and I did not get a clear vision.

Q But without a clear vision you were willing to tell the Major who the man was in the truck with you; is that correct?

A I had only seen this soldier once previously, on the 20th of July, so looking from where I was sitting I pointed this other soldier out and realized I had made a mistake. I walked around the room and pointed to another soldier. (R43, 44).

Zenji Irizawa, the Japanese guard at the gate on 20 July 1949, testified generally that on that date he was gate guard at Area P from 1000 to 1200 and that he knew the accused and identified him in court (R49); that on 20 July 1949 he saw the accused in the assistant driver's seat of a 2½ ton truck leaving the area and that three other persons were on this truck, namely, Saito, Kawahara and Hirukawa (R49, 50); that he

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looked in the truck and saw what he thought was lead but later learned was tin and that he reported this to the depot police; that he allowed the vehicle out the gate without asking for the trip ticket but merely took the plate number which was customary (R50); that he told the driver of the truck when he returned to the area "that he was suspected of taking out some material from the warehouse illegally" (R51); that generally he had orders "to ask a driver for a relocation order or a requisition order when he has material in the truck and is leaving the area" but did not in this case because "when there is a G.I. on the vehicle itself, we do not think that anything dishonest will take place. As a rule, we let the vehicle out." (R51, 52)

Also with respect to identification of the accused at the pre-trial investigation this witness testified:

Q Now do you remember that on September 1st, 1949, that you spoke to a Major who was making an investigation of this case?

A I remember it.

Q And do you remember on that day the Major asked you to point out the soldier who was sitting in the front seat as assistant driver?

A I remember it.

Q And do you remember on that day that you pointed to another soldier that was in the room and not this soldier, the accused, Pelkey?

A I remember that.

Q How was the soldier dressed who was sitting in the assistant driver's seat on 20 July 1949?

A He had on fatigue clothes.

Q And how was the soldier dressed that you pointed out to the Major on 1 September 1949?

A I guess it is known as the regular uniform.

Q What kind of uniform?

A It is the type of uniform that is being worn by all members in this room.

Q But the soldier you first pointed out to when the Major asked you on September 1st, 1949, was not he wearing green clothes too?

A That is not correct.

Q Was the soldier that you first pointed out to this soldier here, the accused, Pelkey?

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A No, sir. (R50, 51)

Tamotsu Sakuma testified that he was chief checker in "P-3" at the Yokohama Engineer Depot and that on 20 July 1949 he worked for the accused; that he did not see any ingots of any kind in P-3 on that date; that the truck involved in this case was moving tape from warehouse P-3 to warehouse P-2 on 20 July 1949; that he did not receive any instructions from the accused about the truck that morning nor did he go over in that area around 1030 that morning; that the vehicle was supposed to be used for moving tape until 1130 that day; that the last time he checked the tape loading that morning was about 0930 or 1000; and that he does not remember the last time he saw the accused that morning but that the accused had told him to finish moving the tape that morning (R104-107).

The defense presented six witnesses, including the accused. Sergeant George E. Ferguson, area supervisor of Area P, Yokohama Engineer Depot, testified that a new man, Private First Class Penrod, reported to him on 20 July 1949 and that he put Penrod in with the accused in warehouse P-3; that he took Penrod to P-3 and introduced him to the accused and that the three of them went through P-3 about 0900 while the witness pointed out various materials in the warehouse to Penrod; that he did not see any tin ingots in P-3 and that he believed if any had been there he would have seen them; that the tin could not have been in the place the Japanese alleged they picked it up as there were a "lot of small items in that particular place and we spent quite a bit of time on that particular place"; that it is possible that some tin might have been in P-3 although his stock locator cards did not so indicate; that some tin was stored in the P-5 area; and that he left Penrod and the accused together at about 0930 (R53-58).

Private First Class Jay A. Penrod testified that 20 July 1949 was his first day of work in Area P; that Sergeant Ferguson introduced him to the accused about 0900 on that date; that he stayed in P-3 warehouse all that morning, did not lose sight of the accused at any time and that the accused was in his presence at all times that morning up until 1115; that he did not see any trucks come in the warehouse that morning nor did he see the accused sitting in a truck in the warehouse that morning; that the accused left the warehouse at 1115; and that he knows it was 1115 because the accused asked him the time just before he left (R59-62).

Private First Class Ralph G. Johnson, receiving checker in Area P, testified that he saw the accused on the morning of 20 July 1949 outside and inside the P-3 warehouse with Private First Class Penrod at about 1000 or 1030 and that he was with them until 1115; at which time the accused stated "he was going in to chow"; that he knows it was 1115 when the accused left because he (accused) asked what time it was before he left; that he thinks tin was stored in the P-5 area which

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was not far from the P-3 warehouse being approximately 50 to 100 feet from P-3 warehouse; and that he did not recall seeing the accused at lunch that day. (R63-65).

Private First Class Richard L. Daiker testified that on 20 July he ate in "Detachment B", did not see the accused at lunch that day but did see him at about 1140 when he (the witness) came in to the company area to wash up and he saw him about 1240 when they fell out for sports; that he placed the time as 1140 because "We usually leave the area about 1130 and come in on a truck at about 1140"; and that the witness was inside the company area when he saw the accused; and that he did not see the accused come up to the company area or leave it and does not know whether the accused rode or walked to the company area (R66-68).

Tomio Saito, a Japanese fork-lift operator, testified that one of the laborers who worked with him asked him to load a truck on the morning of 20 July 1949 with 50 or 60 pieces of tin or lead in warehouse P-3 and that he did so; that three or four laborers were working loading the truck; that there were no soldiers present at the time; that the accused did not tell him to help load the truck; and that the loading was completed between 1030 and 1100 and took between five and ten minutes (R69, 70).

The accused took the stand and testified under oath as a witness in his own behalf. He confirmed the testimony of Sergeant Ferguson and Privates First Class Penrod and Johnson. He stated that he was in the P-3 warehouse on 20 July 1949 from between 0730 or 0745 to 1115; that he knew of no tin stored in P-3 but that there could have been tin in there that he did not know about; that he did not assist in loading tin on a truck with Saito and Kawahara; that he did not leave the P Area on a truck that day; that he left Johnson and Panrod at 1115 having asked them the time; that he "went through the side gate at Area P — it was a short-cut to the gate — and I went out there and caught a truck and took the truck to the Company"; that the driver of the truck was not the driver who had testified in this case; that he arrived at Detachment B area between 1130 and 1135 and had lunch there between 1145 and 1215; that between 1215 and 1245 he was at his hut resting and then fell out for sports; that he never ordered any fork-lift operator to load tin ingots on a truck; that he has had no trouble with Saito or Kawahara or any of the Japanese in the area; that he never asked them to find a buyer for tin nor permitted Saito and Kawahara to be absent from work on 20 July to look for a buyer; that at the pre-trial investigation there were three other soldiers beside the accused present, and the gate guard identified a Private Fox, who worked for the investigating officer, as having been on the truck in question when it left the P area with the tin, and that the truck driver did likewise; that the only time he left the P area on 20 July was at 1115 to go to his company area; that he saw Private Gonzales when he entered the Detachment B Area; that he could not remember the names of the men he ate lunch with; that he left the P area at 1115 because he felt sick; that he had been working

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in the P-3 warehouse nine days prior to 20 July 1949; and that during that morning he had told the checker at P-3 that the truck in question, which was supposed to be moving tape from the P-3 to the P-2 warehouse, could be released at 1115 (R73-88).

4. From the foregoing it is apparent that the accused attempted to establish an alibi for his movements from approximately 0900 on 20 July 1949 until 1140 on that date, with the critical period of time being from 1040 to 1140. The Japanese witnesses Saito, Kawahara, and Tomio Saito definitely place the time that the truck was loaded with the stolen tin as between 1040 and 1050, "a little before eleven", and between 1030 and 1100. Saito and Kawahara testified that the truck with the tin, themselves, the driver, and the accused left the P area at about 1050 and "a little before eleven." Kawahara further testified that he got off the truck between 1130 and 1150, presumably after it had delivered the stolen tin, and after the accused had previously left it at the Yokohama Station.

The defense witnesses Ferguson, Penrod and Johnson, just as definitely placed the accused as either within their sight or in their presence from 0900 until 1115, and the defense witness Daiker placed the accused in the Detachment B Area at approximately 1140. It is clear that, if the witnesses Penrod and Johnson are to be believed, it was impossible for the accused to have departed the P area on the truck with the stolen tin at sometime between 1040 and 1115. Private Gonzales was not called as a witness by either the prosecution or the defense.

In considering the evidence in this case it is observed that two of the Japanese witnesses directly connecting the accused with the wrongful disposition of the property, were themselves admitted thieves, and both of them knew, shortly after the incident, that it was suspected and that they would probably be implicated. It may be assumed that neither the Japanese driver of the truck nor the Japanese gate guard were involved in the theft. Both of these witnesses positively identified the accused at the trial as the soldier who was involved in the illegal taking of the property concerned. However, as was clearly shown on cross-examination of these two witnesses, neither of them were able originally to identify the accused at the pre-trial investigation of the case held on 1 September 1949. While it is true that the driver offered a not unreasonable explanation of his erroneous identification, no explanation was offered by the guard for his original failure to identify the accused at the investigation. The cross-examination of these two witnesses disclosed that the accused, on the date of the offense, was dressed in "green fatigue" clothes and that at the pre-trial investigation the accused was the only soldier in the room (apparently with three or four other enlisted men) who was then dressed in "green fatigues." With this apparent aid to identification, both the driver and the guard originally identified a

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Private Fox as the soldier connected with the theft of the tin. Such uncertainty in the matter of identification, even taking into consideration the explanation offered by the driver, cannot help but affect the weight that can be accorded their testimony at the trial, particularly when the character of the two Japanese witnesses in chief is considered.

As to the defense witnesses, Johnson and Daiker were friends of the accused and it is possible that such friendship might have colored their testimony. On the other hand, the defense witness who substantiates the accused's alibi for the period from 0900 to 1115 on 20 July 1949, the witness Penrod, was a new man in the organization and it would appear did not know the accused prior to 0900 on that date. His substantiation of the accused's alibi, with respect to the accused being with him until 1115 on 20 July 1949, is corroborated by the testimony of the defense witness Johnson.

There is no dispute that some fifty odd ingots of tin were, on 20 July 1949, illegally removed from the P-3 warehouse area, a soldier was probably implicated in the theft, and a soldier was on the truck which transported the stolen property out of the warehouse area. The only controverted questions in the present case are whether the accused was the soldier who conspired with the Japanese to steal the tin, was the soldier on the truck when it left the P warehouse area between 1040 and 1115 on 20 July 1949, and was thus connected with the wrongful disposition of the tin. In addition to the positive testimony of the four Japanese, there are a number of inferences raised which are unfavorable to the accused. For example, there was the accused's claim that he had ordered the checker to release the truck in question at 1115, although the trucks normally worked until 1130; that he had originally told the CID he left the warehouse area at 1115 because he was sick, but was able to participate in athletics an hour and one-half later; that he apparently had approached and attempted to coach a possible defense witness, Gonzales; and he could neither remember nor produce any witnesses with whom he had lunched at the detachment mess on 20 July 1949.

The court is the trier of fact and upon it devolves the duty of weighing the evidence and judging the credibility of the witnesses. It had the benefit of hearing and observing the witnesses and ordinarily its determination of these matters would not be disturbed on appellate review. However, there must be competent evidence sufficient to indicate the reasonableness of the court's determination of fact. The circumstances must not only be consistent with guilt, but inconsistent with innocence (CM 336675, Friedland, 3 BR - JC 185, 194; CM 195705, Tyson). No accused shall be found guilty until his guilt has been established by legal and competent evidence beyond a reasonable doubt and if there is a reasonable doubt, such doubt shall be resolved in the accused's favor and he shall be acquitted (AW 31). The meaning of this rule is that

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the proof must be such as to exclude not every hypothesis or possibility of innocence, but "any fair and rational hypothesis except that of guilt ***" (par 78a, p. 74, MCM, 1949).

As was stated in part by the Board of Review in CM 320681, Watkce, 70 B R 125, 134-136:

"In cases examined by us before confirmation pursuant to the second paragraph of Article of War 50 $\frac{1}{2}$, as is the case here, it is our right and duty to weigh the evidence as well as to pass upon the formal legal sufficiency of the record of trial. In weighing the evidence, we may arrive at a different conclusion than did the court and the reviewing authority, even though their conclusions are, strictly speaking, legally justified by the evidence appearing in the record. Briefly stated, we are allowed in such cases, a difference of opinion. We, too, must be convinced of accused's guilt beyond a reasonable doubt (Dig Op JAG, 1912-1940, sec 408 (1); CM 259987, Loudon, 39 B R 109, 113; CM 243818, Smith, 28 B R 111, 118).

"In the instant case, it appears that the conviction of accused is based almost wholly upon the testimony of purported accomplices and an informer. *** Although a conviction may be based upon the testimony of accomplices, even though uncorroborated, their testimony, or that of those who appear to be accomplices, is of doubtful integrity and is to be considered with great caution (par 124a, MCM, 1928). [par 139a, p. 184, MCM, 1949]. The Board of Review has previously had occasion to weigh accomplice testimony and to find it wanting in credibility (CM Loudon, supra; see also CM 267651, Boswell, 44 B R 35, 42).***"

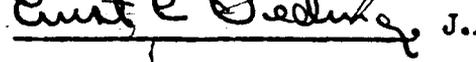
In its appellate review of records of trial by courts-martial the Board of Review has authority to weigh the evidence, judge the credibility of witnesses, and to determine controverted questions of fact (AW 50g; par 98, MCM, 1949). Considering all of the evidence in this case, along with the unfavorable inferences, the Board of Review is of the opinion that the "proof as a whole" is not convincing beyond a reasonable doubt (par 125a, p. 152, MCM, 1949), and consequently, this doubt should have been resolved in the accused's favor and he should have been acquitted.

5. For the foregoing reasons, the Board of Review holds the

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record of trial legally insufficient to support the findings of guilty and the sentence.


E. H. Guimond, J.A.G.C.

Jean M. Brien, J.A.G.C.

Curt E. Sedung, J.A.G.C.

(302)

CSJAGE CM 338993

1st Ind

JAGO, SS USA, Washington 25, D. C. **10 MAR 1950**

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

In the foregoing case of Private Wallace P. Pelkey, 11176954, Detachment B, Yokohama Engineer Depot, APO 503, The Judge Advocate General has not concurred in the holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Pursuant to Article of War 50e (4) the holding and record of trial are accordingly transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.

FOR THE JUDGE ADVOCATE GENERAL:



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

1 Incl
Record of trial and
accompanying papers

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

JAGU CM 338993

20 April 1950

UNITED STATES

YOKOHAMA COMMAND

v.

Private WALLACE P. PELKEY,
RA 11176954, Detachment "B",
Yokohama Engineer Depot,
APO 503

Trial by G. C. M., convened at
Headquarters Yokohama Command,
APO 503, 26 September 1949, 3, 4
and 5 October 1949. Bad conduct
discharge, total forfeitures after
promulgation and confinement for
one year. Disciplinary Barracks.

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

1. The record of trial and the holding by the Board of Review in the case of the soldier named above have been transmitted to the Judicial Council pursuant to Article of War 50e(4). The Judicial Council submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to and was found guilty of knowingly and without proper authority disposing of by turning over to Katsumasa Saito and Umekichi Kawahara, Japanese Nationals, fifty ingots of tin, weighing approximately one hundred pounds each, value about \$1,400.00, property of the United States, intended for the military service thereof, at or in the vicinity of Yokohama, Honshu, Japan, on or about 20 July 1949, in violation of Article of War 94. Evidence of one previous conviction by summary court-martial was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for one year. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50e.

3. The Board of Review has held the record of trial legally insufficient to support the findings of guilty and the sentence on the ground that the court's determination of controverted issues of fact with respect to the identity of the accused as the perpetrator of the alleged offense was improper, and that the evidence, even considered along with inferences unfavorable to the accused, does not establish his guilt beyond a reasonable doubt.

4. The evidence is stated in detail in the holding by the Board of Review. The undisputed evidence for the prosecution shows, in summary, that on 20 July 1949, about fifty ingots of tin weighing about a hundred pounds each and worth about \$1,390, United States property intended for the military service thereof, were illegally loaded onto a truck at P-3 Warehouse, Yokohama Engineer Depot, an Eighth Army installation. In the truck were Yutaka Hirukawa (the driver), Umekichi Kawahara and Katsumasa Saito, all Japanese nationals, and an American soldier. The truck proceeded to the warehouse area gate where the guard, Zenji Irizawa, also a Japanese national, stopped it for a brief time and then permitted it to leave the area. Pursuant to a prior arrangement, the tin was taken to a Japanese home in Tsurumi. The truck had been employed in the moving of tape from P-3 Warehouse to P-2 Warehouse on the morning in question. The first inventory of tin in the Depot Area after the wrongful disposition showed a shortage of 7,300 pounds of ingots.

For the prosecution, the four Japanese nationals mentioned above testified substantially as follows with respect to the issue of identity.

Kawahara testified that he had known the accused for about six months prior to the day in question and the accused had given him items of food purchased at the Post Exchange. Around 16 July the witness saw the tin at P-5 Warehouse. Prior to, and on the morning of, that day the accused, who was in charge of the witness and the other mentioned Japanese, approached the witness and Saito and told them to find a buyer for tin. With the accused's assistance the witness left the area without a pass and, with Saito, arranged for the sale of tin. The accused, who was about two to four yards away when the tin was loaded onto the truck, rode in the truck with the driver, the witness and Saito as far as the Post Exchange near the Yokohama Station. When the accused left the truck he expressed concern over the fact that the gate guard had taken its number. The witness and Saito were to share the proceeds of the illegal disposition with the accused.

As a witness for the court, Kawahara testified that the loading of the truck was begun "a little before eleven" and completed some ten minutes later and the truck left the P-3 area "a little before eleven." He knew the time because he saw the clock at the Yokohama Station when he arrived there. After accompanying the truck to Tsurumi, the witness left it between 11:30 and 11:50.

Saito corroborated Kawahara's testimony in all material respects and testified that the loading was accomplished by the use of a fork-lift at about 10:40 a.m. and the truck left the warehouse about 10:50, as the witness knew from his watch. After the tin was delivered, the witness returned to the Depot later in the day.

Hirukawa, the driver of the truck, identified the accused as present in the truck from the time it was half loaded until it reached the Post Exchange. After delivering the tin, the witness returned to P Area a little before noon. At a pretrial investigation held on 1 September 1949, the witness at first mistakenly identified a soldier other than the accused as the one who entered the truck. Without aid from anyone, he immediately corrected himself and identified the accused as the soldier in question. The soldier in the truck was apparently wearing green fatigue clothes on 20 July and at the investigation, whereas the soldier first identified by the witness was wearing suntans. The reason for the witness's initial mistake was that he had seen the soldier on the truck only once and, as he was sitting at the end of the room behind a typewriter, he "did not get a clear vision." Asked at the trial whether he was sure the accused was the soldier, he replied, "No mistake."

Irizawa, the gate guard, testified that he knew the accused and saw him in the truck with the others when he looked into it and saw what he thought was lead. At the pretrial investigation, this witness also first identified a soldier other than the accused as the one in the truck, even though the soldier in the truck was wearing fatigue clothes, as was the accused on 1 September, and the other soldier was wearing the "regular uniform" on that day.

Tamotsu Sakuma, chief checker at P-3 Warehouse, testified for the court that he received no instructions from the accused about the truck on the morning of 20 July. The truck was supposed to haul tape until 11:30 a.m. The last time he checked the truck was between 9:30 and 10 a.m. He believed the accused directed him to finish transferring the tape from P-3 to P-2 Warehouse on that day.

For the defense, five soldiers, including the accused, and one Japanese national testified on the issue of identity substantially as follows.

Sergeant George E. Ferguson, P-Area Supervisor, testified that at about 9 a.m. on 20 July he went through P-3 Warehouse with the accused, who was its supervisor, and a new man, Penrod, to whom the witness pointed out various materials. He saw no tin ingots in the warehouse and believed if any had been there he would have seen them. Some tin was stored in the P-5 area, but his stock locator cards did not indicate any tin in P-3, although it might have been there. The tin could not have been in the place where the Japanese claimed (before the trial) that they picked it up, as the witness's group spent considerable time there. He left Penrod and the accused together about 9:30.

Private First Class Jay A. Penrod testified that Sergeant Ferguson introduced him to the accused about 9 a.m. on 20 July, his first day of work in P Area. The accused was in the witness's presence at all times

on that morning until the accused left at 11:15, when he asked the witness the time. The usual quitting time was 11:25 or 11:30. The witness saw no trucks coming into the warehouse and did not see the accused sitting in a truck there that morning.

Private First Class Ralph G. Johnson, receiving checker in P Area, testified he believed tin was stored in the P-5 Area, some fifty to one hundred feet from P-3 Warehouse. He was with Penrod and the accused from about 10 or 10:30 until 11:15 a.m., when the accused asked the time and left, stating "he was sick or something like that" and "he was going in to chow." He did not recall seeing the accused at lunch. There was only one mess hall for the organization. He was a friend of the accused.

Private First Class Richard L. Daiker testified that he saw the accused in the Detachment "B" area about a mile from the Post Exchange at about 11:40 a.m. He did not see the accused at lunch but saw him about 12:40 p.m. when they fell out for sports. He played four games of horseshoes with the accused and won two of them. He was a good friend of the accused.

Tomio Saito, a Japanese fork-lift operator, testified that on the morning of 20 July, in compliance with a request by one of the laborers who worked with him, he loaded a truck with 50 or 60 pieces of tin or lead at P-3 Warehouse. The accused did not tell him to help load the truck and there were no soldiers present at the time. Three or four laborers worked on the loading, which took between five and ten minutes and was completed between 10:30 and 11.

The accused testified that he was nineteen years of age and had no civil criminal record. He had been working in P-3 Warehouse for nine days prior to 20 July. He denied having had trouble with Kawahara or Saito (or any other Japanese) in the area, having asked them to find a buyer for tin or having permitted them to be absent from work on that day to look for one. He was in P-3 Warehouse on the 20th from between 7:30 or 7:45 to 11:15. His duties at the time were to transfer tape from P-3 to P-2 Warehouse. He knew of no tin stored in P-3 Warehouse, but it could have been there. There were two fork-lifts in the warehouse. He denied that he ordered any fork-lift operator to load tin ingots onto a truck, assisted in the loading with Kawahara and Katsumasa Saito, or left the P Area on a truck that day. His orders for loadings were customarily given to the foreman and checkers.

There were other soldiers around the warehouse that morning in addition to the accused's group, and he had ample money for his needs. Out of the four soldiers, including the accused, who were present at the investigation, the truck driver (Hirukawa) and gate guard (Irizawa) each identified a Private Fox as the soldier who was on the truck with the tin on 20 July.

Sometime in the morning the accused told the head checker at P-3 Warehouse that the truck which was supposed to be moving tape from P-3

to P-2 Warehouse could be released at 11:15. When he asked Penrod and Johnson the time, they said it was 11:15 and he went through the side gate at P Area - "it was a short-cut to the gate" and at the check point caught a truck to the company (detachment), five hundred yards away. This was the only time he left P Area on 20 July and the reason he left at 11:15, instead of 11:30 as usual, was because he had a headache and felt sick. The Post Exchange was about a mile and a half from the company area, and about three-quarters of a mile from P-3 Warehouse. The driver on the truck which took the accused to the company was not the driver who testified (Hirukawa).

The accused, who did not go to the dispensary, arrived at the Detachment "B" Area between 11:30 and 11:35, at which time he saw Private Gonzales (who did not testify at the trial), and had lunch there between 11:45 and 12:15. He could not remember the names of the men with whom he had lunch. After lunch he rested in his hut until 12:45 and then fell out for sports. He played horseshoes with three others, including Daiker, and won three games.

5. The record presents a direct conflict between the testimony of the prosecution and defense witnesses on the vital matter of the identity of the accused as the soldier involved in the wrongful disposition alleged. The specific issue is his whereabouts between approximately 10:40 and 11:40 a.m. on 20 July 1949. The two accomplices, Kawahara and Saito, each testified positively that the accused, at whose direction they had arranged the sale of the 50 ingots of tin, was present at the loading of the truck "a little before eleven," according to Kawahara who observed the station clock, or from about 10:40 to about 10:50, according to Saito who had his own watch. They testified unequivocally that the accused accompanied them in the truck as far as the Post Exchange near the station. Their testimony is corroborated by that of the professedly and presumably innocent driver of the truck, Hirukawa, to the effect that when the loading was about half completed the accused entered the truck and proceeded with it to the station. The truck returned to the depot area shortly before noon. At the pretrial investigation, the driver at first identified a soldier in suntans, other than the accused, as the soldier in the truck, even though the accused was wearing fatigue clothes both on 20 July and at the investigation. The driver testified, however, that his vision was impeded at the investigation and he immediately corrected his mistake, without prompting, and identified the accused as the soldier in question. His identification of the accused at the trial was positive. The accomplices' identification of the accused was further corroborated in a measure by the testimony of the gate guard, Irizawa whose identification of the accused at the trial, however, was weakened by his unexplained failure to identify him at the investigation. He too identified a soldier in suntans as the one involved (according to the accused the same soldier originally identified by the driver), despite the accused's fatigue attire on 20 July and at the investigation. The record is not clear as to whether Irizawa corrected his mistake at the time. Nevertheless, he

testified positively at the trial that he knew the accused and saw him in the truck when it was leaving the P Area.

Against the foregoing is the testimony of defense witnesses Privates, First Class Penrod and Johnson to the effect that the accused was with them from about 10:00 or 10:30 until 11:15, when, feeling sick, he asked them the time and left the warehouse. Private First Class Daiker placed the accused in the Detachment "B" Area about 11:40. The accused denied any connection with the wrongful disposition and testified that he was in the warehouse until 11:15. He was able to fix the time from Penrod's watch and the reason he left fifteen minutes early was that he had a headache.

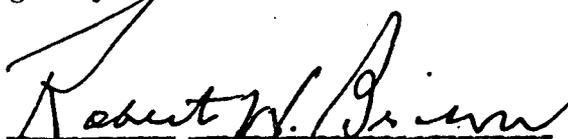
The conclusion is well nigh inevitable that the testimony on one side or the other was at best not worthy of belief and at worst the result of organized perjury. The court chose to believe the prosecution's version that the accused was the guilty soldier. The Board of Review, after full consideration of the record, has concluded that the court was wrong because the prosecution's evidence on the accused's identity as the perpetrator comes from two accomplices whose corroboration is weakened by the original pretrial identification by two presumably innocent witnesses of another soldier dressed differently from the soldier in question and the accused.

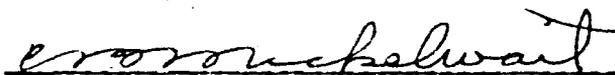
The power of appellate agencies in the office of The Judge Advocate General to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact should be exercised with a view to substantial justice. In the opinion of the Council, the infirmities in the prosecution's case are at least balanced, if not outweighed, by those in the defense testimony. Moreover, the former arise by inference from the unworthiness of belief and probable bias of the Japanese witnesses, whereas the latter have their source not only in the probable bias of the defense witnesses in favor of a fellow soldier and against former enemies, but also in certain inconsistencies and improbabilities inherent in their testimony itself. Sergeant Ferguson's testimony does not concern the vital period, but does tend to prove that there was no tin in P-3 Warehouse. Defense witness Tomio Saito, the fork-lift operator, however, testified that at the request of one of the laborers he loaded 50 or 60 pieces of tin or lead onto a truck in that warehouse on the morning in question. He testified there were no soldiers present and that the accused did not tell him to help load the truck. But the accused himself testified that his orders as to loading customarily were given not directly to the fork-lift operator but to the foreman and checkers. Both sets of witnesses were positive in their testimony as to time, but the accused does not explain why, earlier in the morning, he told the head checker to release the truck at 11:15, fifteen minutes earlier than usual. He claims his reason for leaving at 11:15, again fifteen minutes earlier than usual, was that he was feeling sick. But he did not visit the dispensary and was able to go to lunch not more than a quarter of an hour after reaching the

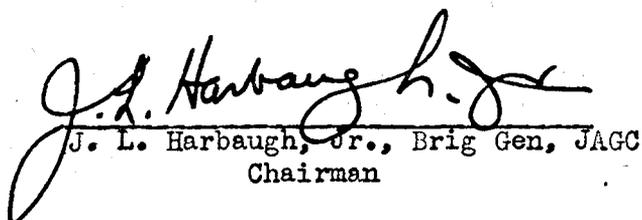
Detachment "B" Area. A possible witness he claims to have seen in the area on the way, between 11:30 and 11:35, Private Gonzales, was not called to corroborate him. This failure is not explained. Nor could the accused remember the names of any possible witnesses with whom he had lunch in the organization's only mess hall. After a half-hour rest, he was able to play horseshoes and win three games.

Under the circumstances, the discharge of the court's duty of weighing evidence, judging credibility of witnesses and determining controverted questions of fact called for the closest scrutiny and observation of the witnesses on the stand. Their general manner, appearance, deportment, sincerity or lack thereof, and behavior generally and especially under cross-examination were vitally important to the court's determination of their credibility in this case (MCM 1949, par 139a, p 184). We find nothing in the record to justify the general conclusion that the testimony of the prosecution witnesses was false and that of the defense witnesses true. Rather, we are of the opinion that the credibility of the defense witnesses was at least as questionable as that of the prosecution witnesses, if not more so. It is evident to us that this record furnishes no basis for disturbing the trial court's findings. To substitute our judgment for that of the court in a case of this character would, in our opinion, be unwarranted (Cf. CM 335526, Tooze, 3 BR-JC 313, 341, 352).

6. For the reasons stated, the Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

(310)

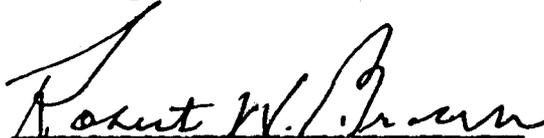
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

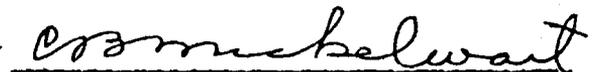
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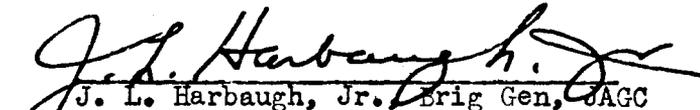
THE JUDICIAL COUNCIL

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

In the foregoing case of Private Wallace P. Pelkey, RA
11176954, Detachment "B", Yokohama Engineer Depot, APO 503,
upon the concurrence of The Judge Advocate General the sentence
is confirmed and will be carried into execution. The United
States Disciplinary Barracks or one of its branches is designated
as the place of confinement.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

20 April 1950

I concur in the foregoing action.


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

24 April 1950
(CCMO 29, May 2, 1950):

Specification 3: In that Private Clarence Felton Anderson, *** did, at Camp Hood, Texas, on or about 0145 1 December 1949, with intent to commit a felony, viz: murder, commit an assault upon First Lieutenant Ellen E. Shaak, 11th Evacuation Hospital, Semi-Mobile by feloniously and willfully cutting her on the neck with a knife.

He pleaded not guilty to and was found guilty of the charge and all 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 might direct for fifty years. The reviewing authority approved only so much of the finding of guilty of Specification 2 of the charge as "finds that the accused did at the time and place alleged with intent to commit a felony, viz: rape, commit an assault upon First Lieutenant Ellen E. Shaak by feloniously and wilfully entering her bedroom after she had retired, sitting on the side of her bed, putting his hand over her mouth, and holding her legs down"; approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50.

3. Evidence

In view of the holding of legal insufficiency hereinafter set forth, the only evidence requiring discussion is the acceptance by the court of two written confessions of the accused over his objection as Prosecution Exhibits 6 and 7.

About 0145 hours on 1 December 1949, Lieutenant Shaak, an Army nurse, was assaulted by a man who entered her quarters uninvited at Camp Hood, Texas (R 12-16). During the ensuing investigation, accused became suspect and was arrested in his barracks about 0600 hours the same morning. The arresting agents, Sergeants First Class Hudson and Bettis of the Camp Hood Criminal Investigation Division, conducted the accused to the provost marshal's office where they interrogated him after apprising him of his rights under the 24th Article of War. The accused disclaimed any knowledge of the incident (R 33,57).

In the afternoon of the same day Sergeants Hudson and Bettis drove accused to the post hospital, where Lieutenant Shaak was under treatment, in an effort to have the victim identify him as her attacker. Sergeant Hudson entered the hospital to make the necessary arrangements, leaving the accused and Sergeant Bettis in his parked automobile (R 57,64).

Sergeant Bettis thereupon continued questioning the accused, and the

following occurred:

"Q. Clarify the matter and tell the court all that happened in the car at that time.

"A. I was talking to Anderson while Sgt Hudson was gone in the hospital. I asked him two or three or four times was he the man over to the hospital, and did he do it, and then he said, 'Yes, Sergeant, I am the man who did it'.

"Q. You did not question him anymore there?

"A. When he said that, I lost my head.

"Q. What did you do?

"A. I really do not know.

"Q. Did you slap the accused?

"A. I would not say that I did or that I did not.

"Q. Did you hit him in the stomach?

"A. I do not know.

* * *

"Q. You lost your head?

"A. I don't really know what happened. I do not know whether I slapped him or grabbed him or struck him; I just don't recall.

"Q. You lost your head?

"A. Yes.

"Q. What do you mean when you say that?

"A. I don't recall what happened. I do not know whether I hit him or struck him, or what. At that moment everything just went blank." (R 58-60)

The accused's version of this tete-a-tete is markedly different than that of Sergeant Bettis. In testifying concerning the involuntary nature of his confessions, accused said:

"A. I was taken down to the hospital to be identified. Sgt Hudson went in the hospital through the dispensary -

"Q. Tell the court who took you to the hospital from the provost marshal's office.

"A. I was taken by Sgt Hudson and Sgt Bettis.

"Q. In what sort of vehicle did they take you?

"A. In a civilian vehicle.

"Q. You arrived at the hospital. Go on from there.

"A. I remained in the car with Sgt Bettis while Sgt Hudson went in the hospital. Sgt Bettis kept asking me questions, and I would not confess. Then he started beating on me and slapping my face.

*

*

*

"A. He started slapping me in my face. I got afraid then, and confessed then.

"Q. Can you testify as to how many times you were hit in the face at that time?

"A. Three times that I remember.

"Q. Were you slapped hard?

"A. Yes.

"Q. Did you at that time confess?

"A. Yes.

*

*

*

"Q. To whom?

"A. To Sgt Bettis." (R 38)

Sergeant Hudson, having completed his arrangements to interview Lieutenant Shaak, returned to the car and drove to the "main entrance" of the hospital. The trio entered the hospital and started for the nurses' ward. En route, Sergeant Bettis told Hudson that accused had confessed. At this point accused said to Hudson, "Sergeant, don't let him beat me anymore" (R 67-69).

Sergeant Hudson assured the accused that no one was going to harm him. He also told the accused, "Anderson, you report to Lt. Shaak and tell her you are the man who stabbed her, and tell her you are sorry you did it." The accused thereupon walked over to Lieutenant Shaak's bed and said, "Lieutenant, I am the man. I am sorry I did it" (R 65, 70). The accused then wrote a short confession which was witnessed by several nurses present. Before he signed this statement, according to Sergeant Hudson, the following transpired:

"I asked him, 'Why are you making this statement?' He said, 'Because I am the man that stabbed the nurse'. I said, 'Are you making this statement under any force, duress or threats?' and he said, 'No, I am voluntarily making this statement'. I said, 'What kind of a man do you rank me as?' He said, 'I would say you are a religious man'. I said, 'Why do you think that?' He said, 'Because you have never raised your voice to me, you have never struck me, or anything like that'." (R 65)

Accused explains these events thus:

"Sgt Bettis, Hudson and I went down to the main entrance of the hospital. Sgt Bettis and I remained in the hall while Sgt Hudson went in and found out if it was all right for us to come in at that time. Sgt Bettis kept asking me, 'How come you lie to me?' and he hit me in the stomach two times and once in the side. About that time Sgt Hudson came out, and I made my confession then. (R 38)

*

*

*

"Q. What did Sgt Hudson say to you, if anything?

"A. He asked me if he was forcing me to make a confession. I said he did not, but that Sgt Bettis was the one.

"Q. At that time, didn't Sgt Hudson say to you, 'What do you consider me as?' and you said, 'I consider you to be a religious man'?

"A. Yes.

"Q. Do you remember also his asking you if anyone put any pressure on you, or words to that effect, to get you to sign this confession?

"A. I said, 'No, you did not'.

"Q. There was no force being used on you at that time?

"A. Not by him. (R 40)

*

*

*

"Q. Do I understand that it was in that ward that you made your confession?

"A. Yes.

"Q. Did you say that when you made such a confession that Sgt Bettis had beaten you?

"A. Yes, in the automobile, before we went down to Ward A-10.

"Q. Did you tell the people to whom you made this confession that Bettis had struck you in the automobile?

"A. The people in the ward?

"Q. Yes.

"A. No.

"Q. Did anyone ask you at any time if any force had been used on you?

"A. Yes. Sgt Hudson.

"Q. What did you answer?

"A. I told him that he had not.

"Q. By 'he', are you referring to Sgt Hudson?

"A. Yes.

"Q. You did not tell him then that Sgt Bettis had struck you?

"A. Before we went into the ward I asked him not to let Sgt Bettis beat on me any more. He said he would see to it.

"Q. Was there anybody present besides you and Sgt Hudson?

"A. No.

"Q. Where was Sgt Bettis at the time?

"A. He was standing by the door as you go into the hospital, talking to a nurse.

"Q. At the time you were in the ward and wrote out your confession, how many people were present?

"A. There were about five nurses, I think; five or six.

"Q. Was that all?

"A. Also, Sgt Hudson and Sgt Bettis and I, about eight in all.

"Q. Is there any reason why you could not then and there state to them that Sgt Bettis had beat you?

"A. I was still with him, and I feared he would do something to me again after we got on the outside." (R 47,48)

The agents then took the accused to a field near the hospital to look for a knife supposedly dropped there by the accused. Here, according to the accused, Sergeant Bettis again slapped and struck him. This testimony is corroborated by Private First Class Maryland Hoover who testified:

"Q. In the afternoon, anytime during the afternoon of 1 December 1949, did the accused come to your attention?

"A. Yes.

"Q. Did you see the accused?

"A. Yes.

"Q. Will you explain under what circumstances you saw him on that date and time?

"A. I first saw him in the corridor by the information desk in the hospital. The second time was when the MP's were taking him across the field in front of the hospital.

"Q. How many MP's were present with him?

"A. There were two, both sergeants first class. I saw one of the sergeants hit Anderson.

"Q. Will you explain? Elaborate on how many times he was hit, where it was, and when.

"A. He seemed to put his hand on his chest, and then hit him approximately four or five times." (R 50)

Sergeant Hudson did not remember seeing or hearing Bettis strike the accused (R 66). Sergeant Bettis did "not recall hitting him in the field" (R 61).

On 2 December, accused gave Sergeant Hudson a complete confession which was reduced to writing and signed and sworn to by the accused on 3 December. Sergeant Bettis was "in and out" of the room while this confession was being taken (R 70-72, Pros Ex 6). Regarding this second statement, accused said:

"Q. At approximately what time did he start questioning you on this morning?

"A. The 1st or 2d?

"Q. On the 2d.

"A. I would say about nine o'clock.

"Q. When did he get through questioning you?

"A. He did not take so very long. I would say it was about forty-five minutes or an hour on the 2d.

"Q. Did you agree to give him a statement at that time?

"A. Yes.

"Q. Were you warned of your rights before giving that statement?

"A. Yes.

"Q. You gave this statement of your own free will and accord?

"A. Yes, because I was afraid.

"Q. Afraid of what?

"A. That Sgt Bettis might beat me up again.

"Q. Did Sgt Bettis come in and threaten you on the 2d?

"A. No.

"Q. Did he talk to you on the 2d?

"A. Yes.

"Q. What did he say?

"A. He asked me if I wanted to go down to Austin to go before some kind of a machine. (R 42)

* * *

"Q. On 3 December, when you signed this statement, were you afraid of Sgt Bettis?

"A. Yes." (R 77)

Corporal Nelson Booker testified:

"Q. Did you see the accused on the night of 9 December?

"A. Yes.

"Q. Did you see him on the 10th also?

"A. Yes.

"Q. Where did you see the accused?

"A. In a cell at the provost marshal's office.

"Q. That is what is commonly known as the detention cell?

"A. Yes.

"Q. Why were you there?

"A. I was put there to overhear anything that the accused said.

"Q. Were you charged with any crime?

"A. No, I was not.

"Q. You were just placed there to overhear anything that the accused said?

"A. Yes.

"Q. Did the accused say anything?

"A. Yes.

"Q. Relate the circumstances surrounding this.

"A. When I went in the cell he and I got friendly. He asked me what I was in for, and I asked him why he was there. He began to tell me he was in there for going in the nurses' quarters early in

the morning of 1 December, and that he did go in the nurses' quarters. He said he put his hand on this nurse's neck, but she would not stop screaming, and that he cut her neck with a knife. Then he heard someone coming, and he ran out across the grass and across the field near the hospital.

"Q. Why did he cut the nurse?

"A. To stop her from screaming.

"Q. What time did you have this conversation with the accused?

"A. I went in there about five o'clock that afternoon.

"Q. How were you dressed at the time?

"A. I had on fatigues.

"Q. Just like any other prisoner?

"A. Yes.

"Q. Did you use any force or use any coercion on the accused at that time to get him to make this statement?

"A. No, I did not.

"Q. He just made it in a general line of conversation?

"A. Yes.

* * *

"Q. Did he make any mention of any confessions he had signed?

"A. What is that?

"Q. Did he make any mention of any confessions he had signed?

"A. He made two.

"Q. Did he say anything about them?

"A. He said he wanted to get it off his chest.

"Q. Did he tell you it was voluntary?

"A. He said it was involuntary.

"LAW MEMBER: He said it was involuntary?

"WITNESS: He said it was voluntary." (R 90-91)

In admitting the two confessions in evidence, the law member said:

*** Under the provisions of paragraph 51-a of the Manual for Courts-Martial, the law member may at any time request the

court to be closed to consult with other members of the court. In view of the fact that a considerable amount of material which is a mixture of law and fact has been put before the court, the law member made this request.

"It is the ruling of the court that the prosecution has satisfactorily carried the burden of proving that the statements of the accused were voluntarily made. The document offered as Prosecution's Exhibit 6 will be received, and will be read to the court by the trial judge advocate. It is to be noted that it is not necessary for the defense to take an exception to the ruling. The point is already made, and the point presented by the counsel for the defense will be covered in the review of the case by the Staff Judge Advocate at this station, and will be covered in the office of The Judge Advocate General.

* * *
"LAW MEMBER: There was also a document marked Prosecution's Exhibit 7 for Identification which prosecution may now offer in evidence. If offered, the ruling will be the same as on Exhibit 6.

* * *
"LAW MEMBER: The document will be received as Prosecution's Exhibit 7 and read to the court by the trial judge advocate. As in the case of Prosecution's Exhibit 6, there is no need for the counsel for the defense to take formal exception, in that the ruling is subject to being automatically reviewed." (R 86-87)

Certain other portions of the record merit quotation as reflecting the attitude of the court regarding certain witnesses and testimony.

a. When the accused had taken the stand and was under cross-examination by the trial judge advocate the following transpired:

"DEFENSE: I object to the trial judge advocate putting these words in the mouth of the accused. I agree that it is cross-examination and great latitude is being allowed him, which is right, but I do object to him putting answers in the mouth of the accused.

"LAW MEMBER: Ordinarily I would not sustain such an objection. However, it appears to the court that the intelligence of the accused may be somewhat doubtful, and I will therefore sustain the objection, and I suggest to the trial judge advocate, before asking such leading questions he endeavor to make it a more or less a direct examination." (R 43)

b. The court interrogated the accused upon his recall as a witness at the request of the law member as follows:-

"Q. And Sgt Hudson got out of the car?

"A. Yes.

"Q. How long was he gone from the car?

"A. Probably fifteen, twenty or thirty minutes.

"Q. While he was gone, how many times did Sgt Bettis hit you?

"A. About three or four times, in the face.

"Q. Actually, Anderson, he did not hit you there until you had already told him you were the man who did this, did he?

"A. He hit me before.

"Q. How long after Sgt Hudson went in the hospital was it until Sgt Bettis hit you?

"A. I beg pardon, sir?

"Q. How long after Sgt Hudson went in the hospital was it until Sgt Bettis hit you?

"A. It was about four or five minutes.

"Q. Had Sgt Bettis been questioning you before that?

"A. Yes, he had asked me some questions.

"Q. Had you given him any answers?

"A. Yes.

"Q. What did you tell him?

"A. I told him, 'No'.

"Q. I believe you previously testified that at some time Sgt Bettis, in striking you, said to you, 'Why did you lie to me?'

"A. That was that afternoon.

"Q. Where? In the automobile?

"A. No, in the hospital ward.

"Q. These slaps in the face, were they all right together, one following right after the other, or did considerable time elapse between slaps?

"A. They were right behind each other.

"Q. Did he fan his hand back and forth?

"A. Yes, one slap right behind the other.

"Q. How long was it from the time Sgt Bettis hit you until the time you said you had done it?

"A. At the same time he hit me was when I told him.

"Q. How old are you?

"A. I am twenty-five.

"Q. Did you ever play football?

"A. No.

"Q. Have you ever done any boxing?

"A. No.

"Q. Have you engaged in any athletics?

"A. No.

"Q. Sgt Bettis is a man, isn't he?

"A. I think he is.

"Q. Did you realize the seriousness of signing that statement?

"A. Yes.

"Q. Were you so afraid of a little beating that you signed a statement that serious?

"A. I was afraid he was going to beat me again.

"Q. You realized the seriousness of what you were admitting in signing that statement?

"A. At the time I did not.

"Q. You realized what you said and what it meant when you told Sgt Bettis, 'I did it'?

"A. I thought I was saving myself from him beating on me.

"Q. When did you say, 'I did it'?

"A. It was when we were out in the car.

"Q. He hit you the first time, and then you said, 'I did it'?

"A. Not exactly at the first lick.

"Q. Did he hit you with his fist?

"A. With his hand.

"Q. Did he hit you hard?

"A. Yes.

"Q. Did the licks make any scar?

"A. No.

"Q. Did you realize what you were admitting when you said, 'I did it', to keep from getting slapped again with the open hand?

"A. I thought he was going to beat me some more.

"Q. Did you say it after he slapped you the first time during the time he was slapping you, or did you say it after the slapping? When was it you said it?

"A. In the car he kept hitting on me, and I told him, "I did it".

"Q. Was that during or after the time you were being slapped?

"A. During the time.

"Q. You say he just slapped you consecutively?

"A. Yes.

"Q. The first time he slapped you, did you say you did it?

"A. I told him, 'Don't beat on me'.

"Q. But you did not say you did it at the first blow?

"A. No.

"Q. Were you handcuffed at the time?

"A. I do not think I was.

"Q. How far were you from the hospital dispensary?

"A. We were right on the side.

"Q. Could you have hollered for help?

"A. Yes.

"Q. How many times were you slapped the first time?

"A. It was three or four times.

"Q. Whereabouts in your face were you slapped?

"A. I was slapped on both sides.

"Q. Would you admit guilt to a charge of a different nature to keep from being slapped by a man?

"A. (No answer).

DEFENSE: The accused does not understand that question.

"Q. Suppose they accused you of stealing a hundred dollars, would you admit stealing that money to keep from being slapped by a man?

"A. I would not want to be beaten up." (R 78,81).

e. Relative to the testimony of defense witness Maryland Hoover the following occurred:

"Questions by prosecution:

"Q. Who was with the MP's?

"A. Anderson.

"Q. How close were you to them?

"A. I was on the porch of the hospital, and they were out in the field where it happened.

"Q. You were on the porch?

"A. Yes, the porch of the hospital.

"Q. How far were you from where Anderson and Bettis were?

"A. Maybe about a hundred feet.

"Q. Did you know Anderson before this time?

"A. I worked with him in Dispensary A.

"Q. Are you a friend of his?

"A. Not necessarily a personal friend. I knew him to work with.

"Q. Did you ever borrow any money from him?

"A. No.

"Q. Did you ever go out with him?

"A. No.

"Q. You just worked with him?

"A. Yes.

"Q. When did you first hear about this case?

"A. I heard about it at reveille time on the morning of the 1st of December.

"Q. When were you called to testify?

"A. Tuesday.

"Q. Who told you what to say?

"A. Nobody told me what to say.

"Q. Were you told what you were going to testify to?

"A. I was to testify to just what I saw.

"Q. Were you told how to say it?

"A. No.

"TRIAL JUDGE ADVOCATE: No further questions.

"DEFENSE: Does the court desire to examine the witness?

"PRESIDENT: The court has some questions.

EXAMINATION BY THE COURT

"Q. You stated that you first saw the two MP's and Pvt Anderson when you were by the information desk?

"A. Yes.

"Q. Where did you go from there?

"A. I went out on the porch in front to wait for my transportation back to the 73d Engineers.

"Q. While you were at the information desk, where did Anderson and the two MP's go?

"A. They got in the MP car and went to the field across from the hospital.

"Q. They went across the field in the car?

"A. I did not see where they parked.

"Q. Did they go across the field in the car?

"A. No.

"Q. You saw them come out and get in the car?

"A. Yes.

"Q. Did they drive across into that field?

"A. No, they drove off down Battalion Avenue. The next time I saw them was when they were out in the field.

"Q. How did you know they were the same two MP's? Did you see them come back to the field? Did you see the car come back? Where did it stop? Did you see it come back and turn around?

"A. The car?

"Q. Yes.

"A. I saw them coming back walking.

"Q. You have stated you saw them come out of the hospital and get in the car and drive down Battalion Avenue. When did they turn around?

"A. They were walking the next time I saw them.

"Q. You saw them get in the car and drive off, didn't you?

"A. I did not see where they parked the car.

"Q. Which way were they walking when you saw them?

"A. They came down Battalion Avenue and turned left into the field.

"Q. The field is south of Battalion Avenue, is it not?

"A. Yes.

"Q. They drove down Battalion Avenue, you have stated. Remember you are under oath.

"A. Yes.

"Q. Where then did the car turn around? The next time you saw them they were walking?

"A. Yes.

"Q. Which direction from the street?

"A. They were walking parallel to the hospital, and to my right.

"Q. How long was it from the time you saw them drive off until you saw them walking?

"A. It was some five to ten minutes.

"Q. Where was the car?

"A. I did not see the car.

"Q. Were they walking facing you?

"A. They faced me several times.

"Q. Were they walking facing you?

"A. They were not walking in the same direction all of the time. I saw them face me, and part of the time they were not facing me.

"Q. Remember that you are under oath.

"A. Yes, I understand.

"Q. Are you sure you saw Anderson and two MP's walking in the field? You saw them and not someone else?

"A. Yes.

"Q. How far away were they from you?

"A. Approximately fifty yards.

"Q. Isn't there a building between that porch and that field?

"A. No, I had a clear view." (R 50,52.)

d. Sergeant Bettis, a material witness, was called only after insistence by the law member. Regarding this it was said:

"LAW MEMBER: The prosecution previously offered in evidence a document purporting to be a statement made by the accused. The defense objected on the grounds of alleged coercion and unlawful influence. The accused has testified in person with respect thereto and laid certain acts at the door of a certain Sgt Bettis. According to the accused, as stated in his testimony, the acts were taking place while no one was present except the accused and Sgt Bettis. Under numerous authoritative precedents in the office of The Judge Advocate General, the court cannot receive this document in evidence unless there is some evidence to rebut the testimony of the accused. It might be obtained from further cross-examination of the accused or other sources. However, with respect to the incidents between him and Sgt Bettis when only those two were there, information regarding the incidents could come only from the accused and/or Sgt Bettis. Is Sgt Bettis present at this time?

"TRIAL JUDGE ADVOCATE: I do not believe so. I believe that he is on a case at Jarrell, Texas.

"DEFENSE: I requested that he be kept here.

"LAW MEMBER: In that case, it will not be necessary to offer any further evidence as to the confession. I cannot accept the confession under the present circumstances. If Sgt Bettis is here, the court will want him called. If he is not available, the court will have to sustain the objection of the defense to the admission of the accused's statement in evidence.

"PRESIDENT: The court will recess until 1300." (R 57)

4. Discussion

The undisputed evidence shows that accused, after being warned of his rights, made two oral inculpatory statements and one written confession on 1 December 1949, another written confession on 2 December, and an admission on 9 or 10 December to a man "planted" in his jail cell. It is also undisputed that sometime in the afternoon of 1 December accused was the victim of some form of physical mistreatment.

There are two main points of conflict in the evidence, sharply defined in the record thus:

a. Did the accused make his first confession prior to

his being beaten or was that confession the product of the maltreatment, and

b. Were the subsequent confessions induced by continuing fear of the original coercive force?

The court resolved these questions against the accused by ruling that the confessions were voluntary and admitting them in evidence. It has long been held that the court has the authority and the duty to decide such questions where there is a conflict in the evidence as to the voluntary nature of a confession (Wilson v. United States, 162 U.S. 613, 624; CM 325329, Holland, 74 ER 147,157; CM 329162, Sliger, 77 ER 361,367).

However, the tenor of the record of trial moves the Board of Review to the opinion that in the instant case it is its duty also to review and resolve the questions presented by the conflict in the evidence after weighing the evidence and judging the credibility of the witnesses.

Under Article of War 50(g) it is our right and duty to weigh the evidence as well as to pass upon the formal legal sufficiency of the record of trial. In weighing the evidence, we may arrive at a different conclusion than did the court and the reviewing authority, even though their conclusions apparently are justified by the record of trial. Succinctly stated, we are allowed a difference of opinion. We, too, must be convinced of the voluntary nature of accused's confessions (CM 335070, Brown, 2 ER-JC 39,45).

In considering the credibility of the witnesses, we must look to the men and their motives. Sergeant Bettis, being a Criminal Investigation Division agent, is a person especially trained in investigative procedures. His assigned mission is the facilitating of the apprehension and conviction of military miscreants. Every interest, pro tempore, of the accused, on the other hand, is centered on the extrication of himself from the position of a long term felon. The equator to the two poles in such a sphere of motivating factors is the testimony of a disinterested witness. Such a witness appears in this case in the form of Maryland Hoover. His unshaken testimony, after his credibility was well tested by the prosecution and almost coercively attacked by the court, has the ring of truth.

Sergeant Bettis admitted "getting hold of the accused" while in the automobile at the time the accused admitted his guilt. He claims however that thereupon his mind became totally blank and he refused to admit or deny striking or beating the accused. When asked whether he struck the accused while they were in a field (the third instance of striking as testified by the accused and witnessed by Maryland Hoover) he answered, "I do not remember hitting him. I was not blank that I know of. I do not recall hitting him in the field." Sergeant Hudson although asked by accused to protect him from Sergeant Bettis "did not

remember seeing or hearing Bettis strike the accused." Maryland Hoover, however, witnessed the third attack complained of by accused. In view of such corroboration and the "convenient" memory of Sergeant Bettis, the Board is constrained to give full credence to the accused's testimony.

It follows, therefore, that in weighing the evidence as to whether the accused was slapped or struck before or after he confessed, the scales must tip on the side of the accused. The members of the Board are not so naive in view of the foregoing as to embrace a proposition that the accused, whose intelligence appeared to the court as "somewhat doubtful," suddenly for no apparent reason "broke down" after hours of repeated denials and made an admission which caused a trained investigator to "lose his head" to the point of brutality. Neither do we believe that the mind of Sergeant Bettis became "blank" so that he could not remember what happened. In the opinion of the Board of Review the admissions of the accused were involuntary and induced by the physical force applied by Sergeant Bettis.

Having determined that the first confession was improperly induced, we now turn to the admission into evidence of the subsequent inculpatory statements.

In CM 325329, Holland, supra, the Board of Review, after holding that an original confession of the accused was inadmissible because of improper inducement, said:

"Within a week after the written confession was made, First Lieutenant Arthur J. Sorenson interviewed the accused. He told the accused that he was the investigating officer and warned him of his rights under the 24th Article of War. The accused admitted to the investigating officer that he took the equipment and loaded it on a jeep. The accused and the investigating officer went to a storeroom where the accused pointed out the equipment. In CM 292716, MacDonald, supra, the Board of Review also had occasion to say -

'And if a confession is induced by threats or violence or any undue influence, a subsequent confession is not admissible, unless it appears to the satisfaction of the court that the prior influences have ceased to operate on the defendant's mind to bring about the later confession. *** But where on the trial of a criminal case a confession of the defendant is offered in evidence it becomes necessary for the trial court to ascertain and determine as a preliminary question of fact, whether it was freely and voluntarily made, and whether the previous undue influence, if any, had ceased to

operate upon the mind of the defendant. In doing so, the court is necessarily vested with a very large discretion, which will not be disturbed on appeal, unless a clear abuse thereof is shown' (Mangum v. United States 289 Fed. 213,215).

'Where a confession has been obtained from the accused by improper inducement, any statement made by him while under that influence is inadmissible, but the question arises as to whether a confession made subsequently to such inadmissible confession is itself admissible. This question, as in the case of any other confession, is one for the judge to decide, and each case must be determined on its own facts. The presumption prevails that the influence of the prior improper inducement continues and that the subsequent confession is a result of the same influence which renders the prior confession inadmissible, and the burden of proof rests upon the prosecution to establish the contrary. Such proof must clearly show, to admit such subsequent confession in evidence, that the impression caused by the improper inducement had been removed before the subsequent confession was made. The determination of the extent of the influence persisting at the time the subsequent confession is made rests upon attendant circumstances, and the inquiry is whether, considering the degree of intelligence of the prisoner, the nature and degree of the influence, and the time intervening between the confessions, it can be said objectively that the confessor was not compelled to confess by reason of the pressure or inducement which motivated him to confess on the prior occasion. If the court concludes from all the facts and attendant circumstances that the improper influence had ceased to operate or had been removed, the subsequent confession is admissible. It has also been held, generally, that the influence of the improper inducement is removed where the accused is properly cautioned before the subsequent confession. The warning, however, so given should be explicit, and it ought to be full enough to apprise the accused: (1) That anything that he may say after such warning can be used against him; and (2) that his previous confession, made under improper inducement, cannot be used against him, for it has been well said that "for want of this information, the accused might think that he could not make his case worse than he had already made it, and, under this impression, might have signed the confession before the magistrate" (Wharton's Criminal Evidence, Vol. 2, sec. 601, pp. 998-1002) (Underscoring supplied).

'A confession *** may be rendered involuntary by a prior involuntary confession (Underhill's Criminal Evidence, 4th Ed., sec. 266, p. 521).

'Once a confession made under improper influences is obtained, the presumption arises that a subsequent confession of the same crime flows from the same influences, even though made to a different person than the one to whom the first was made. *** The evidence to rebut the presumption *** must be presented by the prosecution ***. The evidence to rebut the presumption must be clear and convincing *** (Evidence from American Jurisprudence, Civil and Criminal, sec. 487, pp. 424-425).'"

In the instant case, accused claimed that all through the period of time in which the several confessions were obtained he was laboring under the apprehension of further physical violence upon the part of Sergeant Bettis even though the written statements were given to Sergeant Hudson. This claim was never rebutted by the prosecution. He was never told that his original confession could not be used against him. The puerile attempts of the court to force accused into a variance in his testimony with such questions as, "Were you so afraid of a little beating that you signed a statement that serious?" "Could you have hollered for help?" and "Suppose they accused you of stealing a hundred dollars, would you admit stealing that money to keep from being slapped by a man?" merely serve to buttress the genuineness of accused's exposition.

The Board of Review concludes that the confessions introduced as Prosecution Exhibits 6 and 7 were tainted with improper influence. In reaching this conclusion the Board has also considered the highly significant fact that the key witness, Sergeant Bettis, was not immediately available at the trial, although requested by the defense, and did not appear until the court adjourned to await his arrival.

Article of War 24 provides in pertinent part:

"The use of coercion or unlawful influence in any manner whatsoever by any person to obtain any statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission or confession shall be received in evidence by any court-martial." (Under-scoring supplied.)

It necessarily follows that the erroneous admission in evidence in a trial by court-martial of confessions which are obtained through coercion or duress violates the express provisions of the 24th Article of War.

The admission of these confessions was error prejudicial to the rights of the accused and the findings of guilty cannot be sustained

(CM 329162, Sliger, supra, and cases therein cited). In view of the foregoing, the Board deems it unnecessary to determine from the pauciararticulate testimony of Corporal Nelson Booker whether the admissions made by the accused to that individual were voluntary.

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

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

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

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

18 MAR 1950

CSJAGK - CM 339853

1st Ind

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

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

1. In the case of Private Clarence Felton Anderson, US 54032063, Headquarters Battery, 508th Armored Field Artillery Battalion, Camp Hood, Texas, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50 the findings of guilty and sentence are hereby vacated. You are authorized to direct a rehearing.

2. If a rehearing is directed your attention is invited with respect to the two alleged assaults to paragraph 80a, Manual for Courts-Martial, 1949, page 80, which provides, inter alia:

"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."

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

(CM 339853).

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.

CSJAGV Sp CM 1711

23 MAR 1950

UNITED STATES)

2D ARMORED DIVISION

v.)

Recruit WILLIAM D. DAVIS)
(US 53004424), Head-)
quarters and Service)
Company, 73rd Engineer)
Combat Battalion)

Trial by Sp CM, convened at
Camp Hood, Texas, 19 December
1949. Bad conduct discharge,
forfeiture of \$50 pay per month
for six (6) months and confine-
ment for six (6) months. Camp
Stockade.

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

1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.
2. The accused was tried upon the following Charge and Specifications:

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

Specification: 1 Kolle Prosequi.

Specification 2: In that Recruit William D. Davis, Head-quarters and Service Company, 73rd Engineer Combat Battalion, having been restricted to the limits of the Company area, did at Camp Hood, Texas, on or about 1 December 1949 break said restriction by leaving the limits of the Company area.

Specification 3: In that Recruit William D. Davis, Head-quarters and Service Company, 73rd Engineer Combat Battalion, having received a lawful order from Captain Robert W. Swecker to report to the orderly room every night for a period of thirty days for extra training, the said Captain Robert W. Swecker being in the execution of his office, did at Camp Hood, Texas, on or about 1 December 1949 fail to obey the same.

The accused pleaded not guilty to and was found guilty of the Charge and all Specifications. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit \$50.00 pay per month for six months and to be confined at hard labor for six months. The

CGJAGV Sp Ct 1711

convening authority approved the sentence and forwarded the record of trial for action under Article of War 47g. The officer exercising general court-martial jurisdiction, the Commanding General, 2d Armored Division, Camp Hood, Texas, approved the sentence, designated the Camp Stockade, Camp Hood, Texas, as the place of confinement and forwarded the record of trial for action under Article of War 50g.

3. Captain Robert M. Swecker, Commanding Officer of Headquarters and Service Company, 73d Engineer Combat Battalion, Camp Hood, Texas, testified that he told the accused on 10 November 1949, "to report to the orderly room at 5:30 each evening for thirty days except on Sundays and Holidays for the purpose of special training detail which goes on a road march of approximately nine miles." (R9). On 21 or 22 November 1949, the same officer restricted the accused. "I told him I was restricting him to the limits of the Company Area and not to leave the Company Area in the evenings to go to the PX. The only places he could go was to the mess hall and the special training at night." (R10). On the night of 1 December 1949 the accused did not report for the special training detail and, "did not show up at any time until after the march had left." (R12, 13, 15). The Charge of Quarters of the accused's unit on 1 December 1949, checked the accused's bed and all the barracks but could not find the accused, and the accused never reported to the orderly room at any time during the night of 1 December 1949.

The accused testified under oath that on the evening he was alleged to have broken restriction he was in the chapel, that he thought the chapel was in the company area and had never been told that the chapel was not in the company area (R17).

4. The only question presented in the record of trial is whether the breach of restriction (Specification 2) and the disobedience of Captain Swecker's order "to report to the orderly room every night for a period of thirty days for extra training" (Specification 3) were separate offenses so as to allow the imposition of separate punishments for each.

In the absence of evidence to the contrary, it must be assumed that the breach of restriction and the failure to report to the orderly room were concurrent. Consequently, his act in leaving the company area on 1 December 1949 forms the basis for both offenses, and the two offenses are but different aspects of the same act or omission. Paragraph 27, Manual for Courts-Martial, 1949, provides in part:

"One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person."

Paragraph 80a of the Manual for Courts-Martial, 1949, further provides at page 30:

"If an accused is found guilty of two or more offenses constituting different aspects of the same act or omission,

CSJAGV Sp CM 1711

the court will impose punishment only with reference to the act or omission in its most important aspect."

In CM 328401 Still, 77 BR 65, 67 the Board of Review stated as to that part of paragraph 80a, Manual for Courts-Martial, 1928, which, with minor changes, is identical with that portion of paragraph 80a, Manual for Courts-Martial, 1949, supra:

"This provision has been held to be 'a positive and mandatory rule of limitation' (CM 313544 Carson, 5 Bull. JAG 202) and therefore, the maximum punishment authorized for the offenses alleged in Specification of Charge I and Specification of Charge II as well as those alleged in Specification of Charge III and Specification of Charge IV must be limited to the maximum authorized punishment for the more important aspect of the two offenses in each instance, viz, willful disobedience of the lawful order of a non-commissioned officer and assault with intent to do bodily harm."

The maximum authorized punishment for breach of restriction is confinement at hard labor for one month and forfeiture of two-thirds pay per month for not to exceed one month, and for failure to obey a lawful order of a superior officer is confinement at hard labor for six months and forfeiture of two-thirds pay per month for not to exceed six months (par 117c, pp 138, 139, MCM, 1949). As the maximum punishment which could be adjudged in this case was limited to the most important aspect of the two offenses charged, the maximum punishment imposable was confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of \$50.00 pay per month for six months.

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

(338)

MAY 3 1950

CSJAGV Sp CM 1711

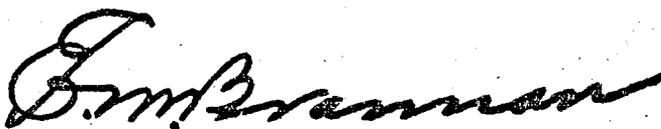
1st Ind

JAGC, Department of the Army, Washington 25, D. C.
TO: Commanding General, 2d Armored Division, Camp Hood, Texas

1. In the case of Recruit William D. Davis (US 53004424), Headquarters and Service Company, 73d Engineer Combat Battalion, Camp Hood, 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, and is legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of \$50.00 pay per month for six months. Under Article of War 50e(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 \$50.00 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, 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 1711).



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

Incl:
Record of trial

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

JAGZ SP CM 1738

MAY 1950

UNITED STATES)

2D ARMORED DIVISION

v.)

Trial by S P C M, convened at
Camp Hood, Texas, 26 January 1950.
Bad conduct discharge, forfeiture
of \$50 pay per month for six (6)
months and confinement for six (6)
months. Camp Stockade.

Recruit MELFORD EDWARD)
(RA 15409908), Headquarters)
and Service Company, 73d)
Engineer Combat Battalion.)

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 upon the following Charges and Specifications:

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

Specification: In that Recruit Melford Edward, Headquarters and Headquarters and Service Company, 73d Engineer Combat Battalion did without proper leave, absent himself from his organization at Camp Hood, Texas from about 31 December 1949 to about 9 January 1950.

CHARGE II. Violation of the 64th Article of War.

Specification: In that Recruit Melford Edward, Headquarters and Headquarters and Service Company, 73d Engineer Combat Battalion, having received a lawful command from Captain Robert W. Swecker, his superior officer, to report to the orderly room at 1730 hours 31 December 1949 to perform hard labor, did, at Camp Hood, Texas, on or about 31 December 1949, willfully disobey the same.

The accused pleaded not guilty to and was found guilty of the charges and specifications. He was sentenced 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, Second Armored Division, Camp Hood, Texas, approved only so much of the findings of guilty of Charge II and its specification as involve findings that the accused failed to obey the lawful command of his superior officer at the time and place and under the circumstances as alleged, in violation of Article of War 96, approved the sentence and forwarded the record of trial for action under Article of War 50e. The Camp Stockade, Camp Hood, Texas, was designated as the place of confinement.

3. Captain Robert W. Swecker, Commanding Officer, of Headquarters and Service Company, 73d Engineer Combat Battalion, Camp Hood, Texas, testified that on 31 December 1949 the accused, among others, was absent from reveille. In his testimony he stated, "At approximately twelve o'clock that day, or a few minutes afterward, I called him and some of the other men before me and administered punishment under the 104th Article of War for failure to appear at reveille. Further, I gave each of them a direct order to report that evening with full field pack, combat boots and steel helmet at 1730 at the orderly room and I told them I would be there to see that they were there and got up to the Battalion Headquarters by 1800. I further pointed out to each of them that this was a direct order, and that failure to obey would subject them to court-martial * * *." (Underscoring supplied). The accused stated that he understood the order and did not report as directed, remaining absent until 9 January 1950 (R 9 and 10). Captain Swecker further testified that the accused was not absent without leave until 1730 on 31 December 1949 although an erroneous entry had been made in the unit morning report showing his absence at 0630 (R 10).

The accused having been advised of his rights as a witness elected to remain silent. No evidence was introduced by the defense.

4. The question thus presented in the record of trial is whether the absence without leave (Charge I) and the disobedience of Captain Swecker's order "to report to the orderly room at 1730 hours 31 December 1949 to perform hard labor" (Charge II) were separate offenses so as to allow the imposition of separate punishment for each.

The evidence clearly establishes that the act of the accused in absenting himself without leave at 1730, 31 December 1949, forms the basis for both specifications of which the accused was found guilty. Paragraph 27, Manual for Courts-Martial, 1949, provides in part:

"One transaction or what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."

Paragraph 80 a, Manual for Courts-Martial, 1949, provides at page 80:

"If an accused is found guilty of two or more offenses constituting different aspects of the same act or omission, the court will impose punishment only with reference to the act or omission in its most serious aspect." (Underscoring supplied).

This part of paragraph 80 a, Manual for Courts-Martial, 1949, is identical with the pertinent part of paragraph 80 a, Manual for Courts-Martial, 1928, except that the word "will" has been substituted for the word "should". The Board of Review in CM 328401, Still, 77 BR 65, 67 stated, with respect to that part of paragraph 80 a, Manual for Courts-Martial, 1928, as follows:

"This provision has been held to be 'a positive and mandatory rule of limitation (CM 313544, Carson, 5 Bull. JAG 202)' and therefore, the maximum punishment authorized for the offenses alleged in Specification of Charge I and Specification of Charge II, AWOL for 20 days and willful disobedience of the lawful order of a noncommissioned officer to remain in barracks/ * * * must be limited to the maximum authorized punishment for the most important aspect of the two offenses * * * viz: willful disobedience of lawful order of a non-commissioned officer * * *."

Applying the rule enunciated in the Still and Carson cases, supra, we are constrained to hold in the instant case that the offenses alleged in the two specifications of which accused was found guilty are merely different aspects of the same act and he may only be punished for the most serious.

The maximum authorized punishment for absence without leave for nine days is confinement at hard labor for 27 days and forfeiture of eighteen days' pay, and for failure to obey the lawful order of a superior officer is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period (paragraph 117c, pp 134, 139, MCM, 1949). Since the maximum punishment which could be adjudged in this case is limited to the most important aspect of the two offenses charged, the maximum punishment imposable is confinement at hard labor for six months and forfeiture of two thirds pay per month for six months.

(342)

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of \$50 pay per month for six months.

Howard V. Puchipole, J.A.G.C.

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

Robert C. Byrne, J.A.G.C.

JAGZ SP CM 1738

1st Ind.

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

To: Commanding General, 2d Armored Division, Camp Hood, Texas.

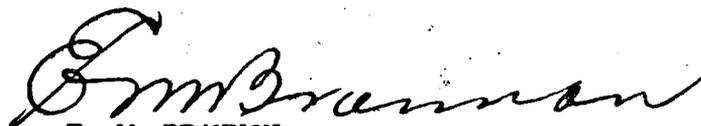
1. In the case of Recruit Melford Edward (RA 15409908), Headquarters and Service Company, 73d Engineer Combat Battalion, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of \$50 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 \$50 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, 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 1738)

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.

JAGV Sp CM 1770

27 APR 1950

U N I T E D S T A T E S)	YOKOHAMA COMMAND
))
v.)	Trial by Sp CM, convened at
Private LESTER W. NESS)	Fuchinobe, Honshu, Japan,
(RA 37578525), 94th)	23 December 1949. Bad conduct
Engineer Maintenance)	discharge (suspended), forfeiture
Company, APO 503)	of \$50 pay per month for three
)	(3) months and confinement for
)	three (3) months. Eighth Army
)	Stockade.

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

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

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

CHARGE: 1 Violation of the 84th Article of War.

Specification: In that Private Lester W. Ness, 94th Engineer Maintenance Company, APO 503, Hiyoshi, Honshu, Japan, did, at 94th Engineer Maintenance Company, APO 503, on or about 25 November 1949, wrongfully dispose of by giving a Japanese Employee a pair of Wool OD Underdrawers of the value of two dollars and forty-six cents (\$2.46) issued for use in the Military Service of the United States.

CHARGE 2: Violation of the 85th Article of War.

Specification: In that Private Lester W. Ness, 94th Engineer Maintenance Company, APO 503, Hiyoshi, Honshu, Japan, was, at 94th Engineer Maintenance Company, APO 503, found drunk while on duty.

CHARGE 3: (Findings of not guilty).

Specification: (Findings of not guilty).

JAGV Sp CM 1770

He pleaded not guilty to all Charges and Specifications, was found guilty of Charge 1 and the Specification of Charge 1 except the words "two dollars and forty-six cents (\$2.46)", substituting therefor the words "one dollar and ninety cents (\$1.90)" and guilty of Charge 2 and the Specification thereto, with addition to the Specification of, "at or about 1100 hours, 25 November 1949." He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit fifty dollars pay per month for three months and to be confined at hard labor for three 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, Yokohama Command, approved the sentence, ordered it executed, but suspended the execution of that portion adjudging bad conduct discharge until the soldier's release from confinement, and designated the Eighth Army Stockade, APO-343, as the place of confinement. The result of trial was promulgated in Special Court-Martial Orders Number 44, Headquarters Yokohama Command, APO 503, dated 17 February 1950.

3. In view of the conclusions hereinafter reached, the only question considered at this time is whether the court was without authority to try the accused in view of the fact that the duly appointed defense counsel was a warrant officer.

4. By paragraph 2, Special Orders Number 37, dated 2 December 1949, the Commanding Officer of the 584th Engineer Construction Group, APO 503, appointed a special court-martial to meet at the call of the president thereof, and Chief Warrant Officer Wallace Watkins was designated as the regularly appointed defense counsel of this court. The accused was brought to trial before the court so appointed and the warrant officer concerned acted as the regularly appointed defense counsel during the proceedings, the accused having stated (R3) that he desired to be defended by the regularly appointed defense counsel. The question is presented whether the regularly appointed counsel for general and special courts-martial are required to be commissioned officers of the Army of the United States in order to conform to the provisions of the Articles of War, and the effect of a failure to so designate commissioned officers. Extended research fails to disclose that this question has arisen heretofore, and the Board of Review therefore must make its determination without the benefit of authoritative precedent.

Pursuant to Article of War 17 an accused is entitled to counsel and that article provides in pertinent part:

***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

JAGV Sp CM 1770

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."

Article of War 11 which provides for the appointment and qualifications of the trial personnel of courts-martial states in pertinent part:

"For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: Provided, That the trial judge advocate and defense counsel of each general court-martial shall, if available, be members of the Judge Advocate General's Corps or officers who are members of the bar of a Federal court or of the highest court of a State of the United States: Provided further, That in all cases in which the officer appointed as trial judge advocate shall be a member of the Judge Advocate General's Corps, or an officer who is a member of the bar of a Federal court or of the highest court of a State, the officer appointed as defense counsel shall likewise be a member of the Judge Advocate General's Corps or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States:***" (underscoring supplied).

In discussing Article of War 11, supra, the Manual for Courts-Martial, 1949, paragraph 6 at page 6, states:

"The term 'member of the Judge Advocate General's Corps' as used in the foregoing subparagraph includes all Regular Army officers appointed in the Judge Advocate General's Corps, and all non-regular officers of any component of the Army of the United States on active Federal duty assigned to the Judge Advocate General's Corps by competent orders." (underscoring supplied).

And in a further discussion in paragraph 43a at page 40, the following appears:

"It is a purpose of Article 11 to insure that an accused person shall have the right, subject to express waiver, to be represented at his trial by general or special court-martial by a legally qualified lawyer in every case in which the prosecution is conducted by an officer so qualified.***" (underscoring supplied).

JAGV Sp CM 1770

Article of War 1 defines certain specific words as they are used in the Articles of War and states in subparagraph 1a:

"The word 'officer' shall be construed to refer to a commissioned officer."

It thus seems clear that the intent of Article 11 is that the regularly appointed defense counsel shall be an officer. The Federal courts in commenting upon adequacy of the regularly appointed defense counsel in other cases considered such counsel as "commissioned officers". (Ex Parte Steele, 79 F. Supp. 428; Romero v. Squier, 133 F. 2d 528; Altmayer v. Sanford, Warden, 148 F. 2d 161).

The fact that at the beginning of the trial the accused, in response to a question by the trial judge advocate, stated that he desired to be defended by the regularly appointed defense counsel cannot, under the circumstances, be considered as a waiver of his right to a regularly appointed defense counsel as provided for in Article of War 11 (See CM 284066, Mejie, 55 BR 241 at pages 242 and 243), nor cure the defect in the organization of the court-martial. The Board of Review is of the opinion that such regularly appointed defense counsel must be a commissioned officer of the Army of the United States. The attempt of the convening authority in this case to appoint as defense counsel an individual who did not meet the requirements of Article of War 11 was tantamount to appointing a court-martial that was without a defense counsel. The provision of Article of War 11 directing the appointment of defense counsel for a general or special court-martial is mandatory and failure to comply with that provision constituted fatal error. (CM 313709, Velarde, 63 BR 237; CM 337855, Watson, 8 Bull. JAG 187). Consequently, the court which tried the accused was without jurisdiction and all acts in connection therewith were void.

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. P. Guernon, J.A.G.C.
Frank M. Quinn, J.A.G.C.
Ant E Sedney, J.A.G.C.

JAGV Sp CM 1770

1st Ind.

11 MAY 1966

JAGC, Department of the Army, Washington 25, D. C.
TO: Commanding General, Yokohama Command, APO 503, c/o Postmaster,
San Francisco, California

1. In the case of Private Lester W. Ness (RA 37578525), 94th Engineer Maintenance Company, APO 503, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under Article of War 50e(3) this holding and my concurrence vacate the findings of guilty and the sentence.

2. It is requested that you publish a special court-martial order in accordance with the said holding and this indorsement, restoring all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated. A draft of a special court-martial order designed to carry into effect the foregoing recommendation is attached. You are authorized to direct further trial before a properly constituted court. Should you determine so to do, a statement to that effect should be added to the special court-martial order, when issued.

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

(Sp CM 1770).

E. L. Brannon

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

Incls:

- Record of trial
- Draft SpCMC

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via mail to [illegible]

APR 1966

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

(351)

CSJAGI SP CM 1792

APR 5 1950

UNITED STATES)

v.)

Recruit GEORGE T. RIVERS)
(RA 12255269), Battery "A",)
32nd Antiaircraft Artillery)
Automatic Weapons Battalion)
(Mobile with Reduction Table),)
Fort Bliss, Texas.)

AAA AND GUIDED MISSILE CENTER

Trial by SP. C. M., convened at
Fort Bliss, Texas, 21 February 1950.
Bad Conduct Discharge, forfeiture
of fifty-eight dollars (\$58.00)
per month for six (6) months, and
confinement for six (6) months.
Post Stockade.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Recruit George T. Rivers, Battery A, 32nd Antiaircraft Artillery, Automatic Weapons Battalion (Mobile with Reduction Table), did, at Fort Bliss, Texas, on or about 30 January 1950, wrongfully violate paragraph 85a, Center Regulations dated 20 April 1949, Fort Bliss, Texas, and as revised 17 January 1950 by having in his hutment an unauthorized firearm, to wit: a .38 caliber Nuevo Matacan Pistol, serial number, 622.

Specification 2: In that Recruit George T. Rivers, Battery A, 32nd Antiaircraft Artillery Automatic Weapons Battalion, Fort Bliss, Texas, did, at Fort Bliss, Texas, on or about 30 January 1950, commit an assault upon Sergeant Curtis A. Sterling, Battery A, 32nd Antiaircraft Artillery Automatic Weapons Artillery Battalion, Fort Bliss, Texas, by pointing at the said Sergeant Curtis A. Sterling, a dangerous weapon to wit: a .38 caliber Nuevo Matacan Pistol, serial number 622.

CSJAGI SP CM 1792

He pleaded not guilty to, and was found guilty of, the specifications and the charge. Evidence of one previous conviction was introduced. He was sentenced to be discharged the service with a bad conduct discharge, to forfeit fifty-eight dollars per month for six (6) months, and to be confined at hard labor for six (6) 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, Antiaircraft and Guided Missile Center, Fort Bliss, Texas, approved the findings of guilty as to Specification 1 of the Charge, approved only so much of the findings of guilty of Specification 2 as involves a finding that the accused, at the time and place alleged, did commit an assault upon Sergeant Curtis A. Sterling, Battery "A", 32nd Antiaircraft Artillery Automatic Weapons Battalion, Fort Bliss, Texas, by pointing at him a weapon, to wit, a .38 caliber Nuevo Matacan Pistol, serial number 622, approved the sentence, designated the Post Stockade, Fort Bliss, Texas, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50e.

3. The record of trial is legally sufficient to support the findings of guilty of Specification 2 of the Charge, as approved by the reviewing authority, 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 officer exercising general court-martial jurisdiction.

4. Specification 1 of the Charge alleges a violation of paragraph 85a, Antiaircraft Artillery and Guided Missile Center Regulations, dated 20 April 1949, as revised 17 January 1950, Fort Bliss, Texas. The court took judicial notice of the regulations, and a certified true copy of the applicable paragraph was introduced into evidence and appended to the record of trial as Prosecution Exhibit 1. It states:

"85. Firearms - a. Privately-owned: All privately-owned firearms of officers, enlisted personnel, and civilians stationed at or employed on the post will be registered at this headquarters. Firearms of personnel living in barracks will be kept in the organization storeroom. Firearms kept in private quarters must be properly safeguarded to prevent their falling into the hands of unauthorized or untrained people."

The prosecution sustained the burden of proving that accused was a member of an organization which was subject to the regulations and that he had a described firearm in his possession in his hutment. However, the record of trial is void of evidence showing knowledge, actual or constructive, on the part of accused of the provisions of the regulations allegedly violated.

CSJAGI SF CM 1792

Paragraph 140, page 189, Manual for Courts-Martial, 1949, states:

"Ignorance of law.—Ignorance of the law, or of regulations or directives of a general nature having the force of law, is not an excuse for a criminal act. However, before a person can properly be held responsible for a violation of any such order or directive of any command inferior to the Department of the Army or the headquarters of an overseas theater or overseas or Territorial department (with respect to personnel stationed or having duties within such theater or department), it must appear that he knew of the order or directive, either actually or constructively. Constructive knowledge may be found to have existed when the order or directive was of so notorious a nature, or was so conspicuously posted or distributed, that the particular accused ought to have known of its existence."

The regulations allegedly violated were promulgated by a "command inferior to the Department of the Army or the headquarters of an overseas theater or overseas or territorial department." Thus the introduction of the appropriate paragraph of the regulations into evidence and the request that judicial notice thereof be taken did not sustain the burden of proving knowledge, actual or constructive, of accused, an essential of the offense charged. Under similar facts, the Board of Review stated:

"The failure to produce evidence showing that accused had knowledge or should have had knowledge of the order * * * is therefore fatal to the prosecution's case. This, despite the fact that it may be assumed that the directive was communicated to the various subdivisions of the Tenth Army. It would have been a simple matter for the prosecution to show that the directive was posted or read to the accused's organization if such were the fact" (CM P-595, Lattimer et al., 4 BR (P) 139, 145; 4 Bull JAG 488).

5. For the foregoing reasons, the Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 1, legally sufficient to support the findings of guilty of Specification 2, as modified, and of the Charge, and legally sufficient to support only so much of the sentence as provides for forfeiture of fifty-eight dollars (\$58.00) pay per month for three (3) months, and confinement at hard labor for three (3) months.

Robert J. Gough, J. A. G. C.
 SICK IN HOSPITAL, J. A. G. C.
John F. Taylor, J. A. G. C.

(3540)

JAGI SP CM 1792

1st Ind

25 APR 1950

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

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

1. In the case of Recruit George T. Rivers (RA 12255269), Battery "A", 32nd Antiaircraft Artillery Automatic Weapons Battalion (mobile with Reduction Table), Fort Bliss, Texas, 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, legally sufficient to support the findings of guilty of Specification 2, as modified, and of the Charge, and legally sufficient to support only so much of the sentence as provides for forfeiture of fifty-eight dollars (\$58.00) pay per month for three months, and confinement for three months. Under Article of War 50e(3), this holding and my concurrence vacate so much of the sentence as is in excess of forfeiture of fifty-eight dollars (\$58.00) pay per month for three months and confinement at hard labor for three months. You are authorized to direct a rehearing as to the offense alleged in Specification 1, or should you desire you may disapprove the entire sentence and direct a rehearing on Specification 1 and Specification 2 (as modified by you).

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 1792)

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.

JAGU Sp CM 1859

2 May 1950

UNITED STATES

YOKOHAMA COMMAND

v.

Private RUDOLPH WILLIAMS,
RA 14285380, Detachment
Medical Department, 155th
Station Hospital, APO 503

Trial by Sp. C. M., convened at
Yokohama, Honshu, Japan, 23 and
27 February 1950. Bad conduct
discharge, forfeiture of \$50 pay
per month for six months and
confinement at hard labor for
six months. Eighth Army Stockade,
APO 343.

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

1. Pursuant to Article of War 50e(2) the record of trial and the holding by the Board of Review in the case of the soldier named above have been transmitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by special court-martial the accused pleaded not guilty to and was found guilty of behaving himself with disrespect toward Chief Warrant Officer William R. Tubbs, Administrative Officer of the Day, then in the execution of his office, by addressing certain disrespectful remarks to him in a sarcastic, contemptuous and insulting manner, at the 155th Station Hospital, APO 503, on or about 0030 hours, 11 February 1950, in violation of Article of War 63 (Charge I and specification), and breach of arrest at the same place on or about 0640 hours, 19 February 1950, in violation of Article of War 69 (Additional Charge and specification). He was sentenced to be reduced to the lowest enlisted grade, 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 47d. The officer exercising general court-martial jurisdiction, along with other action here immaterial, approved the sentence, designated the Eighth Army Stockade, APO 343, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50e.

3. The Board of Review in a formal holding, dated 5 April 1950, held the record of trial legally sufficient to support the findings of guilty and the sentence. In a supplemental memorandum (undated) the Board of Review in effect modified its prior holding and expressed the opinion that since the accused behaved disrespectfully toward a warrant officer in his capacity as administrative officer of the day, an office

normally occupied by a commissioned officer, the offense constituted a violation of Article of War 96, which is closely related for purposes of maximum punishment to the offense of disrespectful behavior toward a commissioned officer in violation of Article of War 63. Inasmuch as the maximum punishment for a violation of the latter article is confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months, and that for breach of arrest in violation of Article of War 69 is confinement and similar forfeitures for three months (MCM 1949, par 117c, Sec A, pages 135, 136), the Board concluded that the sentence of bad conduct discharge and confinement and forfeitures for six months was legal (Ibid, Sec B, p 143).

4. The Judge Advocate General has not concurred in the Board's holding and has transmitted the same and the record of trial together with the Board's memorandum, to the Judicial Council for appropriate action.

5. The Judicial Council concurs in so much of the holding by the Board of Review as holds that the record of trial is legally sufficient to support the findings of guilty of the specification of Charge I and of the Additional Charge and its specification. The only questions are whether the record of trial is legally sufficient to support the finding of guilty of Charge I as a violation of Article of War 96 and whether the record of trial supports the sentence.

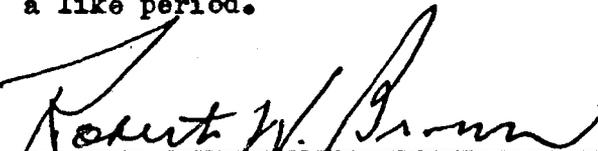
6. Article of War 63 denounces behaving with disrespect toward a superior officer. "Officer" means commissioned officer (AW 1a). Article of War 65 similarly denounces behaving in a disrespectful manner toward a warrant officer while in the execution of his office. Both articles are intended for the protection of their subjects from disrespect (MCM 1949, par 153a, p 207). It is significant that the disrespectful behavior contemplated by Article of War 63 is such as detracts from the respect due to the authority and person of a superior commissioned officer (Ibid, par 151, p 204) whether or not he is in the execution of his office. The disrespectful behavior contemplated by Article of War 65, however, is toward the warrant officer while in the execution of his office. The latter phrase means while engaged in any act or service required or authorized to be done by the warrant officer by statute, regulation, the order of a superior, or military usage (Ibid, pars 152a, 153a, pages 205, 207). Warrant officers may be assigned duties normally performed by commissioned officers, such as the duty of officer of the day. When such duties are assigned to warrant officers, they are vested with the powers of, and governed by regulations applicable to, commissioned officers (Par 3a,b,c(2), AR 610-5, 27 Dec 1945).

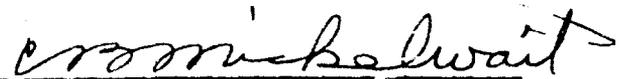
It is clear from the foregoing that when a warrant officer is assigned and performs the duty of administrative officer of the day, he is in the execution of his office within the contemplation of Article of War 65 and the Manual for Courts-Martial. The Table of Maximum Punishments in the Manual provides one punishment for behaving with disrespect toward a superior officer and a lesser punishment for behaving in a disrespectful manner toward a warrant officer in the execution of his office (MCM 1949, par 117c, p 135).

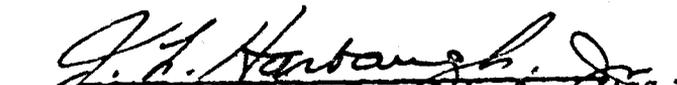
In support of its position that the offense alleged in the specification in question constitutes a violation of Article of War 96, the Board of Review refers to the cases of CM 201648, Statsick, 5 BR 283; CM 202117, Oswald, 5 BR 355; and CM 212091, Hopkins, 10 BR 219. Each of these cases involved an offense aggravated by the fact that the person against whom it was committed was clothed with definite military authority. Statsick disobeyed the order of an acting corporal, Oswald assaulted an acting first sergeant, and Hopkins offered violence to a Second Lieutenant of the Army Nurse Corps (not his superior officer) on duty in a military hospital. The Board of Review consequently concluded in each of these cases that the offense was not specifically covered in the Table of Maximum Punishments and that the punishments authorized for the closely related offenses against noncommissioned officers in the first two cases and a superior officer in the last, were applicable.

The essence of the instant offense, however, is the disrespect to the warrant officer, not merely as such but when clothed with definite military authority, i.e. while in the execution of his office, in this case administrative officer of the day. As indicated above, this precise offense is denounced by Article of War 65, and the Table of Maximum Punishments precribes a specific punishment for it. The Judicial Council therefore concludes that the accused in behaving in a disrespectful manner toward Chief Warrant Officer Tubbs, Administrative Officer of the Day, was guilty of a clear violation of Article of War 65, and nothing more, the maximum authorized punishment for which is confinement at hard labor for two months and forfeiture of two-thirds pay per month for a like period (MCM 1949, par 117c, p 135). The fact that he was erroneously charged with a violation of Article of War 63 is immaterial (Ibid, par 28, p 21). Inasmuch as the accused was also legally convicted of breach of arrest in violation of Article of War 69, which carries a maximum punishment of three months confinement and forfeiture of two-thirds pay per month for a like period, the maximum punishment in this case is forfeiture of two-thirds pay per month for five months and confinement at hard labor for a like period. Reduction to the lowest enlisted grade, of course, may legally be added.

7. For the reasons stated, the Judicial Council is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its specification as involves findings of guilty of the specification in violation of Article of War 65, and is legally sufficient to support the remaining findings of guilty approved by the reviewing authority and only so much of the sentence as provides for reduction to the lowest enlisted grade, forfeiture of fifty dollars pay per month for five months and confinement at hard labor for a like period.


Robert W. Brown, Brig. Gen, JAGC


C. B. Mickelwait, Brig. Gen, JAGC


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

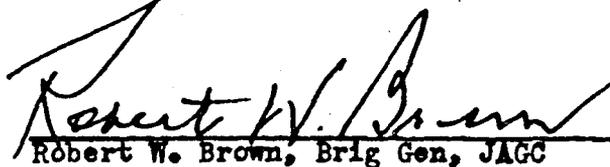
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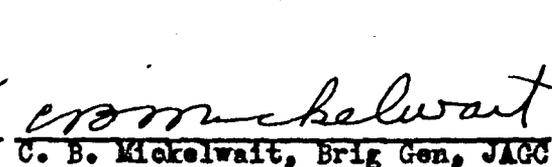
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

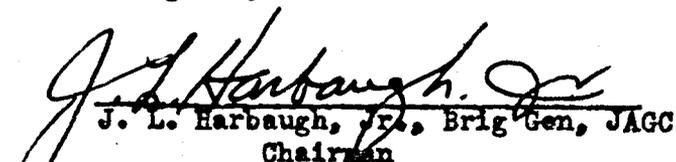
THE JUDICIAL COUNCIL

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

In the foregoing case of Private Rudolph Williams, RA
14285380, Detachment Medical Department, 155th Station Hospital,
APO 503, upon the concurrence of The Judge Advocate General, only
so much of the findings of guilty of Charge I and its specification
is approved as involves findings of guilty of the specification in
violation of Article of War 65, and only so much of the sentence
as provides for reduction to the lowest enlisted grade, forfeiture
of fifty dollars pay per month for five months and confinement at
hard labor for five months is confirmed and will be carried into
execution. An appropriate guardhouse is designated as the place
of confinement.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

2 May 1950

I concur in the foregoing action.


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

3 May 1950

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

JAGZ SP CM 1878

MAY 1 1950

UNITED STATES)

82D AIRBORNE DIVISION

v.)

) Trial by SP C M, convened at
) Fort Bragg, North Carolina, 7 March
) 1950. Bad conduct discharge (suspended)
) forfeiture of \$63 pay per month for six
) (6) months (suspended), and confinement
) for six (6) months (suspended).

) Private First Class
) EVERETT E. INGERSOLL
) (RA 37677587), Company I,
) 325th Airborne Infantry
) Regiment.)

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, 325th Airborne Infantry Regiment, Fort Bragg, North Carolina, on 7 March 1950, the accused was tried upon the following charge and specification:

CHARGE: Violation of the 61st Article of War.

SPECIFICATION: In that Private First Class Everett E. Ingersoll, Company "I", 325th Airborne Infantry Regiment, Fort Bragg, North Carolina did, without proper leave, absent himself from his organization and station at Fort Bragg, North Carolina from about 24 July 1949, to about 3 February 1950.

The accused pleaded not guilty to and was found guilty of the charge and specification and was sentenced to be discharged from the service with a bad conduct discharge, to be confined at hard labor for six months and to forfeit sixty-three dollars of his pay per month 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, 82d Airborne Division, Fort Bragg, North Carolina, approved the sentence, but suspended the execution thereof. The result of trial was published in Special Court-Martial Orders

Number 34, Headquarters 82d Airborne Division, Fort Bragg, North Carolina, 30 March 1950.

3. The record of trial is legally sufficient to support the findings of guilty and that part of the sentence which provides for a bad conduct discharge and confinement at hard labor for six months. The only question presented for consideration is whether the amount of forfeiture, as approved, is legal.

4. Article of War 13 provides that a special court-martial shall not have authority to adjudge forfeiture of more than two-thirds of a soldier's pay per month for a period of six months. It therefore becomes necessary in the instant case to compute the base pay of the accused at the grade to which he was reduced as a result of the sentence adjudged by the court, in order to calculate the maximum legal amount of the forfeiture.

The face of the charge sheet shows the service of accused prior to the current enlistment as two years, four months and seven days, and the date of his current enlistment as 26 March 1948. These figures are confirmed by the records of The Adjutant General. The charge sheet shows the base pay of accused in the grade of Private First Class, his enlisted grade at the time of trial, as \$110.25. In the case of an enlisted person other than the lowest grade, however, a sentence which as ordered executed or as suspended includes a bad conduct discharge, whether or not suspended until release from confinement, or hard labor with or without confinement, immediately reduces such enlisted person to the lowest grade (Par. 116d, MCM, 1949). The base pay of accused resulting from the sentence of the court must therefore be calculated on the basis of the rate of pay for the lowest enlisted grade at the rate of pay for which he is entitled by reason of length of service. With respect to the current service, commencing 26 March 1948, it is necessary to determine the length of time which he is entitled to count for pay purposes. Section 202, Career Compensation Act of 1949 (63 Stat. 807; 37 U.S.C. 233) provides in pertinent part, "* * * in computing the cumulative years of service to be counted by members of the uniformed services for determining the amount of basic pay they are entitled to receive upon completion of such years of service, such members shall be credited with --

"(1) full time for all periods of active service as * * * enlisted persons in any Regular or Reserve component of any of the uniformed services;

* * * * *

"(6) all service which, under any provision of law in effect on the effective date of this section is authorized to be credited for the purpose of computing longevity pay."

These provisions with respect to the problem here under consideration add nothing to the pertinent provisions of Title 37 United States Code 1946.

Paragraph 2a(1), Army Regulations 35-2360, 7 December 1944, which was in effect under both the former and present pay acts, provides as follows:

"2. Service which may or may not be counted.— a. Time lost in nonpay status.

- (1) * * * while the soldier is in a nonpay status, or when he is absent without authority or in a nonduty status in the circumstances described in these statutes, he is not serving within the meaning of the law authorizing increased pay for length of service. Pay is denied him currently and he is required to make up the time so lost to complete his enlistment. It is not service for pay nor for completing the enlistment, neither is such lost time service to be counted for increased pay for length of service. See 2 Comp. Gen. 162, 164; 15 id. 836, 840."

Article of War 107 as enacted by the 80th Congress is identical with the former Article which was in effect at the time the foregoing was incorporated into Army Regulations. It provides in effect that all time during which an enlisted man is absent from his organization without authority, or is confined and awaiting trial, if the trial results in conviction, must be served by him in addition to his normal term of enlistment. It therefore follows that such time must be considered as time not to be counted for increased pay for length of service.

It therefore appears, since accused absented himself from about 24 July 1949 to 3 February 1950, that his current service which may be computed for pay purposes when added to his prior service of two years, four months and seven days amounts to over two and less than four years service. Section 201, Career Compensation Act of 1949 (63 Stat. 807; 37 U.S.C. 232) provides that the basic pay of an enlisted man of the lowest grade, having over two and less than four years service is \$87.50 per month. Thus the maximum legal forfeiture per month in the instant case is \$58.33.

5. For the reasons 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 six months and forfeiture of \$58.33 of his pay per month for six months.

Edward H. Phipple, J.A.G.C.

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

Robert E. Payne, J.A.G.C.

(362)

JAGZ SP CM 1878

1st Ind.

MAY 15 1950

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

To: Commanding General, 82d Airborne Division, Fort Bragg, North Carolina

1. In the case of Private First Class Everett E. Ingersoll (RA 3767-7587), Company I, 325th Airborne 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 of the specification and the charge 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 six months and forfeiture of \$58.33 of his pay per month for six months. Under Article of War 50e this holding and my concurrence vacate so much of the sentence relating to forfeitures as is in excess of forfeiture of \$58.33 per month for six months.

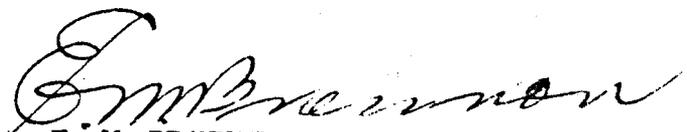
2. It is requested that you publish a special court-martial order in accordance with said holding and this indorsement restoring all rights, privileges and property of which the accused has been deprived by virtue of that portion of the sentence so vacated. A draft of special court-martial orders designed 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:

(SP CM 1878)

2 Incls:

- No. 1 - Record of trial
- No. 2 - Special CM Orders


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

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

(363)

JAGQ - SP CM 1920

MAY 18 1950

UNITED STATES)
 v.)
Recruit WOODROW W. BRASHER)
(RA 34390998), Supply)
Company, 2d Quartermaster)
Battalion, Camp Hood,)
Texas.)

2D ARMORED DIVISION

Trial by SP CM, convened at
Camp Hood, Texas, 9 February
1950. Bad conduct discharge,
forfeiture \$35 per month for
six (6) months and confine-
ment for six (6) months. Camp
Stockade.

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

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

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

CHARGE: Violation of the 93d Article of War.

Specification: In that Recruit Woodrow W. Brasher, Supply Company, 2d Quartermaster Battalion, Camp Hood, Texas, did, at Camp Hood, Texas, on or about 1030 hours 24 January 1950, unlawfully enter building number H-3860, a Barrack of Headquarters & Headquarters Company, 124th Armored Ordnance Maintenance Battalion, with intent to commit a criminal offense, to wit: larceny therein.

The accused 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 discharged from the service with a bad conduct discharge, to forfeit thirty-five dollars (\$35.00) pay per month for six (6) months and to be confined at hard labor at such place as proper authority may direct for six (6) months. The reviewing authority approved the sentence and designated the Camp Stockade, Camp Hood, Texas, or elsewhere as the Secretary of the Army may direct, as the place of confinement. Pursuant to Article of War 50e the order directing execution of the sentence was withheld.

3. Evidence for the Prosecution.

On 24 January 1950, Private First Class Reed saw the accused in the barracks of Headquarters and Headquarters Company, 124th Armored Ordnance Maintenance Battalion (R 10). Reed testified as follows:

"Q. What was the accused doing at that time?

A. Well, I would say he was stealing.

"Q. What did you actually see him do?

A. He was in a footlocker.

"Q. What part of his body did he have in the footlocker?

A. He was bent over, with his hands in the locker.

"Q. Did you see this as you entered the building, or before?

A. I saw it as I entered the door.

"Q. Did you see anyone else present?

A. No, only Sgt Feith on the outside.

"Q. Whose locker did the accused have his hands in?

A. I believe the name is Pvt Stockton.

* * * *

"Q. Did you talk to him?

A. I tried to talk to him.

"Q. What did you say to him?

A. When I entered the building and saw what was going on, I called to him and asked him his name, and if he was in this organization, and he said, 'No'.

"Q. Did you ask him what he was doing in the footlocker?

A. Yes.

"Q. Did you know that was not his footlocker?

A. Yes.

"Q. Is that the building in which you live?

A. Yes.

"Q. Tell the court what his actions were just as he saw you and after he saw you.

A. He was in this footlocker, in the tray part, with the lid up. As I entered the building he saw me. He dropped the

lid over and started to go out. I called to him and he came back toward me as I entered this door. I was trying to talk to him. I asked him if he was in this organization, and what his name was, and he told me, 'No'. We both headed for the outside door, where we ran onto Sgt Feith working a detail.

"Q. Then you both left to go out?

A. Yes.

"Q. What did the accused do then?

A. He went down the street, and I went around toward the orderly room. Sgt Feith was there, working a detail, and I told him, and he went into the orderly room.

"Q. Was the accused, when he left, walking hurriedly, or running, or was he walking leisurely?

A. He was not running, no.

"Q. Was he walking hurriedly?

A. He did not walk like he was in too big a hurry, no.

* * * *

"Q. Did you see anything in the man's hands?

A. No." (R 11-13).

Sergeant Feith testified that he is a member of Headquarters and Headquarters Company, 124th Armored Ordnance Maintenance Battalion (R 13). He identified the accused as the man he saw "around the 21st or 22d of January", walking up the company street. Private First Class Reed brought his attention to the man reporting that he had seen a man in Headquarters and Headquarters Company barracks going through the locker. This witness intercepted the accused who was thereupon questioned by Sergeant Hansen in the presence of this witness.

"A. Sgt Hansen asked him, 'What in the hell are you doing in our barracks?' To the best of my memory, the accused said he was looking for a watch. Nansen asked him what gave him the idea it was in our barracks, and he said he was out with a man the night before, and during the time the said watch disappeared.

* * * *

"Q. I would like for you to finish answering the TJA's question, and complete the conversation you heard.

A. He said he was looking for his watch, and when asked what gave him the idea it was in our barracks, he said he had been with a man the night before, and he gave us the name of 'Nelson'. We told him we had no one by that name in there, and that was all there was to it.

* * * *

"Q. Was this man searched when you accosted him.

A. Yes, later.

"Q. Did you find anything on him?

A. All I saw was two combs and a pair of shoe laces. He was searched in the Captain's office.

"Q. Was there anything important missing in the company that day?

A. No." (R 14-15).

Private Stockton is a member of and has been billeted in Headquarters and Headquarters Company, 124th Armored Ordnance Maintenance Battalion, since 5 December 1949 (R 14-15). He testified that he had never seen the accused before the day of trial and had never given the accused or anyone else permission "to go in his locker." When asked if he knew the accused he testified that he just knew "the guy was in my footlocker" (R 16).

Captain Goodenough testified that he is a member of Headquarters and Headquarters Company, that only members of his company live in the company barracks but the same is not otherwise restricted (R 9) and that on 24 January 1950 Private Stockton, a member of his company, lived in Barracks No. 2, Building 3860 (R 9, 16). It is the same building in which Private First Class Reed was assigned (R 17). The accused has never been a member of said company. It is permissible for those who are not members to visit members of the company in the barracks (R 9).

4. Evidence for the Defense.

The accused testified under oath as follows:

"Q. Will you explain to the court why you were in the barracks of the 124th Ordnance Headquarters Company?

A. Do you mean the whole thing?

"Q. Yes.

A. On a Monday night, the 23d of January, I went in the 64th Street PX. I went into the latrine and met this

soldier. He began talking to me, and asked me if I wanted a drink. I took one with him. I asked him if he would care to sell me the rest of it. In the meantime I had another drink with him. He said he would sell me the rest of it. I was short of money and asked him if he would hold my watch for two pints until I got the money. He said that he would. I had seen him before in the PX. He asked me if I wanted both pints then or did I want to get the other pint in the morning. I told him I would get the other one the next day. He told me he lived in this barracks, and if I would come down I could get the whiskey. He said if he was not there he would leave it in the top of his footlocker, which he said would be unlocked. I went down to get it out of his footlocker, with no intention of stealing anything.

"Q. Did you give him your watch?

A. Yes.

"Q. Have you seen your watch since?

A. No.

PRESIDENT: What kind of watch was it?

WITNESS: It was a fifteen-jewel Waltham wrist watch." (R 19).

On cross-examination he testified:

"Q. Did the man tell you what his name was at the time?

A. Yes.

"Q. What did he say his name was?

A. He said he was Fred Nelson.

"Q. Did he say to what organization he belonged?

A. Yes. He said he belonged to H & H Company of 124th Ordnance.

"Q. Did he tell you in which barracks he lived?

A. He said the second one to the left of the orderly room.

"Q. Was that the one you were in?

A. Yes.

"Q. Did he tell you which was his bed?

A. He said the third or fourth on the right from the latrine, I do not remember for sure. He said there would not be any lock on the locker.

"Q. Had you ever seen the man before?

A. Yes, I had seen him several times before.

"Q. And you were actually looking for whisky at the time?

A. Yes.

"Q. Had you received any permission to be in that footlocker?

A. None except his.

"Q. How did you know it belonged to the person you talked to?

A. He described where it was, and I had no idea other than that was it. I did not think he was lying about it."
(R 20).

He further testified he had told Sergeant Hansen on that day that he was looking for a watch (R 20), that he had told Sergeant Gillette "from the CID" that he had loaned his watch to someone.

"Q. And that you were looking for it when you went into the barracks?

A. I was looking for whiskey." (R 21).

On redirect examination he testified:

"Q. When you went to the orderly room and talked to the sergeant who questioned you, and also the Captain, what purpose had you in telling them you were looking for your watch?

A. I thought the boy was in the company, and I did not want to get him in any trouble.

"Q. When the MP's questioned you, why didn't you tell them what you were looking for?

A. I still did not want to get the boy in trouble.
I was under the impression he was in that company.

* * * *

"Q. Do you know now whether that soldier who gave you the whiskey is in the company?

A. They tell me that he is not.

"Q. Have you checked to find out?

A. I have been locked up since that incident and have had no opportunity to do so.

* * * *

"MEMBER OF THE COURT: Has a check been made with the AG to see if there is a man by that name?

"TRIAL JUDGE ADVOCATE: We will bring out more on that." (P 21-22).

He testified further on examination by the court:

"Q. The man you saw in the PX that you gave your watch to, have you seen him since that time?

A. No. I have been locked up since the day of the incident.

"Q. Had you seen him previous to that time?

A. I had seen him in both the 64th and the 55th Street PX.

"Q. Have you ever seen him other than in the PX?

A. No.

"Q. What did you say his name was?

A. Nelson, Fred N., was the name he gave me.

"Q. When you entered the barracks of the 124th Ordnance and went to the bunk he had directed you to, did that bunk have a locker at the foot of it?

A. Yes.

"Q. Did that bunk have a bunktag on it?

A. No.

"Q. Did the locker have a lock on it?

A. No.

"Q. What was in the tray of the locker?

A. There was just the regular ordinary toilet articles. There was not much of anything, as best I could see.

"Q. What was in the bottom of the locker?

A. I do not know. I had no occasion to look in there.

"Q. Was there anyone else in the barracks?

A. Nobody but this Reed.

"Q. Was there anyone in there when you went in?

A. No, I did not see anyone." (R 22).

5. Rebuttal evidence for the Prosecution.

After the defense had rested the prosecution recalled Captain Goodenough who testified that there was no one in his company by the name of "Nelson" and had not been since he assumed command on 19 November. He testified concerning a conversation with the accused on 24 January:

"A. I came into my orderly room and Sgt Feith and Sgt Hansen and Reed were in my office, along with the accused. I asked the accused for his name and organization and the name of his unit commander. I asked him what he was doing in my barracks.

"Q. What was his answer?

A. He answered he was looking for his watch.

"Q. Did he say what kind of a watch?

A. He did not say, as far as I know.

"Q. Is that all the information he gave you?

A. No, he further said a man by the name of Nelson had his watch and that he was looking for it.

"Q. Did he say anything about a man named Nelson having given him permission to look for his watch?

A. Yes.

"Q. That is what he led you to believe he was doing in there?

A. That is what he told me; he did not lead me to believe it." (R 24).

On examination by the court this witness testified that he did not know whether there was a bedtag on Stockton's bed on 24 January (R 24).

Private Stockton was recalled by the prosecution and testified that he was not sure whether there is a bedtag on his bed now or whether there was one on his bed on 24 January (R 24).

Captain Frederick L. Nelson, 67th Medium Tank Battalion, testified that he does not know the accused and that he personally searched the post locator files and "did not find any 'Fred Nelson' on the list." On cross-examination he testified:

"Q. Did you also check for names such as 'Neilsen' and similar names?

A. Yes. There were one or two Neilsens, I think but I did not check very closely on that. I checked for Nelson.

- "Q. Did you notice if they had first names of 'Fred' or 'Frederick'?
- A. I do not believe they did, but I could not say for sure.

* * * *

- "Q. How many Nelsons did you find in your search?
- A. I did not count them, but I would say offhand there were about ten.

- "Q. Did you contact or talk to any of them?
- A. No.

- "Q. And you are the only 'Fred Nelson'?
- A. Yes.

- "Q. Did you check middle initials, as far as 'F' is concerned, on any of these Nelsons?
- A. No, I do not believe I did, no, I did not, specifically."
(R 26-27).

Two soldiers, each named Nelson, were called by the prosecution and testified that they did not know the accused (R 27, 29). They were not cross-examined by the defense.

Master Sergeant Gillette, 502d Military Police Company, testified that on 24 January 1950, he questioned the accused "about an incident" for "about fifteen to twenty minutes" the first time (R 29) the interrogation covering an hour. He talked to him "a couple of days at various times about the incident". He testified:

- "A. He gave me two or three different stories. He first told me he had loaned a watch to a man at the PX and the man told him he could go down to this barracks and go in his footlocker and pick up the watch. The next time he said the watch had been stolen from him and he was trying to find it, and finally he told me he was looking for whiskey.

- "Q. When did the story about the whiskey come out?
- A. That was the last time, when he wrote the statement.

- "Q. How long had you been on the case at that time?
- A. Two days." (R 30).

On examination by the court he testified:

- "Q. What kind of watch did the accused tell you he was looking for?
A. He did not describe it.
- "Q. Did you ask him?
A. No, I did not.
- "Q. Is it not a customary procedure for someone to describe property that is allegedly lost?
A. The questioning led me to believe Brasher made up the story about the watch. I quit questioning him and put him in the detention cell. Later there was no talk about a watch." (R 30).

The accused was sober (R 30) and did not appear nervous when this witness talked to him but did appear nervous afterward (R 31).

Master Sergeant Mack, Supply Company, 2d Quartermaster Battalion, testified:

- "Q. How long have you known him?
A. I have known him since about February of last year.
- "Q. What do you know about him, as to his character, truthfulness and dependability?
A. He first came to my attention when I was acting 1st Sergeant of the 85th QM. He had been sent to school by Capt Riley, and he was excused from the school and came back and reported in to Capt Harris. Capt Harris talked to him, and he said he would not let it happen again, and that he was sorry it happened. I do not remember for sure, but I believe they let it go with extra duty and hard labor, and a short while afterward -
- "Q. What did Brasher tell Capt Harris was the reason he was released from the school?
A. That I do not remember.

PRESIDENT: Were you present at the conversation.

WITNESS: Yes.

- "Q. Have you ever had any instances, or do you have any knowledge, of the man telling an untruth?

A. Yes. He told Capt Morgan one time when he was absent from formation - I do not believe I remember what he actually said - but he came in and talked to Capt Morgan. Capt Morgan asked him if that was his first offense, and he said, 'Yes'. I knew better, but I did not say anything until Capt Morgan told me, 'We will give him another chance'. I told him then, 'That is what Capt Harris gave him'.

"Q. You have known the accused about a year?

A. Yes.

"Q. Would you believe him under oath?

A. No, I would not believe him on a stack of Bibles.

* * * *

"Questions by defense:

"Q. You have testified to one untruth. The prosecution asked you if you knew of any instances. Do you know of any other lies the accused has told?

A. Yes. He also told Capt Dailey he had never been in any trouble, or words to that effect. That is about all I know, other than two corporals reported to me they had -

"Q. Is this something you know to be a fact?

A. No, it is just hearsay." (R 32).

6. Incompetent Evidence.

a. Opinion evidence. Incompetent opinion evidence was admitted on behalf of the prosecution without objection by the defense. It consisted of the testimony of Private First Class Reed that the accused was "stealing" (R 11), the statement volunteered by Captain Goodenough that the accused explained his reasons for being in the barracks but "he did not lead me to believe it" (R 24) and the gratuitous opinion of Master Sergeant Gillette who testified concerning his questioning of the accused that the latter "made up the story about the watch." (R 30).

"Opinion Evidence.---It is a general rule that a witness must state facts and not his opinions or conclusions. ***" (MCM, 1949, par 125b).

b. Admissions against Interest. Admissions against interest were testified to by Captain Goodenough, Sergeant Feith and Sergeant Gillette in which the accused acknowledged his presence in the barracks not his own and his searching therein of a footlocker belonging to someone else (R 23-24, 14, 29-30). There was no preliminary proof of voluntariness in any instance. The admissions were not made spontaneously or without urging. In each instance the accused was being interrogated as a suspected housebreaker by his military superiors during the course of informal investigations.

"* * * It is the duty of any person in obtaining a statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated and that any statement by the accused may be used as evidence against him in a trial by court-martial (A. W. 24).

"A confession or admission may not be received in evidence if it was not voluntarily made. If the confession or admission was obtained from the accused in the course of an investigation, by informal interrogation or by any similar means, it may not be received in evidence unless it appears that the accused, through preliminary warning or otherwise, was aware of his right not to make any statement regarding an offense of which he was accused or concerning which he was being interrogated and understood that any statement made by him might be used as evidence against him in a trial by court-martial. ***" (MCM, 1949, par 127a).

In CM 332697, Martinez, 81 BR 177, 181, the Board stated the general rule:

"*** although normally admissible in evidence without any showing that they [admissions against interest] were voluntarily made, they fall within the rule enunciated in par. 114b, Manual for Courts-Martial, 1928, [MCM, 1949, par. 127a] that if it is shown that such admissions were procured by means which the court believes were of such a character that they may have caused the accused to make a false statement they may be excluded (CM 330852, Crawford et al, (1948))."

c. Bad Character of Accused. Incompetent evidence of the bad character of the accused was admitted on behalf of the prosecution,

without objection by the defense, as rebuttal to the accused's testimony by which he acknowledged his previous conflicting extrajudicial statements, explaining the reasons therefor, admitting the entry into the barracks and searching of the footlocker of another, but negating any intent to commit larceny. The incompetent testimony of Master Sergeant Mack was to the effect that the accused had previously committed an offense causing his dismissal from a school, that he was absent once from formation and that he was guilty of other offenses and had been in trouble previously (R 32-33). The accused had not offered evidence of his good character.

"Bad Character of the Accused. The general and fundamental rule is that the doing of an act may not be evidenced by showing the bad moral character of the accused or his former misdeeds as a basis for an inference of guilt. This forbids any reference to his bad character in any form, either by general repute or by personal opinions of individuals who know him. It also forbids any reference in the evidence to former specific offenses or other acts of misconduct, whether he has or has not been tried and convicted of their commission." (MCM, 1949, par 125b).

d. Lack of Veracity of Accused. Impeaching evidence submitted in rebuttal by the prosecution, without objection of the defense, attacking the veracity of the accused was incompetent in that it was not limited to evidence of his general reputation for truth and veracity. It consisted of the personal opinion of Master Sergeant Mack that he would not believe the accused "on a stack of Bibles", that he had previously lied to his commanding officer and that he had heard of other instances in which the accused had lied (R 32, 33).

"Various Grounds—General lack of veracity.—When impeachment of a witness on this ground is undertaken, the impeaching evidence must be limited to evidence of his general reputation for truth and veracity in the community in which he lives or pursues his ordinary profession or business. In the military service 'community' may include the organization, post, or station of the witness. Personal opinion as to character is not admissible, except that a witness may, after testifying that he knows the reputation of the person in question as to truth and veracity in the community in which he resides or pursues his ordinary profession or business, and that such reputation is bad, be further asked whether or not from his knowledge of such reputation he would believe the person in question on oath. ***" (MCM, 1949, par 139b; underscoring supplied).

e. Not waived by Accused. The record does not contain an express waiver by the defense, oral or written, of its right to object to the incompetent testimony set forth above and there is no indication that the defense understood its right to object thereto and did not desire to assert it. The failure of the defense to object to the admission of incompetent evidence does not constitute a waiver of the right to object and does not render the error harmless (MCM, 1949, par 140d; CM 231727, Walton, 18 BR 289, 294; CM 238557, Whitford, 24 BR 281, 282; CM 333288, Shore, 81 BR 329, 341).

7. It is the view of the Board that the conviction of the accused was based upon a body of evidence partially illegal and that the accused did not waive his right to object to said illegal evidence. The primary question to be determined, therefore, is whether the admission of the illegal evidence injuriously affected the substantial rights of the accused within the purview of Article of War 37.

In a prosecution for larceny, breach of restriction and false swearing, after the accused had testified, evidence was adduced that, except for military courtesy, the accused was a poor soldier, that he did not respond to orders or keep his area clean and acted in a surly manner. The Board of Review in holding the record of trial legally insufficient to support the findings of guilty and the sentence stated:

"Accused, in the instant case, did not put his character in issue. Moreover, since evidence of collateral offenses is irrelevant where it has no tendency to prove some material fact in connection with the crime charged or where it merely (as in the instant case) 'tends to show that the accused is a criminal' (undesirable) 'generally' (Ibid, sec. 343, p. 485), Lieutenant Cohn's testimony was inadmissible for the further reason that it amounts to a blanket indictment of accused for enumerated types of unsoldierly conduct.***

* * * *

"In the case under consideration, though it be conceded that the preponderance of the evidence tends to establish accused's guilt, it cannot be denied, without wholly discrediting accused's testimony, that substantial evidence was introduced, which, if believed, would have at least raised such reasonable doubts as to have precluded his proper conviction:

* * * *

"*** The inadmissible character evidence adduced from Lieutenant Cohn was certainly calculated to undermine accused's testimony and destroy, through the prejudice invoked thereby, any disposition to give it credence which might otherwise have existed

in the minds of members of the court. ***" (CM ETO 3213, Robillard, 9 BR (ETO) 105, 114).

In CM ETO 16516, Shaffer et al, 31 BR (ETO) 7, the accused were charged with housebreaking and larceny. Each accused testified in his own behalf that he was drunk at the time of the alleged offense and did not remember all that happened but on leaving the cafe they saw on the ground the property alleged to have been stolen. The Board held the record legally insufficient because of the prosecution's interrogation of the accused concerning previous probable black market activities, interrogation of one accused concerning an assault which the accused denied, proof that two of the accused refused to make a pretrial statement, and the court's questioning of two accused concerning their possession of passes. The Board held:

"Errors were committed by the court in permitting inquiry into the commission of other offenses by accused. Thus Parker and Shaffer were interrogated by a member of the court as to their absence from camp without a pass. This was not relevant to any question then before the court and its only tendency was to create prejudice in the minds of the court against accused. It was incompetent (MCM, 1928, par. 112b, p. 112; CM 114908 (1918), Dig. Op. JAG, 1912-40, sec. 395 (7), pp. 200-201; CM ETO 2644, Pointer; CM ETO 3213, Robillard) and nonetheless so because it was elicited on cross-examination of accused (Weiner v. United States (CCA 3rd 1927), 20 F (2nd) 522). For the same reasons inquiry by the prosecution, and then by the court, as to accused's bartering of 'G.I. soap' for cognac was improper. They were not charged with wrongful disposition of government property and the implication of that effect from the extended interrogation to which accused were subjected along those lines, an implication readily seized upon by the court, could not be other than harmful. Similarly, the trial judge advocate's cross-examination of accused Humphreys in reference to his assault and battery upon a farmer, which was alleged to have occurred after the commission of the offense for which they were being tried, was improper.

* * * *

"In addition to this evidence these accused testified that they were so drunk that they had no remembrance of the pertinent events of the day. Another accused testified he became sick as a result of drinking. While the court was not required to believe this evidence, it was their province to give it such

weight as they saw fit in view of the fact that there was corroboration in the prosecution's evidence.

"In this state of the record it can scarcely be said that the evidence as to accused's ability to formulate and retain the requisite specific intent has the 'robust quality of moral certainty and determinativeness which will sustain the finding' in the face of these vital errors. It accordingly follows that the record is legally insufficient to sustain the findings of guilty and the sentences (CM 127490 (1919); CM ETO 1201, Pheil; CM ETO 13317, Parker et al)." (CM ETO 16516, Shaffer, et al, 31 BR (ETO) 12-14).

The situation presented is, in some respects, analagous to, but even more aggravated than the situations presented in CM ETO 1201, Pheil, 4 BR (ETO) 91, and CM 333288, Shore, 81 BR 329. In the latter case the Board held:

"7. The record of trial does not contain an express waiver, oral or written, by the defense of its right to object to the incompetent testimony set forth in paragraph 6a, b, c and d, supra, nor is there any indication that the defense understood its right to object thereto and did not desire to assert it. In such a case, the failure of the defense to object to the admission of the incompetent evidence does not constitute a waiver of the right to object and render the error harmless (para 126c, MCM 1928; CM 231727, Walton, 18 BR 289, 294; CM 238557, Whitford, 24 BR 281, 282).

"8. Having shown that accused's conviction of the offense charged was based on a body of evidence partially illegal, and further that accused did not waive his right to object to said illegal evidence, the prime question to be determined is whether the admission of the illegal evidence 'injuriously affected the substantial rights of the accused' within the purview of Article of War 37. In CM 300644, Pheil, 4 BR (ETO) 91, a case involving the question of whether the erroneous admission into evidence of an accused's confession prejudicially affected his substantial rights, the Board of Review ably stated the rule and test applicable in such cases at page 104 in the following language:

'The rule governing such situation has been succinctly stated:

"It is not necessarily to be implied that the substantial rights of the accused have been injuriously affected by the admission of incompetent testimony; nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony had been excluded enough legal evidence remains to support a conviction. The reviewer must, in justice to the accused, reach the conclusion that the legal evidence of itself substantially compelled a conviction. Then indeed, and not until then, can he say that the substantial rights of the accused were not prejudiced by testimony which under the law should have been excluded. CM 127490 (1919): (Underscoring supplied).

"The rule is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved. CM 130415 (1919)." (Dig Op JAG, 1912-30, sec 1284, p. 634) (Underscoring supplied).

'The foregoing principles were elaborated in the dissenting opinion of Colonel Archibald King in CM 211829, Parnell. Colonel King's opinion was approved by The Judge Advocate General and formed the basis of the subsequent action of the Secretary of War.

'The fate of the accused in the instant case is not to be determined by the simple expedient of separating the legal evidence from the illegal evidence and then evaluating the legal evidence as to its sufficiency to sustain the findings. Such process would be an over simplification and would wholly ignore the actualities of the trial. The court had before it both legal and illegal evidence. It is an impossibility for the Board of Review to measure

the influence of the illegal evidence upon the court, and should it attempt to do so it would be usurping the functions of the court (CM ETO 132, Kelly and Hyde). A reviewer in considering the record of trial to determine whether the "legal evidence of itself substantially compelled a conviction" cannot ignore the impact upon the mind of the court of the illegal evidence. For this reason the Board of Review in CM 127490 (supra) particularly qualified its pronouncement by the statement "nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony has been excluded enough legal evidence remains to support a conviction." (Under-scoring supplied). An accused has not received a fair and impartial trial if his conviction is based upon a body of evidence part of which is legal and which standing alone possesses only sufficient weight to tip the scales in favor of its sufficiency but does not contain the robust quality of moral certainty and determinativeness, and part of which is illegal composed of confessions which are some of the "strongest forms of proof known to law." The Board of Review undoubtedly had this situation in mind when it adopted the qualification last quoted in its holding CM 127490 (supra).!"

8. The accused was charged with and found guilty of housebreaking under Article of War 93. Under the findings of guilty and the sentence adjudged by the court, the prosecution was required to prove beyond a reasonable doubt that: (a) the accused entered the barracks and (b) facts and circumstances indicating an intent at that time to commit larceny therein (MCM, 1949, par 180e). This offense involves the existence of a specific intent at the time of the entry into the building. It was incumbent upon the prosecution, therefore, to prove beyond a reasonable doubt the larcenous intent of the accused.

The competent evidence for the prosecution merely shows that the accused entered a barracks other than his own and while in the barracks searched the tray of a footlocker which did not belong to him without the authority of the actual owner. The accused denied any intent to steal. He testified that a "Fred Nelson" had authorized him to obtain a pint of whiskey from "Nelson's" footlocker, and that the description of this particular barracks and footlocker conformed with the description given the accused by "Nelson". The prosecution introduced evidence in rebuttal tending to show that there was no "Fred Nelson" on

the post who knew the accused. Nothing was stolen from the footlocker or from the barracks and the accused, who was searched immediately after the incident, did not have any stolen property in his possession. There was not established a corpus delicti of a larceny. Although the legal evidence is wholly circumstantial on the question of the accused's intent to commit larceny, it might, nevertheless, have been sufficient to support the findings of guilty if the record of trial had not been tainted by the admission of the incompetent evidence. It is the view of the Board that the erroneously admitted prosecution evidence was clearly calculated to undermine the accused's testimony, vilify his character and destroy, through the prejudice invoked thereby, any disposition to give his testimony the credence which might otherwise have existed in the minds of the court.

*** But once any substantial quantity of illegal evidence is received at the trial of an accused, more than a determination that the legal evidence of record is sufficient to support the findings of guilty is required if the reception of the illegal evidence is not to be held to vitiate said findings. ***" (CM 333288, Shore, 81 BR 329, 343).

Assuming, but not deciding, that after the illegal evidence is excluded sufficient legal evidence remains of record to support the conviction it must be determined whether it virtually, substantially and practically compels a finding of guilty.

The legal evidence of record standing alone lacks that quality of certainty and determinativeness necessary to classify it as "compelling". It is clear that the illegal evidence is of such quantity, in the absence of compelling evidence of guilt, that the accused's substantial rights were prejudiced by the illegal attack on his character and veracity and by the illegal opinion evidence and admissions against interest which contained conflicting statements and were presented as part of the prosecution's case in chief and not as rebuttal. By the prosecution's illegal introduction into evidence of the admissions by the accused the accused was deprived of the full effect of his own testimony under oath in explanation of his extrajudicial conflicting statements. The cumulative effect of the incompetent evidence had a distinct tendency to bring about the accused's conviction on the ground that his previous conduct in general deserved punishment without much regard to whether he actually had the intention to commit larceny when he entered the barracks.

It is the holding of the Board that, after the illegal evidence is excluded, the remaining legal evidence does not virtually, substantially and practically compel a finding of guilty and that the admission

of the incompetent evidence prejudicially affected the substantial rights of the accused.

In view of the foregoing, it is deemed unnecessary to determine whether there was sufficient evidence in the record aliunde the illegal evidence to establish the larcenous intent of the accused or to weigh the evidence which is the duty and prerogative of a Board of Review (CM 338753, Hicks, Nov. 1949).

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

J. L. Seaver JAGC
Laurel L. Chambers JAGC
William G. Sitnick, JAGC

JAGQ - SPCM 1920

1st Ind

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

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

1. In the case of Recruit Woodrow W. Brasher (RA 34390998), Supply Company, 2d Quartermaster Battalion, Camp Hood, Texas, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under Article of War 50e(3), this holding and my concurrence vacate the findings of guilty and the sentence. A rehearing is authorized.

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:

(SPCM 1920).

E. M. Brannon

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

1 Incl
Record of trial



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

MAY 9 1950

JAGI SP CM 2107

UNITED STATES)

v.)

Private First Class)

KENNETH EDWARDS)

(RA 17245331), Company "B",)

370th Infantry Battalion)

(Separate), APO 696,)

U. S. Army)

NURNBERG MILITARY POST

Trial by SP. C. M., convened at
Nurnberg, Germany, 20 April 1950.
Bad Conduct Discharge, forfeiture
of sixty dollars (\$60.00) pay per
month for six (6) months, and
confinement for six (6) months.
Branch United States Disciplinary
Barracks.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Kenneth Edwards, Company "B" 370th Infantry Battalion (Separate) did at Furth (Bavaria) Germany, on or about 2 April 1950 with intent to do him bodily harm, commit an assault upon Rudolf Stautritze by feloniously and willfully striking the said Rudolf Stautritze in the face with his fist.

He pleaded not guilty to the specification and charge and was found guilty of the specification and charge. No evidence of previous convictions was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit sixty dollars pay per month for six (6) months and to be confined at hard labor at such place as proper authority might direct for six (6) months. The officer exercising general court-martial jurisdiction, the Commanding Officer, Headquarters Nurnberg Military Post, APO 696, U. S. Army, approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, or elsewhere as the Secretary of the Army might direct,

but not in a penitentiary, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50g.

3. There is no question that the accused committed an assault upon the victim by wrongfully striking him in the face with his fist. The issues for consideration are whether the evidence is sufficient to justify a finding that the assault was committed with intent to do bodily harm and whether the record of trial is legally sufficient to support that part of the sentence adjudging a bad conduct discharge.

The evidence presented by the prosecution showed that on or about 2 April 1950, at Furth, Germany, at about 0030-0045 hours, the accused and another soldier approached Stautritze and Lochner. Stautritze, the victim, was described as a German National, commercial agent, employed in the labor office at Furth, Germany. Apparently without provocation accused's companion struck Stautritze on the chest causing the victim's hat to fall to the ground. When Stautritze bent over to recover his hat the accused struck him in the left eye with his fist (R. 8, 9). The result of the latter blow, for which the victim received medical treatment, caused the German to have a hematoma or bloodshot eye, still visible eighteen days afterwards at the time of trial (R. 9, 10). The blow administered while Stautritze was in the stooped position caused him to fall down (R. 16). According to Corporal Mervin J. Brown, 793rd Military Police Service Battalion, on patrol as a military policeman and an eye witness to the incident, the blow caused the German to have a black eye. Both the Germans and the soldiers had been drinking moderately (R. 20). No testimony was presented as to the nature or extent of the medical treatment which Stautritze testified he received. There is no indication that the blow to the eye caused any permanent injury or that Stautritze lost any time from his work or otherwise, as a result of the injury. The record contains no description as to the relative size or ages of the assailant and the victim.

There was no evidence offered by the defense. The accused elected to remain silent.

4. With reference to the question of assault with intent to do bodily harm, the Manual for Courts-Martial, 1949, provides in pertinent part as follows:

"* * * With respect to this form of aggravated assault, 'bodily harm' means great bodily harm and not those minor injuries, such as a black eye or a bloody nose, which might result from a simple assault and battery with the fists. It is possible, however, to commit an assault with intent to do bodily harm with the fist, as when a strong man strikes a feeble man and breaks his jaw, or a victim is held by one of several assailants for the purpose of allowing the others to beat him into insensibility with their fists, or is knocked by a blow with a fist from a height (such as a grandstand) so that the resulting fall might cause serious physical injury * * *" (par. 180m, p. 248). (Under scoring supplied)

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The second sentence of the above quotation sets out the exceptions to the general rule that an attack with fists is not ordinarily considered a felonious assault with intent to do bodily harm. Only in extreme instances will the facts of the case justify inferring the necessary intent so as to bring the assault within the offense encompassed by Article of War 93. That the evidence must clearly show a vicious attack by one possessed of superior power or advantage before this intent may be inferred is illustrated by a study of pertinent cases.

In CM (ETO) 1177, Combess, 4 BR (ETO) 59, 63, a conviction under Article of War 93 was reduced to simple assault and battery under Article of War 96 because, although slapping a woman, the accused "did not exhibit an unusual amount of violence towards her, nor did he have an unreasonable advantage over her." In CM 329621, Snyder, 78 BR 123, 124-125, striking a woman, twisting her arm and again striking at her but missing and knocking her baby unconscious, was held to be only simple assault and battery under Article of War 96. The Board said:

"* * * The victim was not knocked from her feet by the blow. The record is entirely silent on the force with which the blow was struck * * *."

See also CM (ETO) 8189, Ritts and French, 19 BR (ETO) 97, 102; CM (ETO) 1690, Armijo, 5 BR (ETO) 223, 225; CM 249165, Crawford, 32 BR 47, 51-52; and CM (ETO) 4071, Marks et al, 11 BR (ETO) 331, 334).

In the instant case there is no showing of extraordinary force; no showing that the assailant was the more powerful; no showing that the victim was knocked insensible; and no showing that the injury sustained was other than minor. Considering the holdings of the Board of Review in the above cases we are of the opinion that the instant case falls short in presenting the requisite proof necessary to support a finding of guilty of assault with intent to do bodily harm. The record, however, is legally sufficient to support a finding of guilty of assault and battery, a lesser included offense in violation of Article of War 96 (CM 329621, Snyder, supra).

The maximum authorized punishment for assault and battery under Article of War 96 is confinement at hard labor not to exceed six months and forfeiture of two-thirds pay per month not to exceed six months (par. 117c, p. 138, MCM, 1949).

5. 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 Specification as involves findings of guilty of assault and battery by the accused as alleged, and at the time and place alleged, in

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violation of Article of War 96; and legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months and forfeiture of \$60.00 pay per month for six months.

Robert Joseph, J. A. G. C.

Harold F. McDonnell, J. A. G. C.

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

JAGI SP CM 2107

1st Ind

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

TO: Commanding Officer, Nurnberg Military Post, APO 696, U. S. Army,
c/o Postmaster, New York, New York

1. In the case of Private First Class Kenneth Edwards (RA 17245331), Company "B", 370th Infantry Battalion (Separate), APO 696, U. S. Army, 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 Specification as involves findings of guilty of assault and battery by the accused as alleged, and at the time and place alleged, in violation of Article of War 96; and legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months and forfeiture of \$60.00 pay per month for six months. Under Article of War 50g, 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 \$60.00 pay per month for six months.

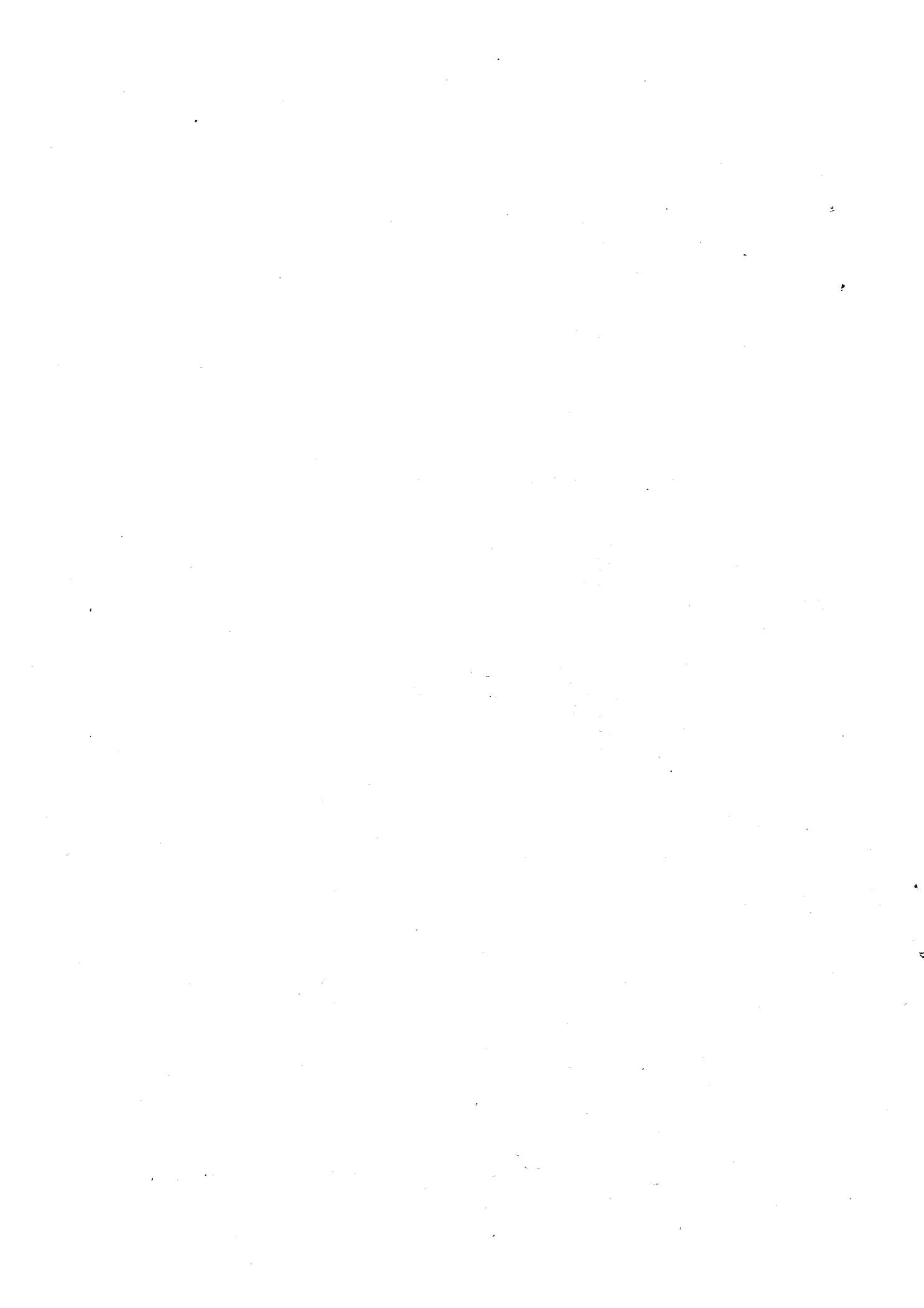
2. When copies of the published order in the case are forwarded to this office, together with the record of trial, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case,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

(SP CM 2107)

1 Incl
Record of trial



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



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