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OF THE ARMY

BOARD OF REVIEW
AND
JUDICIAL COUNCIL

HOLDINGS
OPINIONS
REVIEWS

VOL. 7

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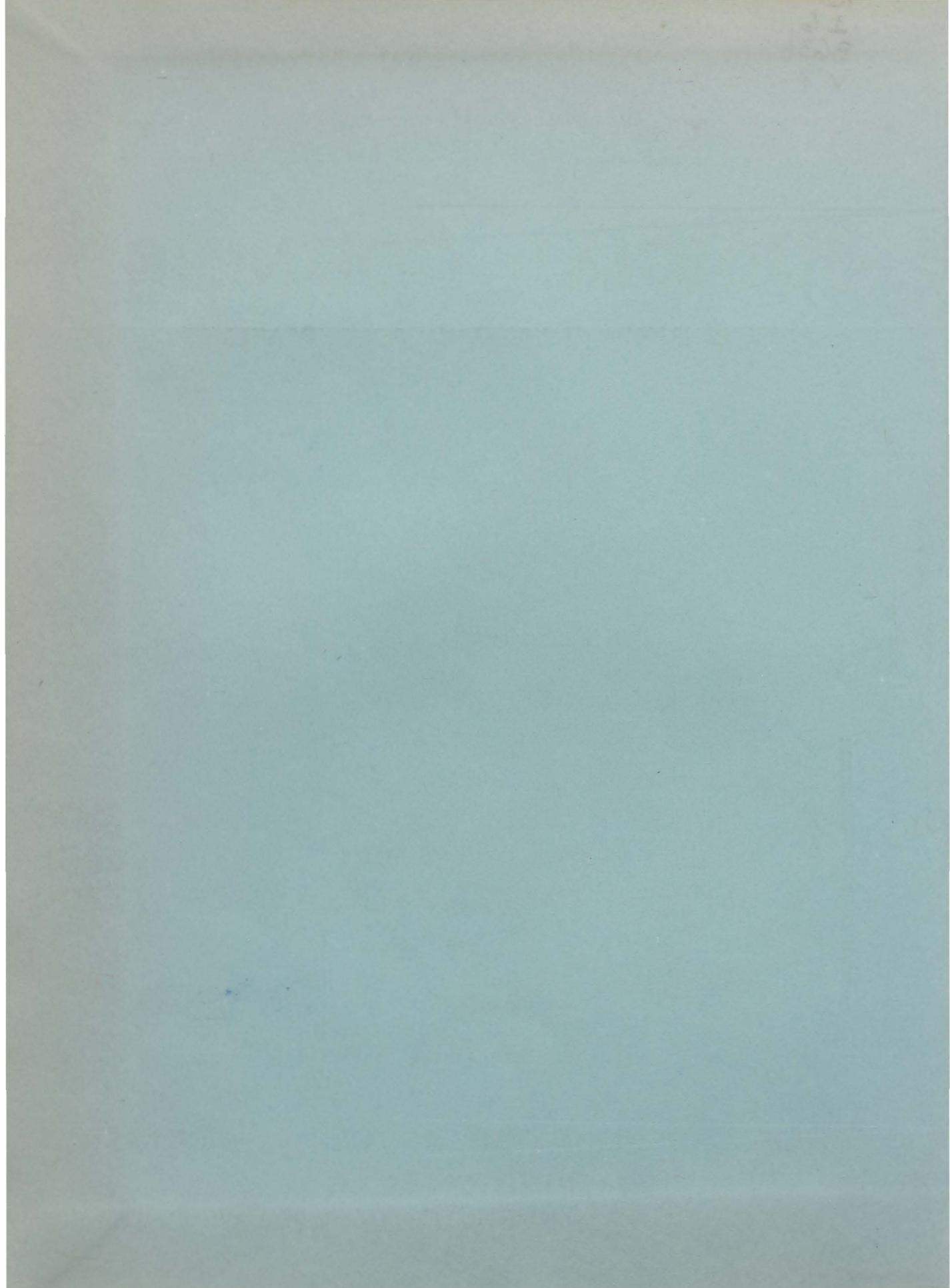
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JUDGE ADVOCATE GENERAL'S CORPS

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EXPLANATORY NOTES

1. References in the Tables and Index are to the pages of this volume. These page numbers are indicated within parentheses at the upper corner of the page.

2. Tables III and IV cover only the specific references to the Articles of War and Manual for Courts-Martial, respectively.

3. Items relating to the subject of lesser included offenses are covered under the heading LESSER INCLUDED OFFENSES rather than under the headings of the specific offenses involved.

4. Citator notations (Table V) - The letter in () following reference to case in which basic case is cited means the following:

(a) Basic case merely cited as authority, without comment.

(b) Basic case cited and quoted.

(c) Basic case cited and discussed.

(d) Basic case cited and distinguished.

(j) Digest of case in Dig. Op. JAG or Bull. JAG only is cited, not case itself.

(N) Basic case not followed (but no specific statement that it should no longer be followed).

(O) Specific statement that basic case should no longer be followed (in part or in entirety).

5. There is a footnote at the end of the case to indicate the GCMO reference, if any.

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ACCUSED	CM NO.	PAGE	ACCUSED	CM NO.	PAGE
Arndt	341921	229			
Babineau	Sp 2064	259			
Brown	Sp 2674	345			
Bussard	341786	197			
Cherwax	341216	65			
Conley	Sp 2132	263			
Connolly	Sp 2293	285			
Cornett	341508	129			
Dully	341865	209			
Fancher	Sp 2706	353			
Ferwerda	Sp 2432	307			
Goodluck	Sp 2490	325			
Guimond	341487	123			
Harris	337189	363			
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Hirsch	341020	23			
Kempe	341450	101			
King	Sp 2735	359			
Kirk	341672	187			
Krivacek	Sp 2300	291			
Linseott	Sp 2461	319			
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Meagher	341945	249			
Melton	341018	1			
Mullen	Sp 2576	339			
Patch	341387	89			
Pinard	Sp 2549	335			
Robart	341458	117			
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11	125, 283, 308, 314, 326, 329, 340
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17	125, 308, 326, 328
24	256, 379, 419
25	182
37	17, 288, 389, 390, 413
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<u>47d</u>	365, 374
<u>48c</u>	42, 56, 257
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54	129
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65	123, 298, 335
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TABLE III
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29 <u>a</u>	265, 274, 279, 288	128 <u>b</u>	377, 400
39	17	129 <u>a</u>	133, 160, 161
42	328	129 <u>b</u>	73, 132, 157, 160, 161, 162, 178, 224
43	328	130 <u>a</u>	133
43 <u>a</u>	309, 341	130 <u>b</u>	160, 161, 178, 180
58 <u>b</u>	341	133 <u>b</u>	172
58 <u>e</u>	96	134 <u>d</u>	156
58 <u>f</u>	96	136 <u>b</u>	415, 418
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80 <u>a</u>	40	142 <u>a</u>	133
87 <u>b</u>	42, 56, 225, 256, 266, 276, 288	146	305
106 <u>f</u>	182	146 <u>a</u>	72
117 <u>c</u>	172, 300, 321	151	337
124	162	152 <u>b</u>	300, 320, 321
125 <u>a</u>	132, 350	153 <u>a</u>	300
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TABLE IV
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182	172, 240	67	361
183	172	116 <u>b</u>	382
183 <u>a</u>	85, 99	122 <u>b</u>	382
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12749	390(b)	254704	266(a)
113535	266(a)	256886	172(b)
120948	348(a)	257057	381(b)
124276	322(a)	258630	155(a), 174(b)
128111	172(a)	260755	194(a)
130811	266(a)	260828	169(a)
148099	337(a)	261112	86(a)
156186	134(a)	264077	98(a)
186992	133(b)	265038	347(a), 350(a)
187548	266(a), 275(a)	266734	348(a), 350(a)
196371	388(b)	269057	175(b)
200734	316(a)	269791	321(a)
202366	15(a)	272642	155(a), 172(a)
202601	85(a)	273791	391(b)
203609	241(a)	274482	380(a)
207591	205(a)	274812	97(a), 169(a)
216004	205(a)	274930	240(a)
217590	98(a)	275342	55(a)
218409	266(a)	277983	205(a)
219135	96(a)	279112	414(a)
220518	178(a)	279757	163(a)
221992	55(a)	280008	85(a)
221993	265(a), 274(a)	280077	85(a)
226512	266(a)	280335	75(a), 242(a)
228971	177(a)	280747	85(a)
232790	414(a)	280840	18(a)
233196	40(a)	282913	382(b)
233766	376(a)	284066	282(a), 310(a)
235496	120(a)	290463	40(a)
236069	85(a)	291957	414(a)
236138	97(a)	296066	72(a)
237265	18(a)	296303	132(a)
238173	163(a), 173(b)	296366	179(a)
238485	169(a)	296630	337(a)
242152	113(a)	298315	361(a)
245278	172(a)	302855	16(b)
247391	337(a)	302963	411(a)
248390	316(a)	307097	172(a)
248464	316(a)	307404	414(a)
249006	85(a)	313057	361(a)
251225	15(a)	313453	256(a)
251490	61(a)	313466	205(a)
254312	337(a)	313709	126(b), 310(b)

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314935	305(a)
316102	316(a)
316558	18(c)
316886	264(b)
316898	283(a)
317430	169(a)
318089	316(a)
318341	411(a), 414(a)
318430	270(a), 279(a)
318596	267(a), 276(a)
318685	133(a), 260(a)
318728	132(a)
319176	283(a)
319514	242(a)
319573	264(b), 274(b)
320168	181(b)
320308	16(a), 242(a)
320455	74(a)
320478	224(a)
320578	242(a)
320669	242(a)
322979	85(a)
323349	169(a)
323764	15(a), 54(b), 255(a)
324095	347(a), 350(a)
324109	377(a)
324235	332(a)
324666	222(a)
324725	224(a)
324736	224(a)
324853	316(a)
324883	282(b)
325107	266(b), 275(b)
325112	224(a)
325200	241(a)
325231	55(a)
325492	256(a)
325518	260(b)
325523	15(a)
325541	265(b), 279(a)
325636	177(a)
326147	155(a), 162(b), 164(a), 178(a), 179(a)
326443	98(a)

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327221	19(a)
328104	182(a)
328250	155(a), 173(b)
328542	260(a)
328857	96(a)
329496	242(a)
329843	169(a)
329973	321(a)
330028	316(a)
330185	300(a)
330208	256(a)
330388	205(a)
330506	132(a)
330698	132(a)
331849	380(a)
332252	16(a)
332510	98(a)
332704	181(a)
332711	61(a)
332879	194(a)
333085	120(a)
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333525	376(a), 388(b), 410(a)
334214	16(a)
334097	316(a)
335048	283(a)
335052	74(a), 172(a)
335123	181(a), 390(a), 412(a)
335586	61(a)
335738	16(a), 255(a)
336350	16(a), 222(a), 255(a)
336362	321(b)
336607	224(a)
336639	15(a), 120(a)
336675	246(a), 256(a)
336706	42(a)
337089	205(a)
337816	74(a)
337855	125(b)
337961	240(a)
337978	194(b)
338217	316(a)
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TABLE V

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339424	55(a)	<u>ETO</u>	
339548	288(a)	1057	322(a)
340473	224(a)	9204	260(a)
340733	242(a)		
340886	247(a)	<u>CM A</u>	
340945	242(a)	501	179(a)
341028	120(a)		
341216	242(a)		
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Sp 102	361(a)		
Sp 256	361(a)		
Sp 765	266(b), 275(b)		
Sp 1770	308(c), 314(c), 329(a)		
Sp 2132	279(c)		
Sp 2293	270(c), 279(c)		
Sp 2432	332(c), 356(d)		
Sp 2490	356(a)		
Sp 2570	356(d)		
Sp 2572	356(d)		
Sp 2573	356(d)		

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

(1)

JAGK - CM 341018

26 MAY 1950

UNITED STATES)

2D ARMORED DIVISION

v.)

Trial by G.C.M., convened at Camp Hood, Texas, 20, 24, 25 and 26 January 1950. Dismissal, total forfeitures after promulgation, and confinement for five (5) years.

First Lieutenant JOHN W. MELTON (O-1686283), Headquarters 41st Armored Infantry Battalion, 2d Armored Division, Camp Hood, Texas.)

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 charge and specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that First Lieutenant John W. Melton, Headquarters 41st Armored Infantry Battalion, 2d Armored Division, did, at Camp Hood, Texas, between 1 October 1949 and 5 December 1949 feloniously steal about three hundred and fifty-nine dollars (\$359.00) in United States Government currency, the property of the Community Chest Fund of Camp Hood, Texas, entrusted to him as agent of Lieutenant Colonel Edwin A. Nichols, a duly appointed Director of the Community Chest 1950 Fund Drive Committee of Camp Hood, Texas.

Specification 2: In that First Lieutenant John W. Melton, ***, did, at Camp Hood, Texas, between 1 April 1948 and 5 December 1949 feloniously steal about four hundred and forty-six dollars and fifty cents (\$446.50) in United States Government currency, the property of the Headquarters Fund, 41st Armored Infantry Battalion, entrusted to him as custodian of said fund.

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

sentenced to be dismissed the service, 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 for the Prosecution

A Community Chest Fund was established at Camp Hood, Texas, on 8 October 1948, and, by means of an annual Community Chest drive, funds were solicited on behalf of various charitable and welfare organizations operating upon the reservation for the benefit of military and civilian personnel. This fund was a sundry post fund within the meaning of Army Regulations 210-50, dated 9 December 1949, but no formal accounting procedure was prescribed therefor. By an official communication dated 13 October 1949 (R 10, Pros Ex 2), the Commanding General, 2d Armored Division, Camp Hood, Texas, announced the names of the members of the Community Chest Fund Council, Fund Drive Committee, and directors within agencies and units of his command. Lieutenant Colonel Edwin A. Nichols, commanding officer of the 41st Armored Infantry Battalion, was named director and conducted the collection of Community Chest funds in his Battalion. During the 1950 Community Chest Fund drive, accused was the adjutant of the 41st Armored Infantry Battalion and in this capacity he was charged by Lieutenant Colonel Nichols with the responsibility of receiving the contributions from officers and units of the Battalion (R 9-12, 60-61,64). The accused received a total of \$535 in Community Chest contributions (R 13-15,19,23, 27,34,38,42,44,49,51,54,56,71). By letter dated 18 November 1949 from Headquarters 41st Armored Infantry Battalion, Camp Hood, Texas, and addressed to the "Commanding General, 2d Armored Division, Camp Hood, Texas, Attn: Custodian Community Chest Fund (Lt Brendzes, Finance Off)" (Pros Ex 7), accused transmitted the sum of \$535 to the said custodian (R 76). This letter states in pertinent part:

"Transmitted herewith \$535 collected for Community Chest, 41st AIB.

37 Officers - -	\$185.00
EM - - - - -	<u>\$350.00</u>
Total - - - - -	\$535.00

FOR THE COMMANDING OFFICER:

/s/ John W. Melton
/t/ JOHN W. MELTON
1st Lt, Inf
Adjutant."

On or about 18 November 1949, Second Lieutenant Joseph V. Brendza, Acting

Treasurer of the 1950 Fund Drive Committee, received the foregoing letter together with \$176 in cash and the accused's personal check for \$359. The check, dated 18 November 1949, was drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, payable to the Community Chest Fund in the sum of \$359 and was signed "John W. Melton 1st Lt Custodian." This check and a hand receipt for \$535 given by Lieutenant Brenda to the accused on 18 November 1949 were received in evidence without objection as Prosecution Exhibits 6 and 9, respectively (R 68-69). The 41st Armored Infantry Battalion did not have a checking account at the National Bank of Fort Sam Houston. It was duly stipulated that the aforementioned check for \$359 was drawn by the accused against his personal account and that the accused has only one account in the drawee bank (R 70,85).

The total amount collected in the 1950 Community Chest Fund drive was \$18,422.49, which included accused's check for \$359. All collections were deposited to the account of the 1950 Community Chest Fund in The First National Bank of Killeen, Texas, prior to 1 December 1949. About 2 or 3 December 1949, the aforementioned check of \$359 was returned by the National Bank of Fort Sam Houston to The First National Bank of Killeen, Texas, unpaid because of insufficient funds in accused's bank account, and the Killeen bank deducted that amount from the account of the Community Chest Fund and returned the check to First Lieutenant Max E. Sosna, custodian of the Community Chest Fund (R 75, 79-80).

Mr. W. D. Bailey, Assistant Vice President of the National Bank of Fort Sam Houston of San Antonio, Texas, a custodian of the records of that bank, stated that accused had an account with the National Bank of Fort Sam Houston from 15 March 1949 until the present time and that the bank had returned the aforementioned check of \$359 unpaid because of insufficient funds in accused's account. The bank ledger sheet listing the status of accused's bank balance, which was admitted in evidence without objection, showed accused's bank balance from 18 November to 6 December 1949, as follows:

"Date ***	Balance ***
Nov 18 '49	\$35.83
Nov 19 '49	35.33
Nov 21 '49	34.33
Nov 22 '49	4.33
Nov 23 '49	1.83
Nov 25 '49	.83
Nov 28 '49	.33
Dec 6 '49	50.33
***	****"

(4)

From 19 October 1949 to 16 January 1950, accused's account fluctuated from 33 cents to \$53.33 (R 84, Pros Ex 15).

On 5 December 1950, the aforementioned check of \$359 was forwarded to Lieutenant Colonel Nichols, who received permission from Division Headquarters to investigate the matter (R 62). Later that day, Lieutenant Colonel Nichols called the accused to his office and, in the presence of Major Robert B. Spielman, his executive officer, warned the accused of his rights under the 24th Article of War (R 62). Lieutenant Colonel Nichol's testimony as to what then occurred is as follows:

**** I produced this check and showed Lieutenant Melton the check and informed [him] at the time this was a check drawn by him against his account in the Fort Sam Houston Bank in the amount of \$359., and that it had been returned for insufficient funds. Lieutenant Melton admitted the check was his and stated it had been drawn to cover monies that had been turned in as Community Chest Fund collections in the battalion. I asked questions concerning the status of a bank account in Fort Sam Houston, or the reason why 'personal funds' would be involved in the collection or payment of public funds, and the witness under his rights under the 24th Article of War declined to answer questions connected with that. I also asked questions concerning the accounts at any other banks or any other accounting that might pertain to public funds, and the witness declined to answer questions connected with that. Lieutenant Melton then stated that the \$359 check, this check here, covered only a portion of the 41st A.I.B. Community Chest contribution. He stated that \$176 in cash had been turned in at the same time as this check had been turned in. He stated he had a receipt to that effect and that that receipt was available and he offered to produce. I asked him to go and get the receipt. He was gone for perhaps a minute, long enough I assume to go to his desk or the safe, and bring back the receipt. I had that receipt in my possession and turned it over to the TJA. The receipt was for a total of \$535.

*

*

*

**** I asked Lieutenant Melton, I said, 'Well, this \$535, that was collected in cash, wasn't it?' and he stated it was, and he admitted that on the turn-in he turned in \$176 in cash and \$359 in check, a personal check, I recall emphasizing. I asked Lieutenant Melton if he was prepared at that time to reimburse the Community Chest Fund for the check, for this check I had in my hand, and he stated no, not at this time. I restated my question, said 'Can you make the check good by money you have on your person?' and he said no. I asked, 'From money you have in your quarters?' and he indicated that he couldn't.

"Q. Could or could not?

"A. Could not. I asked him, 'Can you make the check good from any resources at your disposal at this time?' He stated, 'No.' I asked 'Have you had any money stolen from you recently?' He declined to answer that question, but stated three officers had the combination to the battalion safe. I asked who the officers were and he stated Lieutenant J. B. Russell, and Captain Deerinwater, meaning the other two, including himself, they were the other two. I asked if he had recently reported any money stolen to me or anyone else. He stated, 'No.' That is the portion of the testimony or discussion that occurred while Lieutenant Melten was under the provisions of the 24th Article of War.

*

*

*

"Q. Do I understand the gist of your testimony about 5 December to be that the accused at that time admitted to you in substance either in words or by bringing into the discussion Exhibits 8 and 9, he had collected \$535 for the Community Chest Fund in the 41st Infantry?

"A. There was no question. He stated the \$535 collected that is indicated by the receipts had been collected in the form of cash.

"Q. He told you that?

"A. That is true.

"Q. And he further indicated he had turned in \$176 in cash and the remainder, \$359, was represented by this check you questioned him about?

"A. That is correct, that is why he went and got the receipt, to show it was \$359 of the \$535." (R 63-64, 68)

On 9 December 1949, Lieutenant Colonel Nichols, after again warning accused of his rights under Article of War 24, asked accused whether he had "made good" the \$359 check, to which accused replied that "he had not, that he still did not have the funds, but continued to expect to receive funds shortly" (R 72).

Relative to the fact that other persons had access to the safe in which accused is alleged to have kept the Community Chest Fund collections, Lieutenant Colonel Nichols testified, on cross-examination and on examination by members of the court, as follows:

"Q. Can you recall your memory to the 8th or 9th of November, at which time, I believe, the 41st was in San Antonio, did you observe Captain Deerinwater in the company

of Lieutenant Hartlett counting cash in battalion headquarters?

"A. *** I recall coming out of my office and seeing someone such as Captain Deerinwater, and to the best of my knowledge he had just pulled the drawer open. I asked what he was doing. He said he wanted a count of this money; the Community Chest Fund finance officer had to report to the Division Commander on how much money the battalions had collected. The collection wasn't over. They just wanted to know how it was going, so Captain Deerinwater pulled the cash box open. I told him to shut it, and said 'Don't pull that out. That belongs to Lieutenant Melton.' I told Lieutenant Hartlett he would just have to give a guess or tell them we don't know.

"Q. Obviously, Captain Deerinwater either could get into the cash box or thought he could, did he not?

"A. He wasn't counting the cash. As I recall, my first reaction was I didn't want anyone to touch anything in this box. I was surprised it was unlocked. I didn't want anyone to touch any money in that box.

* * *

"Q. Did I understand you to say the cash box was unlocked?

"A. Apparently it was because I saw Captain Deerinwater in the act of pulling the box open when I told him to close it and shut the safe because the money was in the custody of Lieutenant Melton and I didn't want anyone to touch it, even if it meant not giving Division an answer.

"Q. Did your S1 and S-2 both use the same safe?

"A. That is correct.

"Q. Each had a key?

"A. Each had the combination. The key of this money box is in the custody of the adjutant.

"Q. Does he leave the key in the safe or on his person?

"A. It is his box and he is responsible for the funds. I doubt whether he would leave it in the safe. I imagine he would carry it in his personal possession to protect the money in the box." (R 65-66).

Captain Deerinwater corroborated the testimony of Lieutenant Colonel Nichols on this point (R 160-162).

Lieutenant Colonel Nichols further stated that prior to this occurrence, he had no reason to doubt accused's integrity (R 67).

Specification 2 of the Charge

Lieutenant Colonel Nichols was commanding officer of the 41st Armored Infantry Battalion from May 1948 until the present time. Accused was adjutant of the 41st Armored Infantry Battalion and custodian of its Headquarters Fund from April 1948 until 5 December 1949, except for a period from 11 August 1948 to 27 September 1948 (R 61,117,123). From May to September 1948 accused prepared the records of the Headquarters Fund which Lieutenant Colonel Nichols personally audited and the Division Inspector General approved. From October 1948 to October 1949, Lieutenant Colonel Nichols was busy with other matters and did not see nor concern himself with the Headquarters Fund records. Sometime in October 1949, he informed accused that he would again audit the Headquarters Fund and requested accused to turn over the records to him. This the accused failed to do. Lieutenant Colonel Nichols again requested the records on 1 November 1949 and 1 December 1949, but on each occasion accused stated the books were not yet ready for audit and requested more time (R 266). At noon, 5 December 1949, the records not having been turned in, Lieutenant Colonel Nichols relieved accused as custodian of the Headquarters Fund and ordered him to turn over all money, records and papers pertaining thereto to Major Robert B. Spielman, executive officer of the 41st Armored Infantry Battalion (R 120). Accused turned over to Major Spielman the Fund books, bank statements and a miscellaneous collection of papers, but other papers pertaining to the Headquarters Fund were found in accused's desk and the Battalion Headquarters safe. An examination of the papers revealed that accused had done nothing to maintain the Headquarters Fund records since 30 September 1948. From these papers Lieutenant Colonel Nichols prepared monthly voucher files and a council book for the period of October 1948 to 5 December 1949 (R 118,122,126,134,150-151,266-267; Pros Exs 21A to U inclusive). As a result of this action it was discovered that the accused failed to account for certain Headquarters Fund monies totaling \$446.50, consisting of:

(1) The proceeds of a check in the sum of \$100, dated 20 May 1949, payable to "Petty Cash," drawn by accused as custodian of the Headquarters Fund, 41st Armored Infantry Battalion, against its account in The First National Bank of Killeen, Texas, "For Petty Cash Field PX Supplies." The check (Pros Ex 3) was indorsed on the reverse side thereof by "Augustus B. Maxwell, 1st Lt. Inf., 41st AIB," and was admitted in evidence without objection. Lieutenant Maxwell testified that on or about 20 May 1949, he cashed the check for accused, that he gave the money to the accused, and that the money was to be used "to start a PX in the field." The money was never used for this purpose because merchandise purchased for resale at the field post exchange was obtained on credit. There was no record that the \$100 thus obtained by accused was ever accounted for or redeposited to the Headquarters Fund account (R 86-88, 122, 126-127, 135-136, 141-142; Pros Ex 3).

(2) The proceeds of a check in the sum of \$85, dated 10 June 1949, payable to "Petty Cash," drawn by the accused as custodian of the Headquarters Fund, 41st Armored Infantry Battalion, against its account in The First National Bank of Killeen, Texas, "For Rental of Typewriters." This check (Pros Ex 4) was indorsed on the reverse side thereof by "Sgt Francisco Hernandez Hqs 41st AIBn Cp Hood Tex" and was admitted in evidence without objection. Sergeant Francisco Hernandez stated that, on or about 10 June 1949, he cashed the check for accused at his request and gave the money to the accused. Lieutenant Colonel Nichols stated that he never authorized the issuance of this check to pay for rental of typewriters; that all typewriters rented by the Battalion were obtained from the Waco Typewriter Company which received payment therefor monthly in advance; and that, if the proceeds of this check had been used to pay for rental of typewriters for June 1949 it would have been a duplicate payment as the rental of typewriters by the Battalion for that month was paid by check dated 26 July 1949 in the sum of \$80 issued by accused from the Headquarters Fund to the order of the Waco Typewriter Company (R 95, 122,127-128,137-138; Pros Exs 4,21, p 6).

(3) The proceeds of a check in the sum of \$80, dated 27 June 1949, payable to "Petty Cash," drawn by the accused as custodian of the Headquarters Fund, 41st Armored Infantry Battalion against an account in The First National Bank of Killeen, Texas, "For A&R equipment." This check (Pros Ex 5) was indorsed on the reverse side thereof by "Sgt F. Hernandez R 17-30000761 H&S Co Camp Hood Tex" and was admitted in evidence without objection. Sergeant Hernandez stated that on or about 27 June 1949, at accused's request, he cashed the check, and gave the money to the accused. Lieutenant Colonel Nichols never authorized the issuance of this check and the money obtained therefrom was not used for athletic or recreational equipment or otherwise accounted for (R 95-96,122,128, 139-140,142; Pros Ex 5).

(4) On 7 October 1949, a profit of \$95 which resulted from the operation of the field post exchange mentioned in (1) above, was turned over to accused by First Lieutenant Augustus B. Maxwell, who reported the matter to Lieutenant Colonel Nichols (R 88-89). Notwithstanding that Lieutenant Colonel Nichols directed that the \$95 would be considered as Headquarters Fund money, there was no record that the \$95 thus turned over to accused was ever deposited in Headquarters Fund bank account or otherwise accounted for (R 88-89,129,142,143-144).

(5) In the spring of 1949, \$160 worth of 41st Infantry Battalion decalcomanias were purchased on credit from the Superior Decal Company, Fort Worth, Texas, and distributed to various units for resale (R 130,140). Lieutenant Colonel Nichols ordered accused to pay for them monthly as they were sold. Partial payments therefor

of \$86.50 were turned in to accused as Battalion adjutant, on dates, from units, and in amounts, as follows:

<u>Date</u>	<u>From</u>	<u>Amount</u>	
30 Sep 1949	Company "B"	\$20.00	(R 111-112)
30 Sep 1949	Company "D"	\$20.00	(R 103-104, Pros Ex 11)
4 Oct 1949	Hqs and Service Company	\$10.00	(R 106-107)
9 Nov 1949	Company "A"	\$20.00	(R 113)
Nov 1949	Company "C"	\$16.50	(R 99-101, Pros Ex 10).

The \$86.50 thus collected by accused was never deposited to the Headquarters Fund bank account or otherwise accounted for and the firm was not paid as ordered. In October, 1949, the Superior Decal Company began pressing for payment, whereupon Lieutenant Colonel Nichols ordered accused to pay the amount due from funds in the Headquarters Fund. Accused thereupon issued a check against the Headquarters Fund account, dated 10 October 1949, to the Superior Decal Company, in the sum of \$160, drawn on The First National Bank of Killeen, Texas. This check was paid by the bank and overdrew the account of the Headquarters Fund by \$38.79. Accused thereupon made a cash deposit of \$50 on 1 November 1949 to the Headquarters Fund account to cover the deficit (R 130-132; Pros Ex 21-S-2, Pros Ex 21-S-3).

5. Evidence for the Defense

After being furnished a brief explanation relative to his rights as a witness, accused elected to testify under oath. Accused stated that he entered the Army as an enlisted man in 1941 and was commissioned a second lieutenant in September 1943; that he was a moderate drinker; that he was not badly in need of money as his total indebtedness was about \$300; and that he had not been off the post except on official business for about a year (R 177,178).

With reference to Specification 1 of the Charge, accused stated he was adjutant of the 41st Armored Infantry Battalion; that he received collections from the Community Chest Fund for the Battalion, although he had received no order to do so; that he kept all contributions thereto in an envelope on which the amounts collected and the organizations collected from were noted on the outside of the envelope which he kept in the Battalion safe; that on about 8 November 1949, when he went to San Antonio, Texas, for a few days, the envelope contained \$535; that Captain Russell and Captain Deerinwater, two officers of the Battalion Headquarters staff, also had the combination to the Battalion safe;

that on his return he discovered that \$359 of the \$535 was missing; that he did not report the loss to anyone because, as he stated, "I thought we would eventually get the thing straightened out," but he was unable to state how he expected this to be accomplished; that on 18 November 1949, when he turned in the Community Chest Fund, he made up the shortage with his personal check for \$359, although he knew he did not have sufficient funds in the bank to pay it and knew the bank would not honor his check when presented for payment; that he could have obtained funds to redeem the check but did not do so until his commanding officer confronted him with the check for \$359 which had been returned unpaid; that on about 8 or 9 December 1949 he obtained \$325 from relatives to redeem the check in part, but did not deposit it in either of his bank accounts in The National Bank of Killeen, Texas; and that on 9 December 1949 he told Lieutenant Colonel Nichols, his commanding officer, that he could not repay the shortage (R 176,178-179,181-182,194-195,197,206).

With reference to Specification 2 of the Charge, accused stated that he was custodian of the Headquarters Fund of the 41st Armored Infantry Battalion; that its cash was deposited in The First National Bank of Killeen, Texas; that he had not been requested to maintain the records for audit for a period of thirteen months prior to December 1949; that although Lieutenant Colonel Nichols ordered accused to have his books ready for audit about mid-November 1949, he did not begin working on the records until about 1 December 1949; that he cashed certain checks dated 20 May 1949, 10 June 1949 and 27 June 1949, in the amounts of \$100, \$85 and \$80, respectively, payable to petty cash in the Headquarters Fund account, and that his signatures thereon are genuine; that he had no reason to cash these checks; that he did not account for the funds as provided by current regulations; that he does not know what happened to the money obtained therefrom; that he kept cash belonging to Headquarters Fund in the Battalion Headquarters safe, and used it to purchase items such as furniture polish, floor wax, paint and baseballs for Battalion use for which he did not always obtain receipts; that he paid \$30 for furniture polish and floor wax, \$5 for paint, and \$80 for baseballs, out of the petty cash, but made no vouchers or memoranda of the transactions; that the \$80 paid for baseballs had been paid to a Lieutenant Bogardus, Battalion baseball coach, who has been discharged from the Army; that he deposited \$50 to the Headquarters Fund bank account on 1 November 1949 from petty cash; that it was common practice to retain large amounts of cash, unaccounted for, in the Battalion Headquarters safe; that on 7 or 8 October 1949 he received \$95 from Lieutenant Maxwell as a profit realized from the operation of a field post exchange of the Battalion, but received no order to make it part of the Headquarters Fund; that he received \$70 or \$80 from the sale of decalcomanias; that he understood that as custodian of Headquarters Fund he acted as trustee for the money therein and was held to the highest degree of care for its

safekeeping; that he knew how to maintain the records of the Headquarters Fund but did not do so and had no excuse for not doing so; that he did not see the petty cash fund after 8 November 1949 when he went to San Antonio, Texas, but did not report its loss to anyone; that Captain Russell and Captain Deerinwater, both of whom had the combination to the safe, might have taken the money, but they were on a competitive tour of duty for a regular Army commission, and he did not want to accuse them without proof; that after accused was relieved as adjutant he was not present when the contents of the safe were removed; that during October and November 1949 he had written 14 checks on his personal bank account in the total amount of \$178.06, all of which were returned unpaid because of insufficient funds; that he played the slot machines at the Officers Club and usually lost; and that he did not steal, misapply or misappropriate any money whatsoever from any funds in his possession (R 179-184, 191, 194, 197, 202-204, 216-217, 225-226, 231, 232, 246, 248, 257; Pros Exs 3, 4, 5).

Captain Deerinwater, as a witness for the defense, stated that he had the combination to the Battalion Headquarters safe, and that on 9 November 1949, when asked about the amount collected for the Community Chest Fund, he opened the Battalion safe but did not remove the envelope containing the Community Chest Fund money because Lieutenant Colonel Nichols instructed him not to do so (R 162).

Lieutenant Colonel Nichols, as a witness for the defense, stated that when he determined that there was a shortage in accused's accounts, he did not ask for an explanation but appointed a board to investigate the matter on the recommendation of The Inspector General (R 168).

Three officers stated that they had known accused for from six months to 1-1/2 years, that he led a normal life, was a moderate drinker, an average spender, and that prior to this alleged offense accused's character was of the "very best" (R 166, 169, 170-172, 175).

4. Discussion

Larceny is defined in the Manual for Courts-Martial, 1949, paragraph 180g, as follows:

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

The elements of proof necessary to sustain a conviction of larceny

under Article of War 93 are as follows:

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

Specification 1 of the Charge

Accused was charged and found guilty of feloniously stealing \$359 between 1 October 1948 and 5 December 1949, the property of the Community Chest Fund of Camp Hood, Texas, entrusted to him as agent of Lieutenant Colonel Edwin A. Nichols, a director of the Community Chest 1950 Fund Drive Committee of Camp Hood, Texas. It was proven that during the period alleged the accused, as adjutant of the 41st Airborne Infantry Battalion at Camp Hood, Texas, received a total of \$535 in contributions to the 1950 Community Chest Fund sponsored by the 2d Armored Division at Camp Hood, pursuant to instructions of his commanding officer, Lieutenant Colonel Edwin A. Nichols, a duly appointed director of the Community Chest 1950 Fund Drive Committee of Camp Hood, Texas. On 18 November 1949 accused transmitted the sum of \$176 in cash and \$359 by his personal check to the custodian of the Community Chest Fund, which represented Chest Fund contributions collected by him. When the accused's check for \$359 was presented for payment to the drawee bank it was dishonored because the accused's account in the drawee bank was insufficient to meet payment thereon, and returned to the custodian of the Community Chest Fund. As a result, a shortage of \$359 was created in that fund. The accused failed to make restitution for the dishonored check although he promised to do so.

In his testimony the accused admitted the foregoing facts but stated that after he collected the \$535 in contributions, he placed the money in an envelope and kept it in the Battalion Headquarters safe; that on 9 November 1949, upon his return from a trip to San Antonio, Texas, he discovered that \$359 of the \$535 contained in the envelope was missing; and that he never reported the theft of this money to his commanding officer or to anyone else but issued his personal check for \$359 to the custodian of the Community Chest Fund in place of the stolen money, knowing that he did not have sufficient funds in the bank for its payment. He further stated that he had no special reason for not reporting the missing money to his commanding officer but because two other officers had the combination to the safe he thought the matter would be straightened out eventually. Between the time accused issued his check to cover the missing funds and 6 December 1949 his account in the drawee bank never exceeded \$50.33.

The accused's contention that \$359 was missing from the Battalion Headquarters safe where he kept the Community Chest Fund when he returned from a trip to San Antonio, Texas, is unconvincing and unworthy of belief under the circumstances. His failure to report the purported loss to his commanding officer or to anyone else is clearly inconsistent with the normal action of an innocent person and a prudent officer. Furthermore, the action of accused in issuing a personal check for the deficiency of funds collected, knowing that he did not have sufficient funds in the drawee bank for its payment and admittedly not having any funds with which to make restitution therefor when called upon to do so, confirms rather than dispels guilt pertaining to his shortage of trust property. In view of the incriminating nature of the evidence, the court was warranted in finding that the accused appropriated the funds for personal use, thus constituting larceny as alleged in Specification 1 of the Charge.

Specification 2 of the Charge

Accused was charged with feloniously stealing about \$446.50 between 1 April 1948 and 5 December 1949, the property of Headquarters Fund, 41st Armored Infantry Battalion, entrusted to him as custodian of said fund. It was proved that accused was custodian of Headquarters Fund, 41st Armored Infantry Battalion, from April 1948 to 5 December 1949 except for the period of 11 August to 27 September 1948. From 1 October 1948 to 5 December 1949, he did nothing to maintain the records of said fund as required by existing regulations although he was experienced in keeping the records of such funds. After making several futile requests for the Headquarters Funds records, Lieutenant Colonel Nichols, accused's commanding officer, relieved accused as custodian of the fund on 5 December 1949. All papers in accused's possession, together with other papers pertaining to the Fund found in accused's office desk and the Battalion Headquarters safe, revealed that accused had kept no council book or monthly voucher files from 1 October 1948 to 5 December 1949. A council book and monthly voucher files were reconstructed from the accumulated papers and revealed a total shortage of \$446.50 resulting from five transactions, the funds of which were shown to have been in the possession of accused and not accounted for. Three of these transactions involved sums of \$100, \$85 and \$80 obtained by accused by cashing three checks, drawn on the Headquarters Fund bank account, payable to "Petty Cash," dated 20 May 1949, 10 June 1949, and 27 June 1949, respectively. The cash realized from the three checks was received by accused and was not deposited to the Fund bank account or otherwise accounted for. The fourth transaction, an amount of \$95, received by accused on 7 October 1949 from First Lieutenant Augustus B. Maxwell as a profit incidentally realized in connection with the operation of a post exchange by the 41st Armored Infantry Battalion while in the field, was not deposited to the Headquarters Fund bank account or otherwise accounted for. The funds from one of the aforementioned three checks, in the sum of \$100, payable to "Petty Cash," was intended to finance this post exchange project, but was not used because Lieutenant Maxwell obtained credit for

the merchandise purchased for the post exchange. The fifth transaction, an amount of \$86.50, was turned over to the accused as a partial payment for \$160 worth of decalcomanias sold to various members of the Battalion. The bill for \$160 was paid in full by accused out of the Headquarters Fund of the Battalion, but the \$86.50 which accused received was not deposited to the Fund bank account or otherwise accounted for.

The proof shows that the \$446.50 alleged to have been embezzled came into the possession of the accused on different occasions in separate amounts of \$100, \$85, \$80, \$95 and \$86.50. The question is whether such proof justifies a finding of guilty of the specification as drawn. The evidence clearly establishes the fact that accused embezzled the total sum of \$446.50 between the terminal dates alleged in the specification. Winthrop's Military Law and Precedents, 2d Edition, Vols. I and II, at page 139, states:

"In some cases the offense committed is of a continuing character, extending over a considerable period of time or exhibiting a general habit or course of conduct. In such cases where distinct acts cannot readily be separated and attributed to particular dates, it is allowable to charge the misconduct in form somewhat as follows: 'This during (or in or between) the months of _____, (specifying the particular months or other periods).'"

The defense made no objection to the specification as drawn. The accused could not have been misled and his substantial rights were not prejudiced. In fact, accused benefited thereby, because, had he been tried on five specifications of larceny in which each amount listed above was charged separately, upon conviction thereof, the maximum sentence of confinement therefor would have been five years for each specification, as each amount is of a value of more than \$50.00. It is the opinion of the Board of Review that no prejudice to the substantial rights of accused resulted from the form of Specification 2 of the Charge as drawn.

It is further noted that accused claimed that he made certain Battalion expenditures from petty cash of the Headquarters Fund amounting to \$165.00, of the \$446.50 alleged to have been feloniously stolen in Specification 2 of the Charge, in the amounts of \$50 which accused deposited to the account of the Headquarters Fund to cover an overdraft on its bank account, \$30 for furniture polish, \$5 for paint, and \$80 for baseballs for the Battalion baseball team, which expenditures, if made, leave a balance of \$281.50 that the accused did not account for. Accused acknowledged that he made no vouchers or memoranda to account for these expenditures. By its finding of guilty of Specification 2 of the Charge, the court apparently

gave no credence to accused's testimony. The court upon credible testimony, found that \$446.50 had been unlawfully appropriated as charged and there is no reasonable ground to disturb its finding as to Specification 2 of the Charge.

The accused contends, through his defense counsel, that the \$95 received as profits from the Post Exchange and the \$86.50 received from the sale of the decalcomanias were not properly a part of the Headquarters Fund. The evidence shows that Lieutenant Colonel Nichols directed accused to make the post exchange profit part of the Headquarters Fund. In addition accused knew or should have known that the post exchange profit was a part of the Headquarters Fund because he had previously arranged to finance it from the Headquarters Fund; the profit made was incidental to the operation of the Battalion post exchange in the field; and had said post exchange operated at a loss the Headquarters Fund would have had to pay the loss. The accused should have put the proceeds of the sale of decalcomanias into the Headquarters Fund because, by paying \$160 for the decalcomanias from the Headquarters Fund account, accused, in effect, established a constructive trust for the benefit of the Headquarters Fund of the money derived from the sale of the decalcomanias, at least to the extent of \$160. The evidence thus establishes that the Headquarters Fund had at least a special ownership in and right of possession to the money in question. It was therefore proper to show that the accused had failed to account for these funds as a part of the Headquarters funds entrusted to him. (CM 325523, Hanni, 74 BR 285,303; CM 202366, Fox, 6 BR 129,141).

Although the offense of larceny set out in Specification 2, of the Charge alleges the commission of the offense between 1 April 1948 and 5 December 1949, the proof shows that the offense occurred between 20 May 1949 and 5 December 1949, thus bringing the commission of the offense entirely within the provisions of the Manual for Courts-Martial, 1949, the effective date of which is 1 February 1949. However, even if the offense had been committed, in part, prior to that time, the charging of that part of the offense committed prior to 1 February 1949 substantially in the manner prescribed by the Manual for Courts-Martial, 1949, is not ex post facto (CM 336639, Cole, 3 BR-JC 159,180).

The evidence was uncontradicted that accused was custodian of the amounts stated in Specifications 1 and 2 of the Charge. There is a well established legal presumption that one who has assumed the stewardship of another's property has unlawfully appropriated such property by conversion through breach of trust if he does not or cannot account for and deliver it at the time an accounting or delivery is required of him. A person in charge of funds to whom they have been entrusted, who fails to respond with or account for them when called upon by proper authority, cannot complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting as in the instant case (CM 323764, Mangum, 72 BR 397,403; CM 251225, Johnston, 33 BR 177,181).

The burden of going forward with 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 to be resolved by the court (CM 335738, Carpenter, 2 ER-JC 245, 260; CM 334214, Brown, 81 BR 389, 393; CM 332252, Barrett, 81 BR 63,68; CM 320308, Harnack, 69 BR 323, 329).

As stated in CM 302855, Rodrigues, 59 BR 109,117, citing 1912-40 Digest of Opinions, JAG, section 451(17):

"An adult/^{man} who receives large sums of money from others for which he is responsible and accountable, who wholly fails either to account for or to turn them over when his stewardship terminates, cannot complain if the natural presumption that he has spent them outweighs any explanation he may give, however, plausible, uncorroborated by other evidence."

Whether accused committed the offenses as alleged is resolved in the proof that both funds were in his possession, that he could render no legal accounting for the Headquarters funds or produce a part of the Community Chest funds when called upon to do so, that he did not report the purported theft of the Community Chest Fund at any time; that he claimed its disappearance only after he was confronted with the alleged shortages; and that his failure to keep any records of the Headquarters Fund of which he was custodian for the period of over 13 months showed accused's irresponsibility in caring for the funds with which he was entrusted, constituting, therefore, a breach of fiduciary obligations, and a violation of Article of War 93 (CM 336350, Hoover, 3 BR-JC 39,47).

5. Miscellaneous Matters

a. The trial occurred on 20, 24, 25 and 26 January 1950. On 25 January the court met at 0900 and adjourned at 0135 of the following morning (R 73,238). During the day the court recessed 12 times including time for lunch and dinner (R 79,116,126,136,149,158,164,173,174,194,226, 237) and adjourned at 0135, 26 January (R 238). Accused took the stand shortly after 2030, and after being questioned in direct and cross-examination by defense counsel and trial judge advocate, was examined by the court from 2230 to 0030, and from 0130 to 0135, when the court adjourned for the night (R 194-238). Just prior to adjournment, when it appeared that accused was tiring, a court member moved to adjourn, saying:

"COURT MEMBER: As a member of this court I would like to make a motion that we adjourn. I feel my responsibility as a member of this court, and I feel the accused, the witness now on the stand, is getting mentally weary and hazy which is

reflected in his answers to some of the questions. He has been on the stand now for a period of three hours, which I think, is a pretty long time. In all fairness to the accused, and as a fair and honest court, I feel the accused should have time to think things out. I believe we should adjourn tonight and as a member of this court I ask the President of the court to make a decision on my motion." (R 238)

Immediately thereafter the court adjourned (R 238). The court reconvened at 0900, 26 January 1950, at which time defense counsel moved to strike all testimony of accused in answer to questions by the court on the previous evening, which motion was denied (R 239-240).

The motion made by the defense counsel as set forth above was the first indication that the defense objected to the length of the proceedings and its effect upon the accused. During the accused's examination by the court, the defense counsel made two objections to questions by the court and in both instances the objections were sustained (R 211,222). During the trial, defense counsel made no request for a recess or continuance for any reason.

A careful examination of the testimony of accused during the examination of the court indicates that accused did not appear to be under any unusual mental strain at that time. His answers were carefully worded and indicated that he was keenly aware of the meaning and effect of the interrogation. In addition, the testimony was in general corroborative of testimony previously given by accused on direct and cross-examination.

On the other hand, there is no doubt that the session of 25 January 1950 was more than ordinarily lengthy, even though numerous recesses were taken. Accused remained on the witness stand for four hours and 15 minutes at the end of the long court session, and was examined by the court for approximately two hours and 50 minutes of that time. It was the duty of the president of the court to direct the proper conduct of the proceedings, to take proper steps to expedite the trial, to announce the closing and opening of each session of the court, and to conduct the proceedings in an orderly manner (MCM, 1949, par 39). There is no evidence of an abuse of discretion in this regard.

Article of War 37 states as follows:

"ART. 37. Irregularities - Effect of. - The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the

entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: Provided, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles: ***" (MCM, 1949, p 283)

In view of the foregoing, it is within the authority of the Board of Review to consider whether the effect of the lengthy session of court upon the entire record injuriously affected the substantial rights of the accused.

In the case of CM 316558, Summers, 65 BR 341, the evidence presented established the guilt of accused as to all charges and specifications. Numerous errors were committed during the trial by the President, who was also the law member. The Board of Review held, at page 356, as follows:

"In the light of all the evidence introduced in this case it would be inconceivable that the inexcusable and irresponsible remarks made by the president and law member could affect the findings of the court. Since the evidence of guilt of the offenses alleged seems to us to be compelling, the improper conduct of the President and law member did not prejudice the substantial rights of the accused."

In the instant case, when the accused voluntarily offered himself as a witness he was subject to be questioned at length by members of the court and by the law member. The proof is compelling that accused was guilty of all specifications and the charge. In the opinion of the Board, the action of the court in examining the accused under the circumstances as hereinabove stated did not constitute prejudicial error to the substantial rights of the accused.

b. Although there was evidence that accused was in financial difficulties due to his inability to pay bills and to satisfy his urge for playing slot machines, there was no direct proof showing that accused personally benefited from the wrongful conversion of the funds entrusted to him. However, whether an unfaithful agent personally benefited from his wrongful conversion of the funds entrusted to him is of no importance (CM 280840, Fischer, 53 BR 361,378; CM 237265, Fowler, 23 BR 341,349).

c. Accused suggested a possible defense to the alleged embezzlement of the funds by referring to the fact that two officers other than himself had access to the safe where the funds were kept. However, accused admitted he had no proof that either officer had taken any money from the funds and there is no testimony to support such a contention. Con-

sequently, further consideration of this defense is not deemed warranted.

d. During the trial of the case, the prosecution called as witnesses Captain Clinton Thomson and Captain Harold E. Chapman, both of whom had acted as accused's defense counsel at his pretrial investigation of this case, but who did not participate as his defense counsel at the trial. The defense made no objection thereto. Inasmuch as their testimony related to events which occurred prior to their acting as defense counsel and their knowledge of the events to which they testified was not based upon information received by them in their capacity as such, no error was committed by the admission of their testimony into the record of trial (CM 327221, McGuire, 76 BR 59,65).

6. At a hearing, held 22 May 1950 before the Board of Review, Mr. G. E. Taylor, Attorney at Law, 910 Seventeenth Street, N.W., Washington, D.C., presented a written Appeal and verbal argument, which has been given careful consideration of the matters presented.

7. Department of the Army records show that the accused is 36 years of age, is married, and has two children. He completed 2-1/2 years of high school in 1933, and was employed from 1933 to 1941 as a salesman and assistant manager of a gasoline service station. He enlisted in the Regular Army as a private on 13 December 1941, was commissioned a second lieutenant on 1 September 1944, and was promoted to first lieutenant on 27 January 1945. He was relieved from active duty on 8 November 1945 and recalled to active duty as a first lieutenant on 18 July 1946. He has been awarded the Distinguished Service Cross, the Purple Heart, the Combat Infantryman Badge, the Presidential Unit Citation, the Philippine Liberation, American Theater and Asiatic-Pacific Theater ribbons, and participated in battles at Paupan, Leyte, Luzon, Sidor and Aitape. His award of the Distinguished Service Cross, as recited in General Orders No. 99, Headquarters United States Army Forces in the Far East, dated 27 September 1944, is as follows:

"II. DISTINGUISHED-SERVICE CROSS. By direction of the President, under the provisions of the act of Congress approved 9 July 1918 (Bulletin 43, WD, 1918), the Distinguished-Service Cross is awarded by the Commanding General, United States Army Forces in the Far East, to the following named officer and enlisted men:

"Technical Sergeant JOHN W. MELTON, (14058195), (then Staff Sergeant), Infantry, United States Army. For extraordinary heroism in action near Yakumul, New Guinea, on 7 July 1944. When his platoon was pinned down by heavy enemy mortar, machine gun and rifle fire, and the platoon leader temporarily blinded by an enemy mortar shell, Technical Sergeant Melton immediately assumed command. Despite enemy cross fire, and under direct observation of the enemy, he moved from man to man, issuing orders

and giving encouragement. When he was informed that the platoon had suffered casualties in one sector, he advanced under heavy enemy fire and gave orders for withdrawal and the formation of a new perimeter defense. While the balance of the patrol withdrew, he remained to furnish covering fire, and was the last man to enter the newly formed perimeter, where he continued in command until reinforcements arrived. The courageous leadership and personal daring demonstrated by Technical Sergeant Melton were an inspiration to his comrades."

From 1 September 1944 to 30 June 1945 and from 1 January 1947 to 30 June 1947 his efficiency reports show ratings of three of "Superior" and one of "Excellent." From 1 July 1947 to 31 January 1950 his efficiency reports show ratings of 062, 105, 101, 130, 131 and 069.

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 and to warrant confirmation thereof. Dismissal is authorized upon a conviction of a violation of Article of War 93.

Carlos E. McGehee, J.A.G.C.
Samuel J. Love, J.A.G.C.
Joseph T. Busch, J.A.G.C.

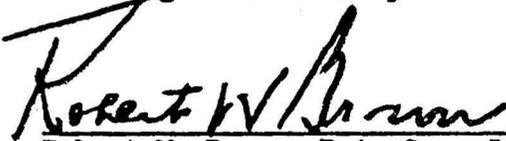
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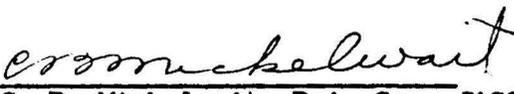
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

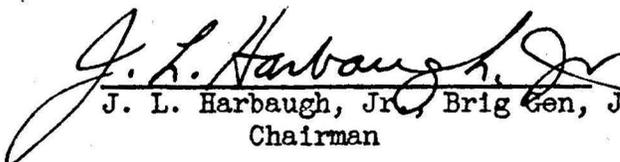
THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant John W. Melton, O-1686283, Headquarters 41st Armored Infantry Battalion, 2d Armored Division, Camp Hood, Texas, 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

28 August 1950

I concur in the foregoing action.

(GCMO 58, Sept 6, 1950).


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

30 August, 1950

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

JAGH CM 341020

APR 17 1950

U N I T E D S T A T E S)
)
 v.)
)
 Major CHET D. HIRSCH (O-309265),)
 Ordnance Department, Headquarters)
 Fifth Army, Chicago, Illinois.)

FIFTH ARMY

Trial by G.C.M., convened at
Springfield, Illinois, 23,24
February 1950. Dismissal.

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 Charges and Specifications:

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

Specification 1: In that Major Chet D. Hirsch, Ordnance Department, Lincoln Ordnance Depot, Department of the Army, did, at the Lincoln Ordnance Plant, Springfield, Illinois, on or about 15 August 1948, knowingly and willfully apply to his own use and benefit, about 1500 square feet of plywood of a value in excess of \$50.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Major Chet D. Hirsch, Ordnance Department, Lincoln Ordnance Depot, Department of the Army, did, at or in the vicinity of Springfield, Illinois, on or about 27 August 1948, knowingly and willfully apply to his own use and benefit one 1-1/2 ton truck, of a value in excess of \$50.00, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Major Chet D. Hirsch, Ordnance Department, Lincoln Ordnance Depot, Department of the Army, did,

at the Lincoln Ordnance Plant, Springfield, Illinois, on or about 15 August 1948, wrongfully and unlawfully cause certain cabinets to be made for use in his privately owned house by the use of government labor and government tools.

Specification 2: In that Major Chet D. Hirsch, Ordnance Department, Lincoln Ordnance Depot, Department of the Army, did, at or in the vicinity of Springfield, Illinois, on or about 27 August 1948, wrongfully and unlawfully cause certain cabinets to be installed in his privately owned house by the use of government labor and government tools.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of Specification 2, Charge I; of Specification 1, Charge I, except the figures and words "1500 square feet;" substituting therefor the figures and words "500 square feet;" of the excepted figures and words: Not Guilty; of the substituted figures and words: Guilty; and guilty of Charge I. He was found guilty of Specifications 1 and 2, Charge II, except the word "his" in each Specification, substituting therefor the word "a"; of the excepted word: Not Guilty, of the substituted word: Guilty, and guilty of Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for one year. The reviewing authority approved only so much of the finding of guilty of Specification 1, of Charge I, as involved a finding that the accused did, at the place and time, and in the manner alleged, apply to his own use and benefit, about 432 square feet of the property alleged, of the value and ownership alleged, and furnished and intended for the use alleged, approved only so much of the sentence as provided for dismissal, and forwarded the record of trial for action pursuant to 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 operations officer at the Lincoln Ordnance Depot, Springfield, Illinois, during the year 1948 (R 90). He was purchasing his home in Springfield on an unrecorded installment contract. He occupied the house, paid the taxes and made such improvements on the property as a stoker, a fence, and both inside and outside stairways "from the second floor" (R 45,95,96). About 15 August 1948, the accused directed Mr. Emery Blasko, the carpenter foreman and supervisor of the

carpenter shop at the Depot to build some kitchen cabinets for him (R 19-22,33,38,42,43,47,59,60,67). He took Mr. Blasko to his home in Springfield, estimated at from two and one-half to ten miles distant from the Depot, where measurements were taken (R 21,41,43,44,56,60,64,69,112). Mr. Blasko considered it a government project and turned these measurements over to Mr. Charlie Blevins, a carpenter in the shop, and directed him to construct the cabinets (R 22,34,36,38,39,47). Mr. Blevins used "government" quarter inch, half inch and three quarter inch plywood, and together with Mr. Grant Milnor constructed the cabinets in the carpenter shop during regular working hours, between other jobs and during rest periods (R 22-24,30,39,41,42,47-49,52,55,72,75,76,115,116). About twenty-five working hours were consumed in this construction (R 48,49). Mr. Andy Waitekunas, a "car bracer" assisted in installing the hardware which the accused furnished (R 23,41,49,54,67,68,70,73). The workmen were all United States government employees (R 19,20,49,59,62,63,66). The accused observed the construction from time to time (R 40,54).

Accused gave Mr. Blasko a "gate release" dated 27 August 1948 and directed him to take a government $1\frac{1}{2}$ -ton vehicle, which was in good condition and furnished for the military service, and three men, Blevins, Milnor and Waitekunas, and install the cabinets in his home (Pros Ex 1, R 24-29,35,49-51,67). About nine o'clock in the morning and during government duty hours, Mr. Blasko drove the truck followed by the accused in his own car, supervised the nailing of the cabinets "onto the wall," and returned about noon (R 25,26,32,33,41,50,51,68,69).

The accused furnished Mr. Blasko with the measurements for some hall shelves and a linen cabinet for the bathroom. Mr. Milnor, also a carpenter in the shop, constructed them from government plywood (R 27,28,59,72,75,113,114). Upon instructions from Mr. Blasko, Mr. George Caufield, a carpenter helper and truck driver, hauled the shelves and cabinets on a government $1\frac{1}{2}$ -ton truck, furnished for the military service, to the home of the accused where they were installed with the assistance of Mr. Milnor and Mr. Paul Gentry, a "car bracer" in the shop (R 57,58,61-65).

Approximately two hundred and twenty-nine square feet of half inch plywood and twenty-two square feet of quarter inch plywood were used in the construction of the kitchen cabinets (R 23,115). Approximately forty-eight square feet of half inch plywood and thirty-six square feet of quarter inch plywood were used for the shelving and approximately seventy-four square feet of half inch plywood and twenty-three square feet of quarter inch plywood were used for the bathroom cabinet (R 27,28,32,115). The price of half inch plywood was twenty-four cents per square foot and fourteen cents per square foot for quarter inch plywood (R 31,32,37). The retail selling price in Springfield was forty-five cents per square foot for three quarter inch, thirty-two cents per square foot for half inch and twenty-four cents per square foot for quarter

inch plywood intended for interior use. The cost to the retailer was about one third less. Plywood was scarce at that time (R 108-111). United States Government power driven and hand tools were used in the construction and installation of the cabinets (R 26,28,48,51).

Mr. Blasko did not know if the accused had purchased some plywood about the same time (R 34). It was not customary to build personal items in the cabinet shop (R 36). No plywood was seen brought into the Depot that was not government owned (R 80,90). As material was drawn for use, it would be dropped from the records. Consequently, no shortage of lumber in the Depot appeared in the records (R 87). The prosecution asked the court to take judicial notice that the truck referred to had a value in excess of fifty dollars (R 98).

b.. For the defense.

The accused was operations officer at the Lincoln Ordnance Depot (R 142). During August of 1948, "Major Hirsch mentioned to Blasko /the chief carpenter/ that he wanted some cabinets made, and said that he could arrange to do it during his lunch hours and break periods; just sort of cut them out and cut and construct them, but not to take out, do it on government time," "use plywood" (R 130,131). On a Saturday "during the summer," "about the same time that he mentioned making the cabinets," when no one was working, the accused was observed by his subordinate, Captain Thomas J. Kelly, unloading eight or ten sheets of plywood from a truck at one of the depot warehouses. The accused stated to Captain Kelly that "he had used some plywood for some cabinets and that he was replacing it" (R 131-133,136,137). There was no secret about the cabinets (R 133). Captain Kelly visited the carpenter shop "about twice a day, morning and afternoon" and did not see workmen building the cabinets during "government working hours" (R 134,136,138). He estimated it would take between eighteen and twenty-five man-hours to make the cabinets. He saw them after they were installed in the home of the accused (R 135). He testified that the accused had an "unquestionable" reputation as to honesty and integrity.

During the Spring and Summer of 1948 the accused "bought periodically plywood and other building material" from the hardware store of Mr. Arthur Grebler in Springfield. He purchased between fifteen and twenty-five sheets of plywood "mostly half inch," and possibly "some three quarters or one quarter" and hauled it away on a passenger type car. These sheets are generally four to eight feet in size (R 120,121,126).

Depot trucks were used for moving household goods of military personnel and their dependents (R 142,143). Section chiefs had authority to dispatch vehicles (R 143). The commanding officer of the depot "encouraged the use of facilities of the Depot in the pursuit of hobbies, or handicraft, and during off-duty hours" (non-working hours). "The

tools or equipment could be used for that" "when the Depot was not engaged in normal operations" (R 143).

The accused after being warned of his rights as a witness elected to take the stand and testify under oath (R 145-147). His version of the transaction is as follows:

"* * in the summer, late summer, early fall of 1948, the quarters which I occupied were in the City of Springfield; I was unable to obtain government quarters. Some portions of those quarters were not adequate or comfortable. Many of those portions I decided to, at my own expense, go ahead and repair and make more comfortable. I have always had sort of a hobby of fooling around a house anyway; painting, cleaning up, putting in new little portions. One portion of the house was the kitchen, and it was very inadequate in cupboard space -- actually there was none. I decided that I would try to set in some kitchen cabinets in the house. At that time I asked Mr. Blasko, who was the Foreman of the Carpenter Shop, if he would be able to cut out some cabinets for me, explaining to him that I did not want him to complete the cabinets, but simply to cut them out; and I asked him if he would be able to do that in off-duty time, such as maybe a break period, or lunch hour, if a man had five or ten minutes. Mr. Blasko told me that they would be able to do that. These cabinets were cut out under that condition, in my estimation. I had no intention of either delaying any work at the Depot, or to cause any inconvenience to the operations, nor to cause the government any expense, because I knew and was fully aware of the fact that it was a private matter. In other words, it was my desire to have the cabinets. These cabinets were cut out, and Mr. Blasko went a little bit further than what I expected him to do, and put them all together before he informed me that they were finished. However, after that I completed the finishing of the cabinets, stained them, varnished them, put all the tin on them, which was, as I said, taking it more in the light of a hobby in order to fix things up. At the time that I asked Mr. Blasko if he could cut these out I went to Mr. Grebler's store and I purchased from him some plywood. I had some plywood at the house already, and at the first available opportunity, which was a Saturday after I spoke to Mr. Blasko, I took the plywood and took it out to the Depot, and put it on the stock pile with the intention that there was plywood there to build my cabinets out of. I knew the specified sizes of the cabinets, and I took an estimate of about how much plywood would be necessary to build them. I figured approximately 500 square feet. I figured that as long as I was supplying the plywood, and the hinges and catches for the door, and the hardware, that I was purchasing material to make the cabinets from; and I definitely dropped it out to the Depot with that intention.

When I arrived in Springfield, as I had quarters outside of the post. When my furniture was delivered it was always delivered with a government truck. One item that I had was a grand piano which had caused about eight or nine men to lift it and place it into the house. This was authorized. I took the eight or nine men in the truck, put the piano on it, and took it up to the house. In my estimation, my thoughts of the thing were the cabinets were the same thing as my furniture. I, therefore, transported them to the house and had the men help me install them the same as I did with the rest of my furniture. I had, under no conditions, any intention at all of doing any wrong, trying to get anything out of the government that I didn't pay for, or trying to use any portion of the government in any way to benefit myself." (R 147-150)

It was during the week that the accused spoke to Mr. Blasko about cutting out the cabinets, and he "took the lumber the following Saturday." "I do not believe in my own mind that they had started the cabinets" (R 151). He believed he mentioned that he would furnish the plywood, but he was "not sure" (R 156). He did not recall telling Captain Kelly that he had used the lumber, or was going to use it (R 152). The truck used to carry the plywood was a civilian vehicle (R 154). The accused purchased fourteen sheets, approximately five hundred square feet, of plywood from Mr. Grebler at a cost of "around \$100." (R 160). Instead of merely "cutting out" the cabinets, Mr. Blasko put them together and "even started sanding them." The accused stopped this when he learned of it (R 153). His recollection was that Mr. Blasko took the original measurements "during the lunch hour" (forty-five minutes) and that all of the work was "on his off-time" (R 154,155,159). Merely "cutting out" the cabinets would require "about four or five hours" (R 157,158). Accused "deliberately expressed that they could take all the time that they wished" (R 158). The distance from the depot to the house was four miles (R 159,160).

Both documentary proof and oral stipulation refer to the high Army efficiency ratings received by the accused, and his outstanding ability and performance of duty (Def Exs A,B,C,D,E,F).

4. Discussion.

The several offenses charged arise out of one chain of events, continuing over a period of about twelve days. It includes the misapplication of government lumber and a government vehicle for the use of the accused under Article of War 94, and the wrongful making and the wrongful installation of cabinets by the use of government labor and tools under Article of War 96.

The proof indicates that the cabinets were made from government lumber by government labor and tools, transported in a government vehicle,

and installed by the use of government labor and tools. The evidence is clear and uncontradicted that at the time the accused ordered that the cabinets be cut out, he was aware that he had produced no plywood for the purpose and that the only lumber available to the carpenters belonged to the government and was intended for military use. The use of this government plywood was with his knowledge and was deliberately intended by him. A subsequent replacement of the lumber as contended by the defense does not efface the initially wrongful use of the government plywood (MCM, 1949, Par. 180g, p.239). The use of a government vehicle intended for military use to transport cabinets wrongfully acquired, the installation of these cabinets in the home of the accused, the use of government labor and tools to make and to install them, all for the benefit of the accused, constitute violations of the Articles of War as charged. The findings of the court as approved are warranted both as to the misapplication of government plywood and the government vehicle under Specifications 1 and 2 of Charge I, and with respect to the wrongful building and the wrongful installation of the cabinets under Specifications 1 and 2 of Charge II.

The defense presented motions to strike Specification 1 of Charge I and to amend Specifications 1 and 2 of Charge II by consolidating them into one specification charging the unlawful "making and installing" (R 8,9). These motions were denied on the grounds that the specifications indicate that the events occurred some twelve days apart and were not parts of one transaction. Even though it be contended that the making of the cabinets with the intention of installing them and their actual installation later constitute but one transaction, the sentence adjudged and as approved is well within the limits in such a case and the defense cannot complain.

The prosecution requested the court to take judicial notice that the vehicle mentioned in Specification 2 of Charge I is of a value in excess of fifty dollars (R 98). The evidence shows that the vehicle was a military type one and one-half ton truck in operating condition. Under these circumstances the court could, and from the record apparently did, take judicial notice of the value as requested (MCM, 1949, Par. 180g, p.241).

5. A recommendation for clemency was signed by five out of the eight members of the court. It was based upon "the length of time that the accused had been in service" and his record, and suggests that only so much of the sentence as provides for dismissal be approved. The reviewing authority apparently followed this recommendation.

6. Records of the Department of the Army show that the accused is thirty-seven years of age, married and has one child. He completed four

years study at the University of Utah, majoring in music. While attending school he served three months in the Utah National Guard as a private first class and was given an honorable discharge. In June 1933 he graduated from the ROTC and was tendered and accepted a reserve commission as second lieutenant of Field Artillery. His civilian occupations consisted of mechanics, theatrical activities such as master of ceremonies and singer, and a teacher of music and citizenship. He was promoted to first lieutenant of Field Artillery in 1936 in which grade he entered on active duty in July 1940. He was promoted to captain in February 1942. From April to September 1943 he was detailed at the Holabird Ordnance Depot. He was then assigned to the Staff and Faculty of the Field Artillery School, Fort Sill, Oklahoma, until March 1944, at which time he was assigned to the Ordnance Department. He served overseas three years from 28 February 1945 and is authorized the Commendation Ribbon, American Campaign Medal, European-African Middle Eastern Campaign Medal, the American Defense Medal, the Victory Medal, and Army of Occupation Medal. His efficiency ratings were "Excellent" and "Superior." His last two over-all numerical efficiency ratings prior to the dates of the offenses charged were 072 and 068, respectively.

7. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, as modified by the reviewing authority, and to warrant confirmation of the sentence. A sentence to be dismissed the service is authorized upon conviction of an officer of the above violations of Articles of War 94 and 96.

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

Lucas Benjamin, J.A.G.C.

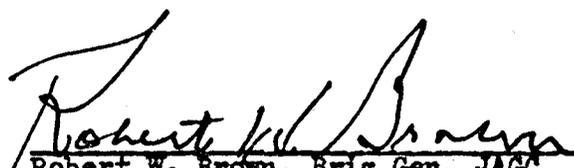
William H. ..., J.A.G.C.

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 Major Chet D. Hirsch, O-309265,
Ordnance Department, Headquarters Fifth Army, Chicago, Illinois,
upon the concurrence of The Judge Advocate General the sentence,
as modified by the reviewing authority, is confirmed and will
be carried into execution.

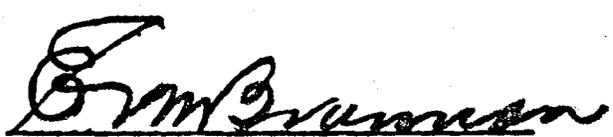

Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC

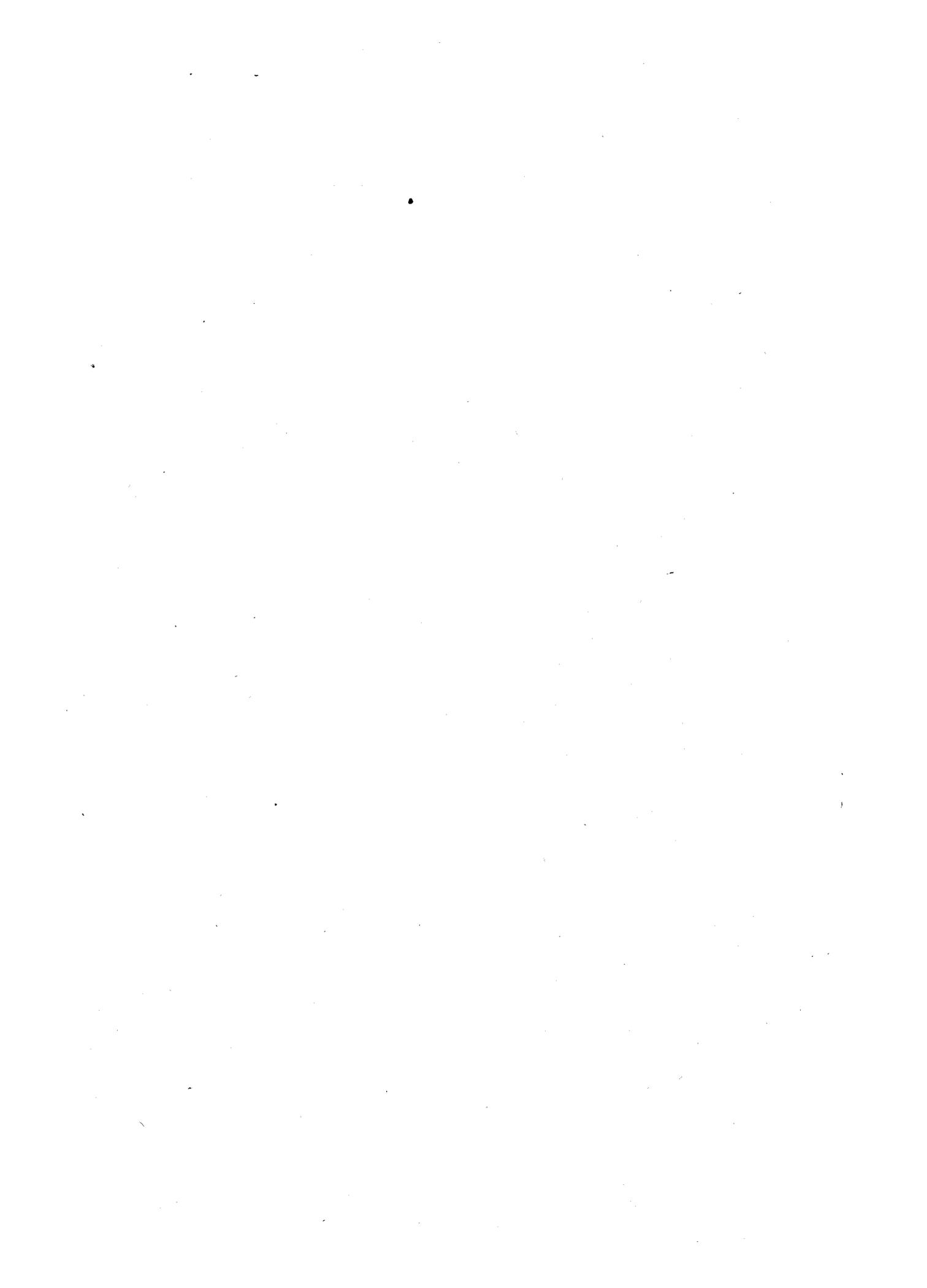

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

1 May 1950

I concur in the foregoing action.


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

3 May 1950



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

(33)

JAGK - CM 341061

1 MAY 1950

UNITED STATES)

UNITED STATES ARMY, EUROPE

v.)

First Lieutenant DAVID WALKER
TUCKER, JR. (O-1550942), 7702
Ammunition Depot Detachment.)

Trial by G.C.M., convened at Heidelberg,
Germany, 20 and 21 February 1950. Dis-
missal, total forfeitures after promul-
gation, and confinement for three (3)
years. Disciplinary Barracks.

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 charge and specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that 1st Lt David Walker Tucker, Jr.,
7702nd Ammunition Depot Detachment, did, at Miesau, Germany,
on or about 8 January 1950, feloniously and unlawfully kill
Max Kloss, by hitting his body with an automobile.

Specification 2: In that 1st Lt David Walker Tucker Jr.,
7702nd Ammunition Depot Detachment, did, at Miesau, Germany,
on or about 8 January 1950 feloniously and unlawfully kill
Hermann Wagner, by hitting his body with an automobile.

Specification 3: In that 1st Lt David Walker Tucker Jr.,
7702nd Ammunition Depot Detachment, did, at Miesau, Germany,
on or about 8 January 1950 feloniously and unlawfully kill
Elfrede Wagner by hitting her body with an automobile.

He pleaded not guilty to and was found guilty of the charge and all specifications. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for three years. The reviewing authority approved the sentence 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, and withheld the order directing execution of the sentence pursuant to Article of War 50(e).

3. Evidence

a. For the Prosecution

At about 1:30 p.m. on 8 January 1950 Max Kloss, Hermann Wagner, Elfrede Wagner and Lorenz Berg were walking abreast of each other along the right side of St. Wendeler Strasse in the town of Miesau, Germany (R 37-38, 68-69, 87-88). A narrow cobblestone gutter borders the road (R 41,50). The accused was driving a four-door Buick sedan on St. Wendeler Strasse in the direction in which these pedestrians were walking (R 38-39, 71, 89, 108; Pros Exs 2, 7). As he approached the group his car was observed swerving to the left and then to the right side of the road in a "zig-zag manner" and it was variously described as travelling "at a very high rate of speed" and "at an unusual rate of speed - a rapid high rate of speed" and "50 or 60 miles an hour" (R 38, 85, 88, 91, 110). When the car swerved to the right, the rear right wheel entered the gutter on the right side of the road and the vehicle skidded sideways with the rear right wheel remaining in the gutter and the front of the car heading toward the left side of the road (R 71, 81-82). At this point the road was rough, moist and slippery (R 83, 112). As the vehicle skidded sideways to the left it struck the four pedestrians with its right broadside leaving dents and broken windows in the doors on the right side of the vehicle (R 39, 52-53, 71-72, 81, 110; Pros Exs 2, 7). The vehicle skidded out of the gutter diagonally to the left across the road where it came to rest at a distance of 75 feet from the point of impact with the pedestrians (R 39, 50). Berg and Elfrede Wagner were thrown to the side by the impact while Kloss and Hermann Wagner were thrown forward to the right a distance of 45 to 55 feet (R 72). It was stipulated between the prosecution, the defense and the accused that Max Kloss, Hermann Wagner and Elfrede Wagner died on 8 January 1950 as a result of the injuries sustained by them when they were struck by a vehicle on St. Wendeler Strasse, Miesau, at 1:30 p.m. on the same date (R 44-45).

Sergeant First Class Cecil Naramore, Private First Class Theodore L. Meekins and Private Donovan Colley were passengers in the accused's vehicle at the time of the above incident. Private Colley testified that he and Private First Class Meekins were "picked up" by the accused on the road to Miesau between the towns of Schoenenberg and Sand at about 1 or 1:30 p.m. (R 108). On the outskirts of town the accused picked up speed, slowed down while crossing over a railroad bridge and then picked up speed again "all the way down to Miesau until he got to a little curve in the town of Miesau where the car

began to zigzag from one side of the road to the other." At that point the car was travelling about 50 or 60 miles an hour. The surface of the road from the bridge toward Miesau was made of asphalt and was smooth but in the town "it was made of little stones, was rough and a little bit slick where the ground was thawing out." After the car zigzagged it hit some people on the right hand side of the road. According to this witness two of the pedestrians were in the gutter bordering the road and two of them were out toward the center of the road "not too far though" from the gutter (R 110,112). On cross-examination he stated the accused appeared perfectly sober to him when he got into the car, and under examination by the court he stated that the accused did not slow down at the curve where it was slick and rough but that he continued travelling fast (R 110,115).

Private First Class Meekins testified, in pertinent part, that after the accused crossed the railroad bridge, before entering Miesau, he increased and decreased his driving speed, but the witness was unable to say how many times the speed was changed or how fast the vehicle was travelling when it entered the town of Miesau (R 121). On cross-examination the witness stated that the accused did not appear to be drunk and that the accused was one of the company officers in his company and that he knew the accused since "the first of 1949" (R 123-124).

Between 2:00 and 3:00 p.m., shortly after the above incident, a Polish medical doctor of a labor service company examined the accused relative to his condition of sobriety. The doctor smelled alcohol on the accused's breath and the accused admitted that he had drunk some liquor and alcohol. His speech was not clear and he staggered during a standing test while standing on one foot although he was capable of walking straight. The accused failed to touch his nose with his fingers while his eyes were closed during a coordination test and he had a pulse beat of 132. In the doctor's opinion, based on the accused's speech, the smell of alcohol on his breath, and the sobriety tests, the accused was under the influence of alcohol, but he was not totally drunk. He further expressed the opinion that as a result of accused's intoxication he could not fully exercise his mental and physical faculties (R 96-107).

At 1:48 p.m. on 8 January 1950, a German policeman arrived at the scene, took various measurements of the track and skid marks which were left by the accused's vehicle and then charted them and other pertinent matters relevant to the incident on two charts or sketches. These sketches, drawn to scale, showing among other things St. Wendeler Strasse at the scene of the incident, markings of the course of the accused's vehicle, and location of the pedestrians before and after the incident, were admitted in evidence without objection as Prosecution Exhibits 5 and 6 (R 46,50). The witness described these markings

and identified them on the sketches as follows: The vehicle tracks leading to the point of impact where blood spots were found showed no skid marks indicating that the car brakes had not been applied prior to the impact. Just past the point of impact the tire markings of accused's vehicle grew wider and wider in a diagonal line across the road to the left into an open yard for a distance of 75 feet where the vehicle came to rest indicating that the vehicle skidded in that direction. The road measured about 17 feet in width and the gutter about 37 inches in width at the point of impact. No sidewalks adjoined the road but there was a narrow dirt "walkway" between the gutter and the adjoining field. The distance between the blood spots at the point of impact and a blood pool where the bodies of Kloss and Hermann Wagner were found after the impact was about 59 feet (R 48-52). The witness stated that there is no prescribed speed limit in Miesau but that according to traffic regulations the driver of a vehicle is required to have control over his vehicle at all times and be able to stop at all times (R 53,57).

At about 5:00 p.m. on the day preceding the alleged incident the accused and Sergeant Naramore brought four bottles of cognac to Naramore's quarters in Schoenenberg, Germany, and with Sergeant Naramore, the latter's wife, Sergeant James C. Schober and his girl friend, commenced drinking cognac (R 10, 24-25). They continued to drink cognac until 10:00 p.m., at which time they went to a guest house in Miesau where they continued drinking cognac. The accused drank with the others but the witnesses could not state how much cognac was consumed by the accused (R 12,25). At about 3:30 the next morning the accused, Sergeant Schober and the latter's girl friend left the guest house and went to the girl's home. From there they proceeded to the accused's quarters where they remained until 6:00 a.m. They had a drink of cognac at the accused's quarters and then returned to the girl's home where they ate some fish and each had a few drinks. At about 9:00 a.m. they left the girl's home and went to Sergeant Naramore's house where the accused, Sergeant Naramore, Sergeant Schober and a colored boy drank some cognac (R 14-17,25-27). Concerning the sobriety of the accused, Sergeant Schober, and the latter's girl friend when they returned to the Naramore house at 9:30 on the morning of 8 January 1950, Mrs. Naramore stated, "I thought they were drunk, they were not perfectly sober, ***." However, the witness further stated the accused spoke and walked properly although he was "tipsy" and talked differently than when he was sober (R 26,28-33). Between 1:00 and 2:00 p.m. of 8 January the accused stated that he "*** wanted to get something to eat and go to bed" and thereupon he and Sergeant Naramore left the house, the accused taking with him a bottle containing about three inches of cognac (R 26-27).

b. For the Defense

As a witness for the defense, Private Meekins, one of the passengers in the accused's vehicle, testified that as they were

approaching the town of Miesau they passed a number of pedestrians who were standing or walking on the road at intervals of 10 to 20 yards ahead of each other. The road was narrow and full of holes. In order to avoid hitting these pedestrians the accused swerved his car first to the left then to the right, again to the left and again to the right, weaving his way among them. After the accused passed the third group of pedestrians who were standing on the road on the right side and had swerved to the left and back again to the right side of the road, the right rear wheel of the car slid into the cobblestone gutter. As he attempted to steer his car to the left again in order to avoid another group of people on the right side of the road the right rear wheel remained in the gutter, the car slid sideways and struck this group of people broadside with the right front door of the car. The accused had been travelling at a speed of about 45 miles per hour but when the car struck the people it had slowed down to about 35 miles per hour (R 162-165, 169, 173-175).

Sergeant Naramore testified that he and the accused bought three or four bottles of cognac and they and three others commenced drinking it at the witness' house between 6:00 and 7:00 p.m., Saturday, 7 January 1950. Witness drank heavily, became sick and went to bed at 8:30 or 9:00 p.m. He did not see the accused again until 9:30 Sunday morning when the accused returned to the sergeant's house with Sergeant Schober and the latter's girl friend. At that time the accused appeared to be sober and normal. From then until 1:30 or 2:00 p.m., when he and the accused left the witness' house, witness saw the accused carry a glass of cognac around but did not see him drinking from it (R 158-159, 161-162, 166).

The accused was warned of his rights as a witness in his own behalf, and elected to make a sworn statement (R 177). He testified substantially as follows: He arrived at Sergeant Naramore's house at about 9:30 on the morning of 8 January 1950, was sober and in full control of himself. Naramore brought out a bottle of cognac and accused poured himself two drinks, "approximately one finger" each, the rest of the glass being filled with water (R 178-179). He drank one glass and left the "bulk of" the second unfinished (R 180). Later, when he left with Sergeant Naramore, he took a bottle with about three inches of cognac left in it to his car and then drove to his quarters with Naramore where he left the bottle and then proceeded in the direction of Miesau (R 181-182). After passing a railroad bridge where he had slowed down to about 25 miles per hour, the road was "macadam surfaced" and he picked up speed until he reached a maximum speed of about 45 miles per hour at the crest of a hill before getting to Miesau. On the crest of the hill he "let up" on the gas and coasted into the village (R 183). The road from the crest of the hill into Miesau was slightly down hill and macadam surfaced all the way to Miesau where

it curves slightly and turns into a cobblestone road. At the curve a man was walking on the pavement toward the accused on the right side of the road. Accused turned slightly left, tooted his horn, and bypassed the pedestrian. Accused then turned back to the right and proceeded on down the road. He then observed some other people in the center of the road and so drove further to the right to allow them plenty of room and passed them safely. Further down the road he saw another group of people to the right center of the road. He pulled over further to the right and passed those people. Up ahead he saw three people, two of whom were walking on the roadway and the other in the gutter abreast of each other. Accused turned his car to the left but it did not respond. He turned the wheel harder to the left but the rear right wheel did not get out of the gutter although the front of the vehicle pointed to the left and it continued along in the same direction it had been going. Accused stated that he could not have turned his vehicle to the left sooner without hitting the other people that he had just passed further up the road. When the accused's vehicle struck these people it was almost broadside to the people (R 183-189; Pros Exs 5,6). After the accident Lieutenant Harold W. Kissack drove up in a jeep and took the accused to the dispensary where he was given certain coordination tests by a Polish doctor. Because of language difficulty the accused and the doctor could not understand each other. The doctor expressed himself mostly by motions. The accused had difficulty in performing the coordination tests because of the language difficulty and his inability to understand how the doctor wanted him to do the tests (R 190-191). Accused stated that when he entered the village of Miesau he was travelling around 40 or 45 miles an hour but when he passed the first group of pedestrians he reduced his speed to 35 miles per hour and that at the time of impact he was travelling less than 35 miles per hour (R 191-192). On cross-examination the accused stated that the evening prior to the accident he arrived at Sergeant Naramore's house at about 5:30, drank two or three small drinks of cognac mixed with water, left there at 9:30 and went to his quarters and from there proceeded to the guest house in Miesau arriving at 10:30 or 11:00 o'clock. At the guest house he drank beer and had one drink of cognac. He left the guest house at about 3 o'clock the following morning and stopped at a German girl's house. From there he went to his quarters with some other people and between 5 and 6 o'clock that morning drank "part of a beer." Then around 8:30 he had a sip of cognac and water at the German girl's house before returning to Sergeant Naramore's house. The accused did not go to bed or sleep from the time he started drinking cognac at Sergeant Naramore's house the previous evening or prior to the accident the following afternoon. During the same period he ate a piece of cake, two boiled eggs, and a slice of bread (R 197-202). The accused had driven through Miesau over the route on which the accident occurred three or four times daily for several months and was aware of the character of the neighborhood (R 205). He had applied his brakes prior to the impact but with "not too much" pressure so as not to cause his vehicle to skid.

Concerning his control of his vehicle he testified as follows:

"Q Was it your thought that relying on your maneuverability and your horn that you might weave your way through this crowded street?

"A Well, when I blew my horn the people themselves should open up and give me enough room to get down the street without leaving the roadway.

"Q Were you travelling at such a speed that if you saw the people did not get out of your path, you could stop your car before you hit them?

"A At first, I could have stopped, if I had to stop, -- if the car would have responded to the first turn, -- but if I had seen at that time, I could have stopped before hitting the people directly in front of me, if I had known that the car was not going to turn." (R 206-207)

The last group of pedestrians which the accused by-passed before the impact were about 12 yards away from the pedestrians who were struck and the accused had first observed them when he was about 60 or 70 yards from them (R 208).

In the opinion of Lieutenant Kissack and Sergeant Thomas T. Nordin who had known the accused and who observed the accused at the scene of the accident, the accused was sober, walked straight, talked normally, and his actions and behavior were not that of a drunken man (R 132-134; 153-157).

4. Discussion

a. Motion for appropriate relief. Following the arraignment the defense presented a motion for appropriate relief contending that the specifications allege an unreasonable multiplication of charges growing out of a single transaction and accordingly requested "that either two of the specifications be stricken entirely from the charge sheet, or all three specifications be joined together, alleging the three alleged victims in a single specification." The law member denied the motion (R 8). This motion was renewed at the close of the prosecution's case (R 217) and again at the close of the whole case (R 229) and in each instance was denied.

Since the punishment adjudged, as predicated on the findings of guilty of all specifications, does not exceed the maximum authorized for the offense found under any one specification the question of multiplicity raised by the defense motion is rendered inconsequential since the pleading in no sense resulted in the assessment of multiple

or duplicitous punishment, or to the prejudice of any substantial right of the accused (CM 233196, Bell, 19 BR 365; MCM, 1949, par 80a, p 80).

b. The specifications and the charge. Under each specification of the charge the accused was charged and found guilty of involuntary manslaughter. The Manual for Courts-Martial U. S. Army, 1949, paragraph 180a, defines the crime of involuntary manslaughter as follows:

"Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not inherently dangerous to human life, or by culpable negligence in performing a lawful act or an act required by law."

What would constitute recklessness or culpable negligence within the foregoing definition as applied to the operation of a vehicle has been stated as follows:

"The degree of negligence necessary to be shown in a prosecution for involuntary manslaughter, based upon an unintentional killing by a motor vehicle, is more than is required on the trial of an issue of negligence in a civil action. The general rule is that negligence, to become criminal, must necessarily be reckless or wanton and of such a character as to show an utter disregard for the safety of others under circumstances likely to cause injuries'. (Blashfield, Cyclopedia of Automobile Law and Practice, Vol. 8, pp. 108-109).

"At common law, one causing death by negligent driving is not criminally responsible unless the negligence is so great that the law imputes a criminal intent. A motor vehicle is not a deadly or inherently dangerous instrumentality, so as to impose liability for mere carelessness in its use or operation, and the degree of negligence necessary to support a conviction is such recklessness or carelessness as is incompatible with a proper regard for human life. It is sufficient, however, if it reasonably appears that death or great bodily harm was likely to result from the driver's conduct.' (Sec. 1380, 42 C.J., pp. 1356-1357) (Underscoring supplied.)" (CM 290463, Childs, 57 BR 113,118.)

Applying these principles to the facts established in the present case, it is clear that the evidence amply supports the findings of involuntary manslaughter. It compels the conclusion that the accused's negligence was so gross and flagrant that it may be properly classified as a wanton disregard for the safety of others. Thus it is shown that in broad daylight on the early afternoon of 8 January 1950 the accused drove his automobile down a narrow street at a speed estimated by two eyewitnesses as a "very high," and "unusual" and a "rapid high" rate of speed, while a passenger in the accused's vehicle testified that the accused was driving his vehicle at 50 or 60 miles per hour just

before he struck the alleged victims. The recklessness and culpability of the accused's acts are preeminently established by the uncontroverted proof which shows that immediately preceding this fatal incident he had driven through several intervening groups of pedestrians at the highly dangerous speed mentioned which, even by his own testimony, was admitted to be between 35 and 45 miles per hour. Furthermore, notwithstanding the fact that the accused was driving from the crest of a hill and had an unobstructed view of these pedestrians he did not, according to his own testimony, apply his brakes to diminish his speed in the exercise of due care but merely tooted his horn and then maneuvered his vehicle between them by swerving and zigging from one side of the road to the other at such excessive speed as clearly indicates the recklessness and heedlessness of his driving. As a result thereof, the right rear wheel of his car ran into the cobblestone gutter of the road and slid sideways into a group of four pedestrians, killing three of them. The force of the impact by which two of the victims were thrown a distance of 45 to 55 feet and the fact that after the impact the car skidded sideways for a distance of 75 feet to the left across the road and into an adjoining yard over loose dirt and sand further indicates, circumstantially, the high rate of speed in which the accused was travelling and his total lack of control over his vehicle. Although the evidence shows that no maximum speed limit was prescribed for St. Wendeler Strasse by the local traffic laws it was the custom and understanding in that community, as it is universally the recognized rule of the road, that a driver of a vehicle is required to maintain control of his vehicle at all times and particularly where pedestrians may be encountered. The accused had driven through the town of Miesau several times daily for months and therefore knew that he was entering a populated vicinity and that, since it was a rural town without sidewalks, pedestrians customarily used the road as a matter of convenience. Thus, he was charged with the duty of driving at such a prudent rate of speed as would enable him to have his car under control at all times. The evidence shows a gross deviation from the standard of care requisite under the circumstances. His reckless driving was the direct cause of death of the alleged victims and his wanton disregard of the safety of others is typically characterized by his testimony to the effect that when he blew his horn the pedestrians themselves should have opened up to give him enough room to get down the street without leaving the roadway.

The evidence is uncontroverted that the accused had been drinking cognac and beer during a period of 20 hours preceding the alleged incident while engaged in revelry without securing the normal sustenance of food and sleep. Although the quantity of alcoholic beverage consumed by the accused is not positively established and although the accused and several defense witnesses maintained that the accused was not drunk at any time during said period, the testimony of Mrs. Naranore

who saw the accused within the hour before the incident and the testimony of the doctor who examined and tested the accused for his state of sobriety immediately thereafter affirmatively shows that the accused, while not "totally" drunk, was under the influence of alcohol. In any event the reckless behavior of the accused and his lack of control over his vehicle under the circumstances warrant the conclusion that the effects of his earlier drinking had not worn off and that he was under the influence of liquor to such degree as to cloud his judgment and impair his skill in the operation of his automobile. We conclude, therefore, that the offense of involuntary manslaughter as alleged in each specification is amply sustained by the evidence.

5. The reviewing authority designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, or elsewhere as the Secretary of the Army may direct but not in a penitentiary as the place of confinement. Paragraph 87b, Manual for Courts-Martial 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)(3), the confirming authority is the Judicial Council, acting with the concurrence of The Judge Advocate General (CM 336706, Pomada, 3 BR-JC 209).

6. Civilian and Military Background

a. Civilian. The accused was born at Chelsea, Oklahoma, on 28 July 1922. He enlisted in the Army upon graduation from high school and has never married. His service records show no civil or criminal conviction.

b. Military. Accused enlisted in the Army on 29 July 1940 and received basic training in the Field Artillery at Fort Sill, Oklahoma. He served as an enlisted man until 6 November 1942, attaining the grade of technical sergeant, during which period he received a superior efficiency rating. He was commissioned a second lieutenant, Ordnance, AUS, on 7 November 1942 and was promoted to first lieutenant on 11 May 1943. He served in the Southwest Pacific Area from 8 August 1943 to 21 November 1945 as a bomb disposal officer and on his return to the United States was stationed at Camp Shelby, Mississippi. Since August 1946 he has been serving in various ammunition depots in Germany where

he has been engaged in destroying unserviceable ammunition. His 201 file discloses that he has received disciplinary punishment under Article of War 104 on two occasions and that on another occasion such action was instituted but final action thereon is not shown. For an offense of being under the influence of alcoholic beverages in a public place on 7 June 1943, the accused received a reprimand and a \$50 forfeiture of pay. On 29 July 1944, the Commanding General, Headquarters Intermediate Section, U.S. Army Services of Supply instituted disciplinary action under Article of War 104 against the accused for being drunk and disorderly at APO 928 on 12 July 1944. Correspondence pertaining thereto indicates that this Headquarters did not receive accused's reply to its basic correspondence. For using a Government vehicle without authority on 9 February 1946 and being involved in an accident at Hattiesburg, Mississippi, from which he departed without making required reports, the accused received a forfeiture of \$75 under the provisions of Article of War 104. His efficiency ratings (adjectival) from November 1942 to December 1946 include 7 "very satisfactory," 2 "excellent" and 1 "superior," and from July 1947 to date he has an average, over-all, numerical rating of 071. The accused's WD AGO Form 66-1 shows that he is authorized to wear the American Defense ribbon, Asiatic-Pacific Theater ribbon with three bronze stars, the Philippine Liberation ribbon with two bronze stars, the Bronze Arrow Head, the American Theater and World War II Victory Medals and four Overseas Bars.

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

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

Samuel J. Love , J. A. G. C.

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

(44)

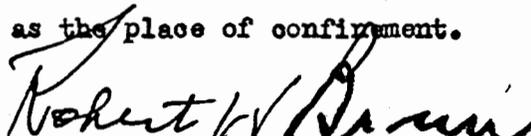
CM 341061

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 David Walker
Tuoker, Jr., O-1550942, 7702 Ammunition Depot Detachment,
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.

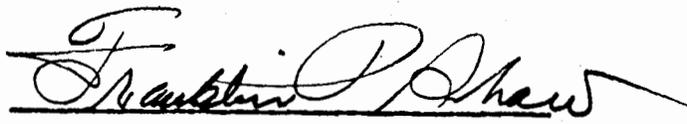

Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

22 MAY 1950

I concur in the foregoing action.


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

22 May 1950

(GCMO 42, 31 May 1950).

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

(45)

JUN 26 1950

JAGH CM 341067

UNITED STATES)

v.)

Captain LAVERGNE F. WATERMAN)
(O-363478), Headquarters and)
Headquarters Company, 7717)
European Command Quartermaster)
School Center.)

FRANKFURT MILITARY POST

Trial by G.C.M., convened at
Frankfurt-am-Main, Germany, 10,
14 March 1950. Dismissal, total
forfeitures after promulgation,
and confinement for one (1) year.

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 Charges and Specifications:

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

Specification: In that Captain LaVergne F Waterman, Headquarters and Headquarters Company, 7717 European Command Quartermaster School Center, did, at Darmstadt, Germany, on or about 5 December 1949, feloniously steal \$684.65, the property of the First Three Graders Club, 7717th European Command Quartermaster School Center.

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

Specification: In that Captain LaVergne F Waterman, Headquarters and Headquarters Company, 7717 European Command Quartermaster School Center, being indebted to Karl WEBER in the sum of six hundred (600) Deutsche Marks, said Deutsche Marks being of a value of over \$50.00, for a loan, which amount was due and payable on demand, did at Darmstadt, Germany, from on or about March 1949 to on or about 8 January 1950, dishonorably fail and neglect to pay said debt.

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

Specification: In that Captain LaVergne F. Waterman, Headquarters and Headquarters Company, 7717 USAREUR Quartermaster School, having been duly placed in arrest at the Quartermaster School, Darmstadt, Germany, on or about 23 February 1950, did, at Darmstadt, Germany, on or about 28 February 1950 break his said arrest before he was set at liberty by proper authority.

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

Specification: In that Captain LaVergne F. Waterman, Headquarters and Headquarters Company, 7717 USAREUR Quartermaster School, did without proper leave, absent himself from his organization at Darmstadt, Germany from about 1700 hours 28 February 1950 to about 1045 hours 1 March 1950.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor, at such place as proper authority may direct, for one year. 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.

Captain LaVergne F. Waterman, the accused, was the Special Services Officer at the 7717 European Command Quartermaster School Center, Darmstadt, Germany, and on 23 November 1948 was made the "custodian" of the funds of the First Three Graders' Club and of the Enlisted Men's Club, which positions he held until 17 January 1950 (R 13,24,27,30; Pros Ex 4).

As to the Specification of Charge I:

As "custodian" of the funds of the First Three Graders' Club he was entrusted with club funds, some of which were kept in the club safe and the remaining amounts in a safe in his office (R 27,49,54,57). Appropriate regulations of the European Command provide for the safeguarding of "non-appropriated funds" (R 10,11). The club manager, Technical Sergeant Jack M. Abbott, the assistant club manager, Sergeant W. T. Carpenter, and the bartender, a German national, had access to the club funds kept in the club safe during the period 1 September 1949 to 1 January 1950 (R 27,28,

29). Sergeant Carpenter took or used no club funds except upon voucher for authorized club expenditures. He knew nothing of any shortage in club funds, and did not take or use any club funds without authority (Stipulation, R 26). The accused obtained German marks to pay the employees. When supplies were needed he either gave a check drawn on the bank or supplied the necessary cash money. The purchases or expenditures made for the club were in every case covered by a voucher prepared by Sergeant Carpenter. The funds other than those in the hands of the accused were always kept as an "operating fund" in the club safe to which the accused had no key. Sergeant Abbott did not take or use any of the club funds except for authorized expenditures (R 27-30). The books of account had been kept by Ernst Teuschel, the "German chief clerk from Special Service," since 1 March 1947, except for the time they were kept by Sergeant Hubert J. Ersin during October and November 1949 (R 30,35,53).

When First Lieutenant Arthur H. Gauthier, the successor to the accused as club custodian, assumed his duties on 18 January 1950, the club fund revealed a shortage of \$684.65 (R 23-26,43,45). The inventory was conducted at that time by Lieutenant Gauthier and the books were audited by Warrant Officer Thomas Jones (R 24,25). Chief Warrant Officer Richard B. Towle, conducted the monthly club inventory on 1 December for the month of November and in an effort to check the funds at that time he experienced some difficulty in finding the accused present in his office. The accused was away on normal duties or on temporary duty. Mr. Towle never did count the cash in the safe located in the office of the accused (R 32,33,36,47,61). The regular auditor had not counted the money in this safe for the months of September to December 1949 (R 60,61). This was eventually accomplished by Major Henry M. Jonas, the school inspector, in the absence of the accused, after obtaining a duplicate key from the adjutant's office. It was done following the instructions of the school commandant to investigate the accounts of the custodian of the club. The shortage was determined by checking the statements for October, November and December which were signed by the accused, and the cash on hand and in the bank account (R 35,36,37,38,43,46,47,50,55,57,58). The books had "always balanced" previously (R 47,48). After discovery of the shortage in the club funds, Major Jonas called the accused into his office about 29 December 1949, and after explaining to the accused his rights under the 24th Article of War, asked him about the shortage in his funds. The accused explained that on or about 2 December 1949, he had placed approximately \$650.00 in an envelope. He thought that he had left the envelope containing the money on his office desk when the school commandant called him to his office by telephone to perform some kind of duty. He was absent from 1600 hours to 1900 hours. Upon his return, the accused was unable to find the money (R 38,42). He then watched his employees "to see if some of them showed sudden signs of affluence." He said nothing to anyone at the time about it because he

was "scared to by the fact that so much money was gone." However, he did report the loss about 21 December to the school commandant, two days after the audit of the books was directed by the commandant (R 42,43,45, 47). The accused repaid a loan to the American Express Company due in installments during the period from July to October 1949, by making two payments of approximately one hundred dollars each in November and December 1949 (R 64).

As to the Specification of Charge II:

The Enlisted Men's Club was undergoing some repairs pursuant to a contract with Mr. Karl Weber, a German national, providing for payment of about eight thousand Deutsche Marks. Advances were made periodically under the contract as the work was performed. Approximately two thousand marks were to be paid about 15 April 1949. The accused arranged with Mr. Weber for Mr. Gotthard Fiebig, the assistant club manager, to pay Mr. Weber fourteen hundred marks and for Mr. Weber to accept a receipt signed by the accused for the remainder of six hundred marks (R 13-20; Pros Ex 5). Mr. Fiebig testified that the accused told him that he, the accused, would pay Mr. Weber the next week (R 15). Mr. Weber testified that "Captain Waterman asked me for some money and I said yes but I don't know anymore how much" (R 21), and referring to the assistant manager, "He gives me a receipt for it but it's up to me whether I want to sign for the entire amount or not." He did sign for the entire amount (R 15,16, 20). Mr. Weber saw the accused only once in regard to collecting the money. That was in November or December 1949. The accused did not deny owing the money, and Mr. Weber had no "ill feeling" because of his failure to repay (R 21). Later, however, Mr. Weber asked Mr. Fiebig about the money twice. Mr. Toesche, the secretary of the accused, represented that the accused was going to "settle it on Monday" (R 21). In contrast to this statement, Mr. Weber upon redirect examination answered affirmatively to the following leading question by the prosecution: "I believe you have testified that when this paper - Prosecution Exhibit No. 5 - was handed to you you were told that Captain Waterman would settle that with you the following week" (R 22). Mr. Weber was told by his mother that the accused had called at the Weber home to talk with him. This occurred after he had seen the accused in November or December (R 21). The accused has failed to repay the sum of six hundred marks and it is still owing (R 20).

As to the Specifications of Additional Charges I and II:

The accused was placed in arrest in quarters by Colonel J. V. McDowell, the Quartermaster School Center commandant, on 6 February 1950. Permission to be absent was required either from the commandant or the executive officer (R 66,67,73,79,100,103,104; Pros Ex 7). Upon several occasions the accused was given oral permission to leave the

boundaries of his arrest by Lieutenant Colonel Kenneth W. Dalton, Executive of the Quartermaster School, at one time for "a couple of days" to prepare for his trial, at which time he was required to "sign out" (R 67,72). "Almost every day * * he would want to go hither and yon, and there was no attempt to keep him corralled. We wanted to know where he was. We didn't want him out playing bingo or in the community because we were being criticised because a man relieved from all duties was presumed to be kept in a quiet place until the case was over" (R 100,103). He was given permission to leave for Darmstadt on the afternoon of 28 February 1950 by the executive officer (R 68,73). It was not required that he sign out and in when he was going to Frankfurt (R 72,73,79). He did not have permission from the commandant to leave the post "on the afternoon," nor permission from the executive officer to go to Frankfurt in the evening of 28 February (R 72,73,79,103,104). The executive officer clearly remembered giving the accused permission to be absent on 28 February, but did not remember the specific hours that he authorized the accused to be absent.

"No, I don't remember that. I was involved a little bit during the pay of officers, and I recall Captain Waterman speaking to me. We tried to be unobtrusive about his contacts, not to embarrass him or anything, and he would frequently sort of say to me, 'Do you mind if I run down to the bank or run down to the subpost,' or something like that, and I would say, 'No, go right ahead, but when will you be back?' And he told me he had a little business to do down town. It seems to me he said something about the American Express. It may not have been but I seem to recall something like that, and I said, 'O.K. When will you be back?' and he said, 'I'll be back this afternoon,' and, as a matter of fact, if he hadn't reported back I wouldn't have thought anything about it because we had no reason to keep him in custody. I explained that to him a couple of times. I said, 'The reason we're keeping you around here is not that we think you're a bad man or a criminal or anything like that, but we have received comment about you being down to the Bahnhof and a few places like that, and we thought for the morale of the other officers here that it would be best that you undergo this formal restraint, and I don't mean by that that you can't go anywhere if you have reason to, but we can't be criticised for letting you go and come as you please.'" (R 101,102).

He further testified that "it would be possible" that accused asked for permission to go to Frankfurt "on that particular day."

"I didn't give him the third degree when he wanted to go. If he said he wanted to go someplace, I would say, 'Is it on business?' and he would say, 'Yes,' and I would let him go. I didn't want to get any criticism that we interfered with his defensive operations and I was very careful -- we never did anything that would

hold him back from his defense. Two or three times he got on the trail of some funds and I gladly let him go. All he had to say was that and we let him go." (R 102)

He did not "feel" there was a possibility that the accused construed his leniency with passes as authority to be absent from 1700 hours on 28 February until 1045 on 1 March (R 102). "About 4:00 to 5:00 o'clock" 28 February 1950 the accused was seen at the Quartermaster School gate but he made no effort "to slip out of the gate" (R 76,78). About 5:00 o'clock, 28 February 1950, the accused had returned, and had requested and received permission from the executive officer for transportation to Frankfurt on the following morning at 7:45 a.m. to attend his court-martial trial. The trial was later postponed (R 66,68,69). The executive officer was "disturbed" several times while talking to the accused, but did not recall that the accused stated "he would need to see him /Major Jones/ on the evening of the 28th before his trial" (R 72). It was discovered the following morning at "approximately 9:00 o'clock" that the accused was not present in "a room with Capt. Waterman's name on the door." The bed did not appear to have been slept in (R 75,76). It was stipulated that the accused was "off of the post" between 1700 hours on the 28th of February and 1015 hours on the 1st of March (R 77, 78). About 1045 hours the accused appeared in the office of the executive officer who testified as follows in regard to the incident: "I didn't ask him where he had been. I expressed myself as being very much disappointed in his failure to keep faith with me on the quarter to 8:00 appointment and told him that he had been reported as having broken arrest and we were very much shocked with his conduct under the circumstances, and he said, 'Yes, I let you down. I took off. I am sorry.'" (R 69)

b. For the defense.

The accused after being duly warned of his rights as a witness elected to testify under oath.

His duties included being the Special Services Officer, German Youth Assistance Officer, the Billeting Officer, Athletic Officer, Defense Counsel on the Special Court and being on six or seven boards. He had thirteen jobs, some of which required considerable travelling (R 81,82,90).

"* * on or about the 2nd of December I had prepared around 4:00 o'clock in the afternoon, around 1600 hours, \$650.00 which I had placed in an envelope, a brown Manila envelope, to take down to deposit at the American Express Company. This was due to the fact that I would soon be returning to the States and I wanted to get some of the money out of the way. I had it in my hand-- the deposit was in my hand and I received a telephone call to

report to the Commandant. I do not know where I placed this envelope. To the best of my knowledge, I tossed it on the desk and went down to the Commandant's Office, and even now, I cannot remember what the call was for. It was, if my memory serves me best, it was relative to a coming inspection or something existing in the gymnasium, whereby I immediately took off and went up to the gymnasium, forgetting the money. I spent possibly two hours and a half before I realized what I had done. I went back in my office and I made a thorough search. I could find no trace of the envelope and no trace of the money. I was just panic stricken then, knowing the fact I have these club funds in my custody, what happens when funds are short--I didn't know what to do. I made no report of it because, as I say, it is just the idea of the stigma attached to it and what might happen if the money was not found." (R 81)

"Ever since the time, somewhere around 21 December, I have practically devoted half of my time to trying to raise this money. The Commandant had me in the office a short time ago and asked me how I had made out, if there was any possible way I could get it. I told him I would try once more, and also, that my insurance check was due; that is the insurance rebate from the NSLI, and I would turn that over to the club. I made arrangements to borrow \$300.00 for a personal loan and went back and told the Commandant, and the Commandant sat down with pencil and paper with me and discussed the money, recommended that I come up to the Staff Judge Advocate and tell him what I had raised, and request a lesser disciplinary action than a general court. I came up and discussed it with Major Jones, defense counsel, and went up and saw the Staff Judge Advocate, and he said that he had no power and no way of accepting the money, and advised me to return to the school, repay the money to the custodian of the fund and have Colonel McDowell call Colonel Perry, and also, requested that I request Colonel McDowell to put that in writing." (R 82)

The accused repaid \$300.00 of the shortage of \$684.65 in the club funds and agreed to pay the remaining unpaid amount from his insurance check (R 56,57,81,82,92; Def Ex A). The money used to make his personal December 12 payment to the American Express Company was obtained by drawing against his December salary (R 83; Def Ex C). The payment of \$100.00 to the American Express Company in November "left me short" (R 94). He had a "Class E allotment" of \$200.00 (R 88). The accused did not take the money involved in the shortage "with the intention to keep it." He did not "derive any benefit from that loss whatsoever." He "categorically, honestly" denied that he "stole the money as alleged" (R 84). The loss was reported during "the week of the 14th or the 21st."

He told the "whole details of it to Major Jonas" on the 21st. (R 89). The cash money in amounts ranging from seven hundred to two thousand dollars had previously been kept in the safe in his office (R 89,93). The statements for September, October and November were brought to the accused to sign in January while he was in the hospital. They had not yet been prepared for his signature at an earlier date (R 95,96).

The accused "arranged with Herr Weber" for a loan of six hundred marks repayable at the convenience of the accused. This money came from a payment of two thousand marks being paid to Mr. Weber, the contractor, who was redecorating the club. The accused left the balance of fourteen hundred marks with Mr. Fiebig and told him that he, the accused, would make "arrangements" with Mr. Weber the next week. He did not say the loan was going to be paid the next week.

"I saw Herr Weber I think it was the following week and he said, 'Take your time, Captain. Pay me when you can.' In that time, all that time, it may sound incredulous, but I did not have the money to repay him, but at no time did he ask me personally or did he ask me in a statement or written for the repayment of that money. I have talked with him several times since then and just recently he expressed great surprise that he was called in on this. He said at no time had he any intentions of going to any officer requesting repayment of the loan because he knew that I would pay him back. * * * he came to the office on a Thursday--sometime I think it was in December, and asked if I could come over to the house to see him the following week, and I said, 'Yes, I would be over on a Monday.' I went over on the following Monday evening. Herr Weber was not at his own home and I went to his father's home, which is in Pfungstadt and he was not there then. I spoke to his Mother and told her as he was working in the depot I would probably see him there. At no time have I denied knowledge of this loan and it is my full intention and always has been to pay back the 600 Marks." (R 84,85,90).

There was no specific time set for repayment. Mr. Weber has never requested repayment (R 85,90).

The accused understood that the "words and actions" of Colonel Dalton gave him permission to return to Frankfurt to see Major Jonas, his defense counsel, on the evening of Tuesday, February 28, 1950 (R 87,89). He needed the transportation on the morning of 1 March so as to be sure to "get back ... in plenty of time for my trial at 1:00 o'clock in the afternoon." (R 91) He thought the transportation would wait for him (R 92).

"* * I was to be tried by general court Frankfurt a week ago, I think it was, tomorrow. On Tuesday morning I had received

permission from Colonel Dalton--although he stated Darmstadt-- I had received permission to consult with Major Jones on my defense. I came to Frankfurt and Major Jones was not in his office. Major Nichols was in the office. I came up here by train and got here around 12:00 o'clock, I think. I had dinner with the Consul-General from Stuttgart and came over to the office and Major Jones was having his physical examination. I told Major Nichols. We discussed the case a little bit and I told Major Nichols to tell Major Jones I would see him that evening in the Casino because I knew Major Jones always went to the Bingo game, and I returned to Darmstadt, arriving there at approximately 4:00 o'clock at the school, going immediately to Colonel Dalton to advise him of my return. When I returned to Colonel Dalton, if I remember the words of my conversation, it was very similar to this: 'Sir, I was unable to see Major Jones this morning or this afternoon, and I have to return to Frankfurt, and I would like transportation tomorrow morning at 7:45 to take me to Frankfurt for my court-martial case', and he said, 'O.K.', and he called for transportation. Taking that--I mean, I may say this now, that every time I left my billets to go practically any place, even to the kaserne, I had very often gone to Col. Dalton for permission either going to the theater in the kaserne or the library or places like that, I have never tried to break arrest or go AWOL and Col. Dalton has always treated me with the greatest of fairness and given me permission to attend any place I wanted to go and never denied it; and when he said, 'O.K.', I took it for granted that covered returning to Frankfurt. Otherwise, I would never have returned. I returned just about 8:00 o'clock and saw Major Jones across at a table and went over and got a Bingo card and sat with Major Jones the whole evening. In between the Bingo games we discussed the case, which was why I was there, and I missed the last train back and got the train back in the morning. It left---I think it left here at 9:15 or 9:30--I forget what time it was--and I arrived at the school around 10:15 and went over and shaved. Nobody advised me as I came in that the Colonel was looking for me, and I went over and shaved and then returned. At that time, after I was through shaving, the German janitor told me the Colonel was looking for me, so I immediately went over to Col. Dalton, and when I came in the office, Col. Dalton looked at the clock and I looked and it was a quarter to 11:00, and he handed me a letter which had already been prepared, advising Col. Perry I had broken arrest and was AWOL. Although it is inconceivable to me, I can see the Colonel's viewpoint; I can't see how under the sun I would break arrest and go AWOL on a day I was having a general court-martial. I certainly did not do it intentionally. If I had known what was going to happen, I would have crawled back to Frankfurt on my

(54)

hands and knees, but I had no idea that this would come up like this, that there would be a charge against me." (R 86,87)

* * *

"Col. Dalton told me at the time, he said, 'Captain, if you had just called me, we wouldn't have had to send transportation up there. You could have gone direct.'" (R 87)

4. Discussion.

As trustee of club funds, the accused admittedly held in his possession the money which later became the subject of the shortage involved in this case. There is no conflict in the evidence that the amount of the shortage was \$684.45. The accused claims that \$650.00 of this amount was lost through carelessness rather than by stealing as charged, and that its whereabouts is unknown to him. The court in its finding resolved this issue of fact against the accused. The Board of Review is not inclined to disturb this finding.

"It may be presumed that one who has assumed the custodianship of the property of another has stolen such property if he does not or can not account for or deliver it at the time an accounting or delivery is required of him." (MCM 1949, Par. 125b, pp. 151,152)

"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). The evidence of carelessness and theft by others testified to by the accused is not convincing. A person in charge of trust funds who fails to respond with or account for them when they are called for by proper authority cannot complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting (CM 251225, Johnson, 33 BR 177,181; CM 251409, Clark, supra). (CM 323764, Mangum, 72 BR 397,403).

The accused has repaid a substantial amount of the missing money and testified of his intention to repay the balance of the shortage. However,

repayment in whole or in part of funds involved in a larceny is no defense (MCM 1949, Par. 180g, p.239; CM 275342, Dobbs, 48 BR 31,37). The evidence supports the findings of guilty of Charge I and its Specification.

The accused borrowed six hundred Deutsche marks from Mr. Karl Weber in April 1949. Mr. Weber testified that he saw the accused only once in regard to collecting the money. That was in November or December 1949. Mr. Weber had no ill-feeling over the failure of the accused to pay the debt. There is no evidence of fraud, deceit, evasion, false promises or any other circumstance, in connection with this failure to pay, of such a nature as to bring dishonor upon the military service (CM 339424, Elliot). Mere failure to pay an obligation promptly, in this case nearly nine months, is not of itself sufficient grounds for charges against an officer under the Articles of War (See CM 325231, Silverio, 74 BR 129,131 (delay of one year); CM 221992, Moore, 49 BR 153,166,167, (delay of nearly eleven months)). The evidence is considered insufficient to support the findings of guilty of Charge II and its specification.

The accused was placed in arrest on 6 February 1950 and was required not to leave his quarters without the permission of the commandant or the executive officer of the school. The word "quarters" was defined as Building B-26. However, by subsequent oral direction and permission of the executive officer, the terms of the arrest were so relaxed that the accused was able to "go anywhere" if he had "reason to" but he was to avoid any criticism of the school command by having it appear that the accused was being permitted to come and go as he pleased, "because a man relieved from all duties was presumed to be kept in a quiet place until the case was over." "There was no attempt to keep him corralled." The executive officer testified that if the accused had not reported back in the afternoon "I wouldn't have thought anything about it because we had no reason to keep him in custody." The school command wanted to know where he was, and did not want him out playing "bingo," because of criticism. The accused testified that he reported to Colonel Dalton that he had been unable to see Major Jones, his defense counsel, on the afternoon of 28 February and that he would "have to return to Frankfurt." Colonel Dalton did not recall this but testified he was interrupted several times during the conversation. The fact that arrangements were made for transportation on the following morning to the trial in Frankfurt, and the uncontradicted testimony of the accused that Colonel Dalton told him that if he had only called there would have been no need to send transportation and that the accused could have gone direct, tend to indicate that the accused certainly had permission to be in Frankfurt and that the real criticism of the conduct of the accused was based upon his not being immediately available to use the transportation which had been requested for 7:45 o'clock on the morning of 1 March. And this may further serve to explain the statement of the accused that he was sorry about being

away. Although Colonel Dalton stated that he did not "feel" there was a possibility that the accused construed his leniency with passes as authority to be absent, he testified that he did give the accused permission to be absent on 28 February, but that he did not remember the specific hours he authorized the accused to be away. It is significant that the accused conscientiously and consistently avoided violating the conditions of his arrest prior to this time. He testified that he fully believed that he had permission to be absent upon this occasion. A conviction on a criminal charge does not appear to be warranted under these circumstances, especially in view of the laxity in the control exercised over the accused. Under all the evidence in the case the Board of Review is of the opinion that it is not established beyond a reasonable doubt that the accused violated the terms of his arrest and was absent without proper leave. It is, therefore, considered that the findings of guilty of Additional Charge I and its Specification and of Additional Charge II and its Specification are not warranted.

The reviewing authority designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement. Paragraph 87b, Manual for Courts-Martial, 1949, provides on page 97:

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

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

5. Consideration has been given to representations for and on behalf of the accused, orally by his counsel, Major Raymond F. Body, on 23 May 1950, and in letters addressed to the Secretary of Defense and to The Judge Advocate General. At the request of counsel for the accused consideration has also been given to the Report of Proceedings of Board of Officers, Headquarters 7717 European Command Quartermaster School Center, dated 8 February 1950.

6. Department of the Army records show that the accused is forty years of age, married, and has one child. He was graduated from high school at Waterloo, New York, and was employed in civilian life as a restaurant manager and hotel clerk. He served as an enlisted man in the New York National Guard from 24 March 1926 to 25 February 1938 at which time he was appointed second lieutenant, Army of the United States. He was promoted to first lieutenant on 26 March 1941, to captain on 26 February 1944, and was appointed major, Officers' Reserve Corps, on 4

November 1947. He served overseas on Guadalcanal from 27 February 1941 to 10 May 1944, and in Europe from 9 December 1946 to date. He is entitled to wear the Asiatic-Pacific Campaign Medal, the American Defense Medal, the American Theater Campaign Medal, and the World War II Victory Medal. His unit received a meritorious unit service plaque. His efficiency ratings include two ratings of excellent and eight of superior. His last two over-all numerical efficiency ratings were 065 and 081, respectively.

7. The court was legally constituted and had jurisdiction of the person and of the offenses. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, legally insufficient to support the findings of guilty of Charge II and its Specification, of Additional Charge I and its Specification, and of Additional Charge II and its Specification, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal and confinement at hard labor for one year are authorized upon conviction of a larceny of property of a value of more than fifty dollars in violation of Article of War 93.

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

Arthur Swain, J.A.G.C.

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

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

JAGU CM 341067

7 August 1950

UNITED STATES)
)
 v.)
)
 Captain LAVERGNE F. WATERMAN,)
 0-363478, Headquarters and)
 Headquarters Company, 7717)
 European Command Quartermaster)
 School Center)

FRANKFURT MILITARY POST
Trial by G.C.M., convened at
Frankfurt-am-Main, Germany,
10, 14 March 1950. Dismissal,
total forfeitures after promulgation,
and confinement for one year.

- - - - -
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 by general court-martial in the case of the officer named above and the opinion of the Board of Review have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to and was found guilty of feloniously stealing \$684.65, the property of the First Three Graders Club, 7717th European Command Quartermaster School Center, at Darmstadt, Germany, on or about 5 December 1949, in violation of Article of War 93 (Charge I and specification); dishonorably failing and neglecting to pay a debt of 600 Deutsche Marks to Karl Weber for a loan payable on demand, at Darmstadt, from on or about March 1949 to on or about 8 January 1950, in violation of Article of War 96 (Charge II and specification); breach of arrest at Darmstadt, on or about 28 February 1950, in violation of Article of War 69 (Additional Charge I and specification); and absence without proper leave at Darmstadt, from about 1700 hours 28 February 1950 to about 1045 hours 1 March 1950, in violation of Article of War 61 (Additional Charge II and specification). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for one year. 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 insufficient to support the findings of guilty of Charge II and Additional Charges I and II and their specifications, and legally sufficient to support the findings of guilty of Charge I and its specification and the sentence and to warrant confirmation of the sentence.

3. The Judicial Council is in accord with the conclusions of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Additional Charges I and II and their specifications, and legally sufficient to support the findings of guilty of Charge I and its specification and the sentence. The only question is the sufficiency of the evidence to support the findings of guilty of Charge II and its specification.

4. The specification under Charge II alleges that the accused, being indebted to Karl Weber in the sum of 600 marks for a loan payable on demand, dishonorably failed and neglected to pay said debt from about March 1949 to about 8 January 1950. The evidence relating to this specification is substantially as follows:

Gotthard Fiebig, of Darmstadt, Germany, testified that he was Accountant and Assistant Manager of the Quartermaster School Center Enlisted Men's Club in March 1949, when the club was being painted under a contract with Karl Weber, providing for payment of 8,000 marks. The accused was custodian of the club funds. When Weber needed money during the course of the work he would request partial payments (R 13-14). On a certain day in April, Fiebig was to make a partial payment of 2,000 marks to Weber. On that day the accused asked Fiebig for 600 marks. Fiebig replied that the only marks available to him were those to be paid to Weber. The accused stated he was in a hurry and asked Fiebig to give him 600 of the marks intended for Weber. He told Fiebig, "I'll sign an I.O.U. for Mr. Weber and he'll be satisfied with it and I will pay him on Sunday, next week." Fiebig typed a receipt dated 15 April covering 600 marks "out of the Payment for Painter Heinrich Weber," which the accused signed (R 15, 16; Pros Ex 5). The accused stated he would pay Weber "next week." Fiebig believed the accused also said, "I think Weber will be satisfied with it anyway." When Weber came to the club office for his 2,000-mark payment, Fiebig advised him of the 600-mark deduction, "and I think he was a little disappointed" or surprised. Weber told Fiebig, "I have to hurry up and get the other 600 marks then. I can't meet my payment today." Fiebig advised Weber that the accused had said he would pay him back the next week, and asked Weber if he would sign the voucher for the full amount and take the receipt for the 600 marks, adding that he "could take the receipt or leave it." Weber took 1,400 marks and the accused's receipt for 600 marks, and signed the voucher for 2,000 marks, saying he knew the accused would "straighten out with me anyway next week." (R 15-16, 17).

Weber never complained to Fiebig between this time and December 1949, when he was engaged in further painting work at the club and informed Fiebig he was still holding the receipt for the unpaid 600 marks and stated he could not afford to lose the money. Fiebig advised him to see the accused before the latter left for America that month (R 15, 17).

Karl Weber, of Pfungstadt, Germany, in his testimony, corroborated Fiebig's testimony with respect to Weber's signing the voucher for 2,000 marks and receiving only 1,400 marks and the accused's receipt for 600 marks. Weber had agreed to lend the accused some money. The 600 marks was never returned to him (R 19-21). When the accused's receipt was handed to him, Weber was told the accused would settle it the following week (R 22). In November or December, Weber asked Herr Toesche, the accused's secretary, about the money, and Toesche advised him the accused was "going to settle it on Monday." Weber also asked Fiebig about it twice, but saw the accused only once, after December, at which time the accused did not deny owing him the money. He tried to collect the money from the accused only once and he had no ill-feeling toward the accused for not having paid it (R 21).

On his own behalf, the accused testified that in April he had known Weber for four or five weeks. He needed some marks and, since he didn't have the money to purchase them, discussed the matter with Weber, who said he would loan him the marks. "To do that he would need a part payment of the account due him," so the accused converted military payment certificates belonging to the club in the amount of 2,000 marks. The accused brought the marks to the club office. He was leaving for Munich that evening and Weber was not in the office. "It had already been arranged with Herr Weber," and the accused asked Fiebig for 600 of the 2,000 marks in exchange for his receipt. To Fiebig's inquiry whether "that was right," the accused replied "yes" and that he "was making arrangements next week with Herr Weber. At no time did I say it was going to be paid the next week." There definitely was no time set for repayment, which was to be at the accused's own convenience. Fiebig gave him the 600 marks, but had nothing else to do with the transaction.

The next week Weber told the accused, "Take your time, Captain. Pay me when you can." The accused did not have the money to repay him, but Weber at no time requested repayment. Just recently Weber had expressed great surprise

"* * * that he was called in on this. He said at no time had he any intention of going to any officer requesting repayment of the loan because he knew that I would pay him back. Now, even though I was due to be rotated in December, I had already made arrangements with the G.Y.A officer of this post to have me returned here in the grade of Master Sergeant * * *, and I told Herr Weber * * * on or about the 14th of December * * * I was going to the States and would come back in approximately sixty days * * * and he said 'Yah, yah.'"

Sometime in December, Weber asked the accused to come to his house the next week. The accused did so, as agreed, but Weber was out. The accused never denied knowledge of the loan and has always intended to repay it. Weber never requested repayment, and the accused did not know of Weber's ever having complained to anyone about the accused's owing him the amount for such a long time (R 84-85, 90, 92).

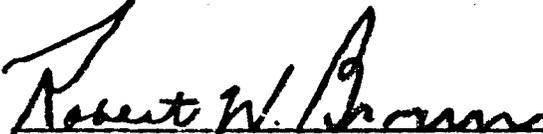
5. Neglect to pay debts does not violate the Articles of War unless the attendant circumstances are such as to make the neglect dishonorable. The debt must have been contracted under false representations or the failure to pay be characterized by fraud, deceit, evasion, or false promises, and the neglect continued for an unconscionable period (CM 335586, Wilkins, 2 BR-JC 153, 166, and authorities cited; CM 332711, Loman, 81 BR 195, 196-197, and authorities cited). The fact that the debt was contracted with a person not on an equal footing with the debtor tends to characterize the continued failure to repay it as dishonorable, as where an officer neglects for an unreasonable period to repay a loan to an enlisted man (Cf CM 251490, Clift, 33 BR 263, 266).

In the instant case the accused, who was custodian of the club funds, caused Fiebig, the assistant club manager, to withhold and deliver to him 600 marks from the 2,000-mark partial payment due Weber, a German painter working under a contract to paint the club, and to give Weber the accused's receipt or "I.O.U." for the 600 marks. Fiebig testified that when the accused signed the receipt he stated he would repay Weber the next week, and that Weber indicated disappointment in not receiving his full payment under the contract, which he required in order to meet certain obligations. Relying upon the accused's promise, relayed by Fiebig, that he would pay him back the next week, Weber accepted 1,400 marks and the accused's receipt for the remaining 600, and signed a voucher for the full amount of 2,000 marks. Weber did not complain of nonpayment of the debt until December 1949. According to his testimony, when he asked the accused's secretary about the money, he was advised the accused would repay it shortly. Weber asked Fiebig, who had been connected with the transaction from the start, about the money twice.

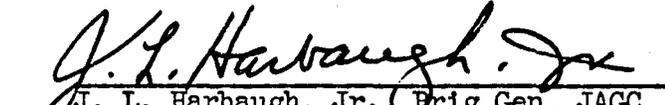
The accused took advantage of his superior position over Weber with respect to club contracts to withhold a portion of a partial payment to him in the guise of a loan from him under unusual and unfair circumstances. He caused a promise to repay the loan within a week to be communicated to Weber. These circumstances imposed a duty upon the accused of scrupulous and prompt payment and may properly be taken into consideration in the determination of the degree of culpability of the accused. For a period of about eight months he made no effort whatsoever to repay the loan and intended to leave the European Command without liquidating it. In view of the accused's failure to repay the loan, his statement that he was going to return to the European Command as a master sergeant and intended to repay the loan then is not convincing and is unworthy of consideration. Weber's failure to make vigorous complaint is not significant in view of the fact that he obviously was not in a position to press the accused, as the latter well knew. Under all the circumstances, the Judicial Council is of the opinion that the evidence establishes beyond a reasonable doubt that the accused's failure and neglect to repay the 600 marks to Weber was dishonorable as alleged.

6. For the foregoing reasons the Judicial Council is of the opinion that the record of trial, although legally insufficient to support the findings of guilty of Additional Charges I and II and their

specifications, is legally sufficient to support the findings of guilty of both Charges I and II and their specifications and the sentence and to warrant confirmation of the sentence.


Robert W. Brown, Brig Gen, JAGC

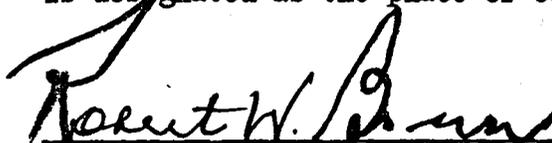

C. B. Mickelwait, Brig Gen, JAGC


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

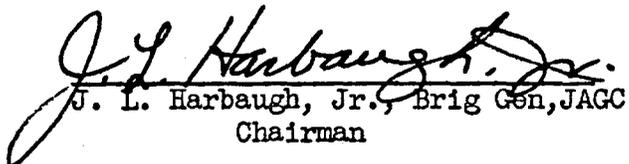
THE JUDICIAL COUNCIL

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

In the foregoing case of Captain Lavergne F. Waterman, O-363478, Headquarters and Headquarters Company, 7717 European Command Quartermaster School Center, upon the concurrence of The Judge Advocate General the findings of guilty of Additional Charges I and II and their specifications are disapproved, and the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC

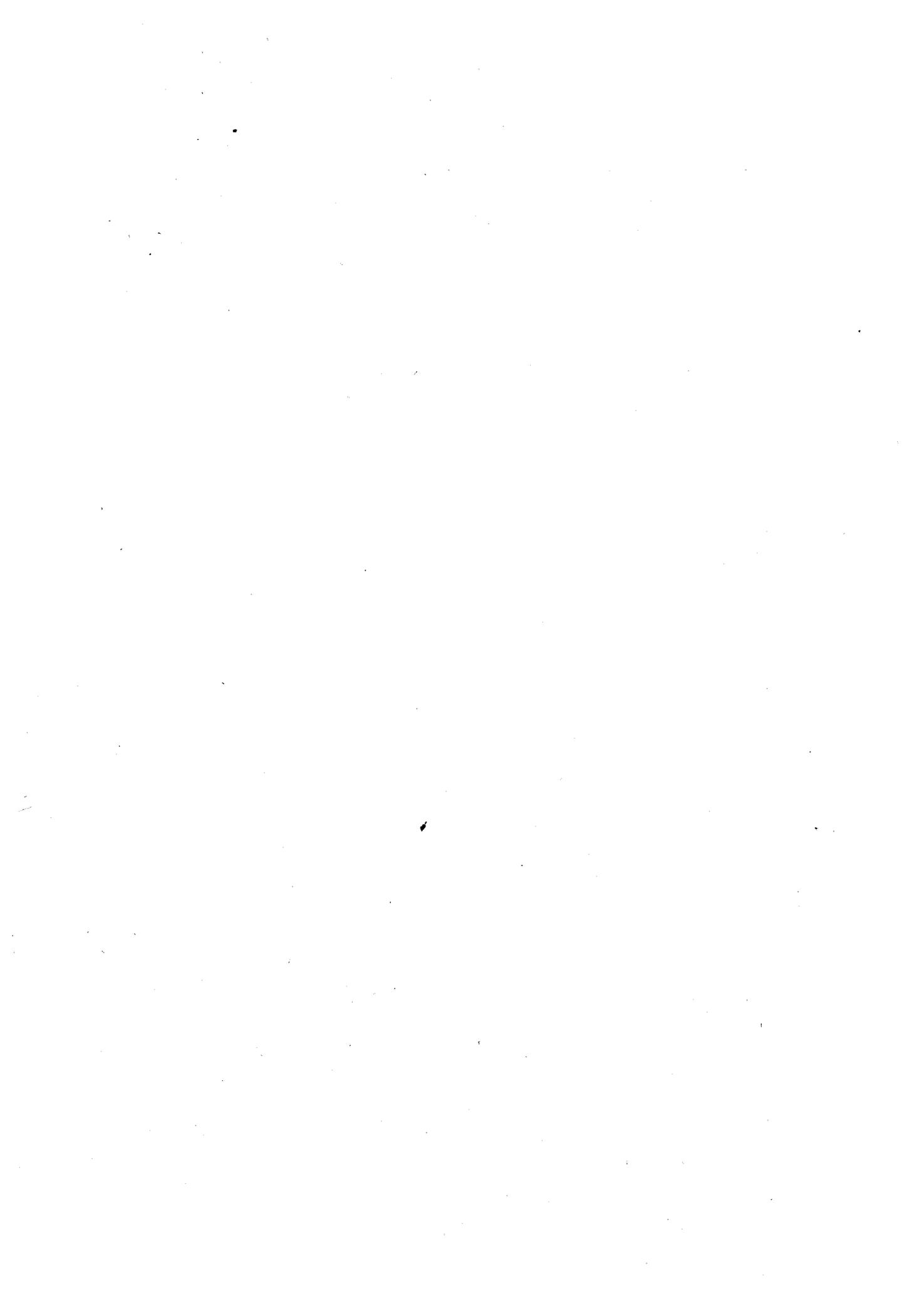

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

7 August 1950

I concur in the foregoing action.


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

8 August 1950



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

JAGK - CM 341216

27 APR 1950

UNITED STATES)

FORT KNOX, KENTUCKY

v.)

Trial by G. C.M., convened at Fort
Knox, Kentucky, 21 March 1950.
Dismissal.

Captain LUDY JOHN CHERWAK)
(O-1015743), Headquarters)
and Headquarters Company,)
Division Trains, 3d Armored)
Division, Fort Knox, Kentucky.)

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 1: In that Captain Ludy J Cherwak, Headquarters and Headquarters Company, Division Trains, 3d Armored Division, Fort Knox, Kentucky, did, without proper leave, absent himself from his organization at Fort Knox, Kentucky from about 0730 hours 6 January 1950, to about 0730 hours 10 January 1950.

Specification 2: In that Captain Ludy J. Cherwak, ***, did, without proper leave, absent himself from his organization at Fort Knox, Kentucky from about 0730 hours 3 February 1950, to about 0700 hours 8 February 1950.

Specification 3: In that Captain Ludy J Cherwak, ***, did, without proper leave, absent himself from his organization at Fort Knox, Kentucky from about 0700 hours 24 February 1950, to about 2130 hours 1 March 1950.

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

Specifications: In that Captain Ludy J Cherwak, ***, did, at Fort Knox, Kentucky, on or about 10 February 1950, with intent

to deceive Lt Colonel Hiram A Miller, Commanding Officer, Division Trains, 3d Armored Division, officially state to the said Lt Colonel Hiram A Miller, Commanding Officer, Division Trains, 3d Armored Division that, "reimbursement made this date," such statement relating to reimbursement to the Fort Knox Officer's Club for two checks held by the said Fort Knox Officer's Club, which statement was known by the said Captain Ludy J Cherwak to be untrue in that reimbursement had not been made that date.

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

3. Evidence for the Prosecution

Specifications 1, 2, 3 and Charge I

Three duly authenticated extract copies of morning reports of Headquarters and Headquarters Company, Division Trains, 3d Armored Division, Fort Knox, Kentucky, were admitted into evidence without objection by the defense as Prosecution Exhibits 1, 2 and 3 (R 8,9).

These exhibits list the following pertinent entries:

"8 January 1950

Cherwak Ludy J 01013743 Capt
Dy to AWOL Eff 0730 6 Jan 50
* * *

"10 January 1950

Cherwak Ludy J 01013743 Capt
AWOL to dy 0730" (Pros Ex 1).

"7 February 1950

Cherwak Ludy J 01013743 Capt
Dy to AWOL Eff 0730 3 Feb 50
* * *

"8 February 1950

Cherwak Ludy J 01013743 Capt
AWOL to dy 0700" (Pros Ex 2).

"24 February 1950

Cherwak Ludy J 01013743 Capt
Dy to AWOL 0700
* * *

"1 March 1950
 Cherwak Ludy J 01013743 Capt
 AWOL to dy 2130 ***" (Proc Ex 3).

Specification and Charge II

Major Mildred C. Burgess, Headquarters 2128th Area Service Unit, Station Complement, Fort Knox, Kentucky, was the "Post Treasurer." In February 1950 two checks drawn on the Citizens Fidelity Bank and Trust Company and purportedly signed by the accused and uttered to the Fort Knox Officers Club were returned unpaid by the drawee bank. Major Burgess prepared and forwarded to the Commanding General, Fort Knox, Kentucky, a letter in reference to these checks. The club has never been reimbursed for these checks and the checks were in Major Burgess' possession at the time of trial (R 10,11).

The letter prepared by Major Burgess and nine indorsements thereto were offered in evidence as Prosecution Exhibit 4. The defense made no objection to the basic communication and indorsement three thereto, but objected to all other indorsements upon the ground that they had not been connected with the case. The court received in evidence the basic communication and the first five indorsements thereto (R 16,17). The basic communication and the five indorsements read in pertinent part:

"FORT KNOX OFFICERS CLUB
 Fort Knox, Kentucky

"AIDIA-T 201.24

DATE 6 February 1950

SUBJECT: Returned Check

TO: Commanding General
 Fort Knox, Kentucky

27 Jan 50

\$6.00

1. A checks dated 30 Jan 50, in the amount of 5.00, drawn on Bank of Louisville, Louisville, Kentucky, issued by Captain Ludy J. Cherwak, O-1013743, S-3 Sec Div Trains, 3rd Armd Div, Fort Knox, Ky endorsed by Fort Knox Officers' Club, Fort Knox, Ky, and cashed by the Fort Knox Officers Club has been returned for the reason indicated: Insufficient funds.

2. It is requested that the above officer be required to reimburse the Fort Knox Officers Club.

/s/ Mildred C. Burgess
 /t/ MILDRED C. BURGESS
 Major, WAC
 Post Treasurer"

*1st Ind

HEADQUARTERS, FORT KNOX, KENTUCKY, 7 February 1950

TO: Commanding General, 3rd Armored Division, Ft Knox, Ky

For immediate compliance with the provisions of paragraph 3, Daily Bulletin number 8, Headquarters Fort Knox, Kentucky, dated 12 Jan 1950, and return of correspondence to this headquarters indicating action taken.

* * *

* *** 2nd Ind

SUBJECT: Returned Check

HEADQUARTERS 3D ARMORED DIVISION, FORT KNOX, Kentucky, 7 February 1950

TO: Commanding Officer, Division Trains, 3d Armored Division, Fort Knox, Kentucky

1. For necessary action.
2. Subject officer will be required to reimburse the Officers' Club in cash, and will furnish, by indorsement hereon, a full explanation of the circumstances surrounding this violation.
3. This correspondence will be returned to this headquarters by 10 February 1950.

* * *

* *** 3rd Ind

SUBJECT: Returned Check

Hq, Div Tns, 3d Armd Div, Ft Knox, Ky, 9 Feb 50

TO: Captain Ludy J. Cherwak, Inf, 01013743

For compliance with 1st Ind, and return to this headquarters on or before 1400 hours 10 Feb 50.

* * *

*201-Cherwak, Ludy J. (0) 4th Ind LJC/haf
(6 February 1950)
SUBJECT: Returned Check

Captain Ludy J Cherwak, Inf. 01013743, 10 Feb 50

TO: CO, Hq Div Tns, 3d Armd Div, Ft Knox, Ky

1. Reembursement made this date.
2. This violation was enadvertenly made due to mistake in proper booking.

/s/ Ludy J Cherwak
/t/ LUDY J CHERWAK
Capt, Infⁿ

*201-Cherwak, Ludy J. (0)
(10 Feb 50)
SUBJECT: Returned Check

5th Ind

HAM/hef

CO, Hq, Div Tns, 3d Armd Div, Ft Knox, Ky, 10 Feb 50

TO: CG, 3d Armd Div, Ft Knox, Ky

Attention is invited to preceeding indorsement.

/s/ Hiram A Miller
/t/ HIRAM A MILLER
Lt Col, FA
Commandingⁿ

Lieutenant Colonel Hiram A. Miller, Commanding Officer, Division Trains, 3d Armored Division, Fort Knox, Kentucky, identified the accused as an officer under his command. In February 1950 Colonel Miller was notified by "G-1" that the accused had cashed checks without having sufficient funds in the bank to pay the checks. Thereafter he received as an official communication the letter from Major Burgess to the Commanding General, Fort Knox, with two indorsements thereon. He talked to the accused about the checks. Thereafter he caused the correspondence to be sent to the accused by third indorsement. The papers were returned to him, at which time they contained the fourth indorsement thereto. He thereupon executed the fifth indorsement inviting attention of the Commanding General, 3d Armored Division, to the preceding indorsement (R 12-15). Colonel Miller further testified on cross-examination:

"Q. Do you know the signatures of the persons who signed the previous indorsements?

"A. Yes.

"Q. Personally?

"A. I believe I do. May I look at them again.

Prosecution's Exhibit 4 for identification was handed to the witness by the trial judge advocate.

"A. (Continued) I recognize Major Van Buskirk's signature.

LAW MEMBER: Which indorsement?

WITNESS: The second indorsement.

WITNESS: That is Lieutenant Thouvenelle's signature on the third indorsement. That is Captain Cherwak's signature on the fourth indorsement.

"Q. Can you state that of your own knowledge those signatures are genuine?

"A. To my knowledge and belief.

"Q. Have you had any experience in handwriting, Colonel?

"A. No.

"Q. Do you still insist those are genuine signatures of those persons?" (R 15-16)

At this point in the testimony, the law member interposed the following:

"LAW MEMBER: The court will reply with reference to these. Until thoroughly qualified as an expert, the testimony of the witness will be received the same as any other lay witness or what may be arrived at by everyone or any member of the court as to the signatures; and not as to the expertness or authenticity of them, since it is perfectly possible that they could be forged or fabricated; and, as to the reception of the proffered exhibit, Prosecution's Exhibit 4 for identification only, it will be received into evidence, including the basic communication and the first four indorsements thereto, as being circumstantial evidence received through the regular course of the mails and identified by the witness, but not as to the authenticity of the signature of any particular individual other than those which the witness may recognize in his own office or his own signature, if it appears anywhere there, but not as to the accused's signature or those persons with whom he may not be working everyday." (R 16)

Colonel Miller then testified:

"Q. Colonel Miller, did you or any member connected

with your staff have occasion to see any of these persons sign these indorsements, and, particularly the accused?

"A. No; I speak for myself. I did not see the accused sign the indorsement.

*

*

*

"Q. Do you accept that document then as the one you did send forward in answer as instructed in your preceding indorsement?

"A. Yes.

"Q. You forwarded them as an official reply and can you tell us if it was tendered to your headquarters as an official reply to the preceding indorsement?

"A. Yes.

"Q. You mean Captain Cherwak's reply?

"A. That is right; yes.

"Q. The fourth indorsement?

"A. Yes." (R 17)

About 19 February 1950 the correspondence was returned to Colonel Miller with a statement that the checks had not been paid. He called the accused into his office and asked him, "What about it?" The accused stated "that he expected - when he wrote that, he expected to be able to borrow the money and pay it that same day." The accused also said that he would get the money and redeem the checks (R 19-21).

The defense objected to the introduction of the above statements of the accused into evidence because there was no showing that the statements were voluntary and because the accused had not been warned of his rights under Article of War 24. The law member stated:

"The Law Member will rule that the witness may answer and the court will give the answer its own weight as to the voluntariness or unvoluntariness of it, and it is not necessary that he be warned of his rights under the 24th Article of War. You may answer." (R 21)

4. For the Defense

The defense offered no evidence. The accused was advised of his rights as a witness and elected to remain silent (R 22).

5. Discussion

Specifications 1,2,3 and Charge I

The accused was charged in these specifications with absenting himself without leave on three separate occasions in violation of Article of War 61. The three duly authenticated extract copies of morning reports from accused's organization (Pros Exs 1,2 and 3), admitted into evidence without objection, constituted prima facie evidence of accused's guilt of absence without leave for each of the periods of time alleged in these three specifications (MCM, 1949, par 146a; CM 296066, O'Dell, 58 BR 61,64).

Specification and Charge II

In this specification it was charged that the accused did on 10 February 1950 with intent to deceive Lieutenant Colonel Hiram A. Miller, Commanding Officer, Division Trains, 3d Armored Division, officially state to Colonel Miller that "reimbursement made this date", such statement relating to reimbursement to the Fort Knox Officers Club for two checks held by the club, which statement was known by the accused to be untrue.

The evidence established that in January 1950 two checks, bearing the accused's name as drawer, were received by the Fort Knox Officers Club. These checks were returned unpaid by the drawee bank with a notation that payment was refused because of insufficient funds. Major Burgess as "Post Treasurer" wrote a letter to the Commanding General, Fort Knox, Kentucky, wherein she set forth the fact that these checks had been returned unpaid and requested that Captain Cherwak be required to reimburse the Fort Knox Officers Club in the amount of these checks. This letter was, by first indorsement, sent by the Commanding General, Fort Knox, Kentucky, to the Commanding General, 3d Armored Division, who in turn sent it to the Commanding Officer, Division Trains, 3d Armored Division, by second indorsement. Lieutenant Colonel Miller received the letter as Commanding Officer of the Division Trains, 3d Armored Division. He talked to the accused in reference to the checks held by the Officers Club and on 9 February 1950 caused the entire file to be forwarded to the accused by third indorsement. In this indorsement Colonel Miller directed the accused to comply with a preceding indorsement and return the file to his headquarters by "1400 hours 10 February 1950." A fourth indorsement from the accused to "CO, Hq, Div Tns, 3d Armd Div, Ft Knox, Ky" dated "10 Feb 50" stated in part, "1. Reimbursement made this date." This indorsement is signed, "Ludy J. Cherwak." This indorsement was received in evidence as part of Prosecution Exhibit 4 over the objection of the defense that the indorsements had not been connected with the case. In view of the objection to the fourth indorsement contained in Prosecution Exhibit No. 4 it was incumbent upon the prosecution to establish that this indorsement was in fact

a statement by the accused.

Paragraph 129b, Manual for Courts-Martial U. S. Army, 1949, provides in part:

"b. Authentication of Writings. - General. - In order to prove that a writing is what it purports to be, in the case of a private letter, the person who received the letter should testify that he received it, and he should identify it. Then it should be proved that the signature is in the handwriting of the purported writer of the letter. But in proving the genuineness of letters the rule is that the arrival by mail of a reply purporting to be from the addressee of a prior letter duly addressed and mailed is sufficient evidence of the genuineness of the reply to justify its introduction in evidence. ***"

The other evidence tending to show that the fourth indorsement was signed by the accused is the testimony of Colonel Miller who stated that this indorsement had not been signed in his presence but that he recognized the signature thereon as the signature of the accused. Colonel Miller also testified that he caused these papers to be sent to the accused for a reply and that thereafter he received a reply in the form of the fourth indorsement thereto. This indorsement was signed with the accused's name. These communications were dispatched and received through customary military channels of communication. About the 19th of February 1950 Colonel Miller had occasion to question the accused in reference to the statements made in the fourth indorsement and at that time the accused stated that when he "wrote that" he expected to borrow the money and pay it the same day.

The defense objected to the introduction of these admissions into evidence because there was no showing that the statements were voluntary and because the accused had not been warned of his rights under Article of War 24.

Paragraph 127a, Manual for Courts-Martial U. S. Army, 1949, provides in part:

"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. The fact

that a confession or admission otherwise admissible was made to an investigator during an investigation of a charge does not make the confession or admission inadmissible. If it appears that the accused made a confession or admission spontaneously and without urging or request, as when the accused, a private, makes an incriminating statement to a friend, another private, the statement may be regarded as voluntary.

"A confession is not admissible in evidence unless it is affirmatively shown that it was voluntary. An admission of the accused, however, may be introduced without such preliminary proof except when it is indicated that the admission was involuntary. ***"

There is no evidence to show that the admissions were in fact involuntary. Neither is there any evidence to show that the accused was not aware of his rights under Article of War 24. All that appears is that Colonel Miller did not warn accused of his rights before this particular interview. The charge sheet upon which the accused was arraigned shows that he has been continuously in the Army since March 1942, that he was originally commissioned as an officer in October 1942, and has continued in that status until the present except for a period between 27 May 1947 and 5 October 1948 when he was an enlisted man. The appellate agencies in the Office of The Judge Advocate General have long recognized that commissioned officers are charged with a greater awareness of their rights against self-incrimination than are inexperienced soldiers (CM 320455, Gaillard, 69 BR 345, 376; CM 333420, Hummel, 81 BR 349, 356; CM 335052, Venerable, 2 BR-JC, 19,36; CM 337816, Sippel (7 Feb 1950)). Under these circumstances the Board of Review is of the opinion that it may be presumed that the accused was "otherwise" aware of his rights under Article of War 24.

In the opinion of the Board of Review the admissions made by the accused to Colonel Miller on or about 19 February 1950 were properly

received in evidence.

Considering the evidence as a whole the Board of Review is of the opinion the record of trial contains sufficient competent evidence upon which the court was justified in determining that the fourth indorsement contained in Prosecution Exhibit 4 was in fact a statement made by the accused. The statement made by the accused in the fourth indorsement was made in reply to an official communication and is therefore an official statement. The statement contained in the fourth indorsement that, on 10 February 1950, accused made reimbursement of the two checks referred to in the basic letter, was the false official statement alleged to have been made. The accused knew and intended that Colonel Miller would rely upon this statement. The proof further shows that at the time the accused made this official statement he had not reimbursed the Fort Knox Officers Club for the two outstanding checks issued to it. In fact the accused had not reimbursed the club for the checks at the time of trial on 21 March 1950. The statement of the accused was therefore a false official statement. It has long been established that if an official statement is falsely made the intent to deceive may be inferred. 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; CM 338522, Howard (1949)).

6. Department of the Army records show the accused to be 29 years of age and married. He graduated from high school and attended college for 1-1/2 years. He enlisted in the Regular Army on 17 March 1942 and on 23 October 1942 he was honorably discharged as a Technician 4th Grade. He attended Officers Candidate School at Fort Knox, Kentucky, and was commissioned a second lieutenant, Army of the United States, on 24 October 1942. On 2 July 1943 he was promoted to first lieutenant and on 25 January 1945 to captain, Army of the United States. His temporary rank as a captain was terminated as a result of reclassification proceedings and on 12 March 1945 he was reappointed a first lieutenant, Army of the United States. On 7 May 1947 he was separated from the service. He enlisted in the Regular Army as a master sergeant on 27 May 1947. On 6 October 1948 he was recalled to duty as a captain, Infantry Reserve. On 14 November 1949 he was convicted by special court-martial for absence without leave for a period of two days in violation of Article of War 61 and sentenced to forfeit fifty dollars of his pay per month for two months. His efficiency reports for the period 1 July 1944 to 31 December 1946 average 4.7. His overall efficiency ratings show 084 for the period 22 November 1948 to 30 January 1949; 100 for the period 31 January 1949 to 31 March 1949; 078 for the period 1 April 1949 to 31 July 1949; 080 for the period 1 August 1949 to 5 September 1949; 052 for the period 8 November 1949 to 7 January 1950.

He served seventeen months in the Philippine Islands and is entitled

to wear the American Theater Service medal, Asiatic-Pacific Service medal, Philippine Independence ribbon and World War I Victory medal.

7. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized for a violation of Article of War 61 and is mandatory upon conviction of a violation of Article of War 95.

Charles E. McAfee , J.A.G.C.
Samuel S. Covey , J.A.G.C.
Joseph T. Brack , J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

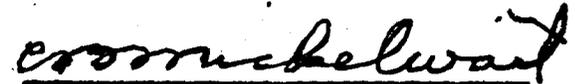
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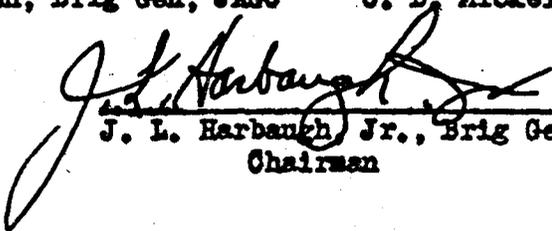
THE JUDICIAL COUNCIL

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

In the foregoing case of Captain Ludy John Chervak,
O-1013743, Headquarters and Headquarters Company, Division
Trains, 3d Armored Division, Fort Knox, Kentucky, upon the
concurrence of The Judge Advocate General the sentence is
confirmed and will be carried into execution.


Robert W. Brown, Brig Gen, JAGO


O. B. Mickelwait, Brig Gen, JAGO


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

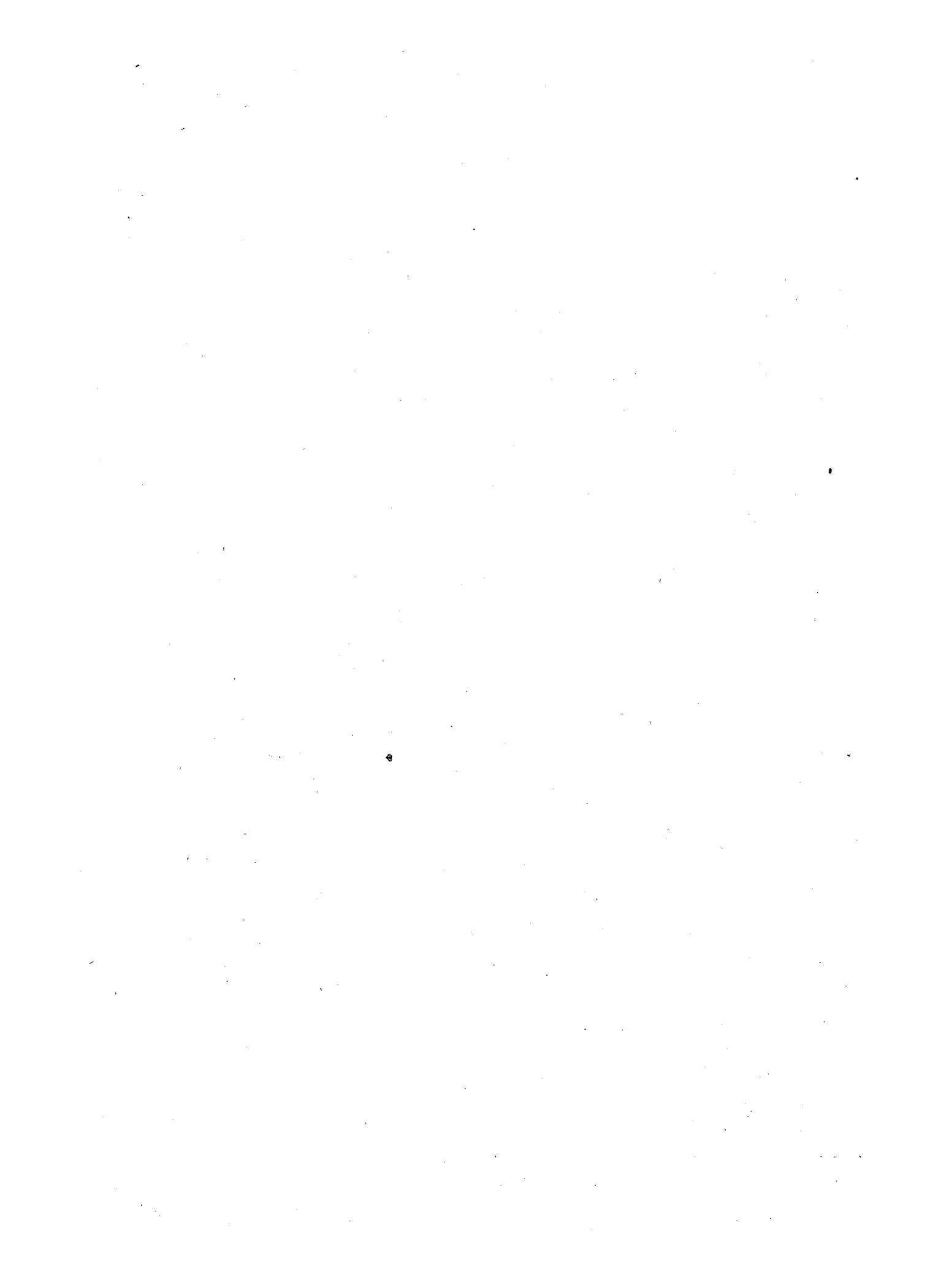
3 May 1950

I concur in the foregoing action.


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

3 May 1950

(CCMO 33, 8 May 1950)



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

JAGH CM 341379

MAY 12 1950

UNITED STATES	)	FORT KNOX, KENTUCKY
)	
v.	)	Trial by G.C.M., convened at
	)	Fort Knox, Kentucky, 10,15
First Lieutenant EARL LEWIS	)	March 1950. Dismissal.
WOOD (02029647), 57th Ordnance)	
Recovery Company.)	

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 Charges and Specifications:

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

Specification 1: In that 1st Lieutenant Earl L. Wood, 57th Ordnance Recovery Company, 4th Ordnance Battalion, Fort Knox, Kentucky, did, at Route 2, Vine Grove, Kentucky, on or about 22 December 1949 with intent to defraud, wrongfully and unlawfully make and utter to Basham Brothers a certain check in words and figures as follows, to wit:

	<u>22 Dec</u>	<u>1949</u>
<u>Merchants National Bank</u>		
Name of Bank		27
<u>Indianapolis, Ind.</u>		
Address of Bank		
Pay to the		00
Order of <u>Basham Bros</u>		<u>\$16</u>
	No	
<u>Sixteen Dollars -----100 -----</u>		<u>Dollars</u>

For value received, I represent that the above amount is on deposit in said bank in my name subject to this check and is

hereby assigned to payee or holder hereof.

For Earl L. Wood 1st Lt 02029647
57th Ord. Fort Knox, Ky

and by means thereof did fraudulently obtain from Basham Brothers merchandise and lawful money of the United States, of the value of \$16.00, he, the said Lieutenant Earl L. Wood then well knowing that he did not have, and not intending that he should have, sufficient funds in the Merchants National Bank, Indianapolis, Indiana, for the payment of said check.

Specification 2: In that 1st Lieutenant Earl L. Wood, 57th Ordnance Recovery Company, 4th Ordnance Battalion, Fort Knox, Kentucky, did, at Route 2, Vine Grove, Kentucky, on or about 23 December 1949 with intent to defraud, wrongfully and unlawfully make and utter to Basham Brothers a certain check in words and figures as follows, to wit:

	<u>23 Dec</u>	<u>19 49</u>
<u>Merchants Natn Bank</u>		28
Name of Bank		
<u>38th St Branch Indianapolis Ind</u>		
Address of Bank		
Pay to The	00	00
Order of <u>Basham Bros ---</u>	<u>16 00</u>	<u>\$16 00</u>
<u>16 Sixteen dollars</u>		
		<u>Dollars</u>

For value received, I represent that the above amount is on deposit in said bank in my name subject to this check and is hereby assigned to payee or holder hereof.

For Earl L. Wood 1st Lt
02029647

and by means thereof did fraudulently obtain from Basham Brothers merchandise and lawful money of the United States of the value of \$16.00, he, the said Lieutenant Earl L. Wood then well knowing that he did not have, and not intending that he should have, sufficient funds in the Merchants National Bank, Indianapolis, Indiana, for the payment of said check.

Specifications 3 and 4: (Finding of not guilty).

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

Specification 1: In that 1st Lieutenant Earl L. Wood, 57th Ordnance Recovery Company, 4th Ordnance Battalion, Fort Knox, Kentucky, being the Officer of the Guard, for the 4th Ordnance Battalion, on the 22 December 1949 did fail to comply with General Order Number 14, Headquarters, 4th Ordnance Battalion dated 20 September 1949 which reads as follows:

"5. a (3) He will not absent himself from the 4th Ordnance Battalion Area during his tour of duty except on the expressed approval of the Battalion Commander. He will remain in Battalion Headquarters except when making normal inspections or investigations relating to his normal duties as Officer of the Guard. Whereabouts will be made known to Sergeant of the Guard at all times."

by going to the Non-Commissioned Officers Club Number 2 (Paradise Club) Fort Knox, Kentucky.

Specification 2: In that 1st Lieutenant Earl L. Wood, 57th Ordnance Recovery Company, 4th Ordnance Battalion, Fort Knox, Kentucky, being the Officer of the Guard, for the 4th Ordnance Battalion, on the 23 December 1949 did fail to comply with General Order Number 14, Headquarters, 4th Ordnance Battalion dated 20 September 1949 which reads as follows:

"5. a (3) He will not absent himself from the 4th Ordnance Battalion Area during his tour of duty except on the expressed approval of the Battalion Commander. He will remain in Battalion Headquarters except when making normal inspections or investigations relating to his normal duties as Officer of the Guard. Whereabouts will be made known to Sergeant of the Guard at all times."

by going to Basham Brothers whiskey store, Route 2 Vine Grove, Kentucky.

Specification 3: (Finding of not guilty).

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of Specifications 1 and 2 of Charge I, not guilty of Specifications 3 and 4 of Charge I, not guilty of a violation of the

95th Article of War, but guilty of a violation of the 96th Article of War. He was found guilty of Specifications 1 and 2 and not guilty of Specification 3 of Charge II, and guilty of Charge II. 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 evidence pertinent to the findings of guilty is summarized as follows:

Mr. Erwin Basham, together with his brother Mr. O. H. Basham, owned and operated a retail liquor business in Muldraugh, Kentucky, known as Bashams' Liquor Store. On 22 December 1949 the accused, First Lieutenant Earl L. Wood, 57th Ordnance Recovery Company, Fort Knox, Kentucky, visited this store, purchased some whiskey and gave Mr. O. H. Basham a check in the amount of \$16.00. The following day, 23 December 1949, the accused returned to the store, purchased more whiskey and gave Mr. O. H. Basham another check for \$16.00 and might have been given some cash in change. These checks, drawn on the Merchants National Bank of Indianapolis, Indiana, were deposited for collection and were returned with the notation "No Account" (R 12-15; Pros Exs 2,3,4). It was stipulated by and between the prosecution, defense and the accused that the accused did not have, and never has had a checking account in the Merchants National Bank, but that the accused and his wife had a joint savings account at that bank with a balance of \$1.00 on 1 October 1949 and that there had been no deposits or withdrawals on this account from that date to 6 March 1950 (R 21,22; Pros Ex 5). On 5 January 1950, Agent William M. Franke of the 34th CID, interviewed the accused. After explaining to the accused his rights under Article of War 24, the accused gave Mr. Franke a written statement which was received in evidence without objection as Prosecution Exhibit 6. The statement reads in part as follows:

"On 22 December 1949 I did present for payment to Basham Brothers a check in the amount of Sixteen dollars (\$16.00), the check was drawn on the Merchants National Bank, Indianapolis, Indiana.

"On 23 December 1949 I did present for payment to Basham Brothers a check in the amount of Sixteen dollars (\$16.00), the check was drawn on the Merchants National Bank, Indianapolis, Indiana.

* * *

"I further certify that I have on deposit in the Merchants National Bank, monies to cover the amount of the aforementioned checks in the amount of Forty Seven dollars and Twenty Cents, (\$47.20). Some

time ago I had written a check to cover accessories I had purchased for my car, the check was returned with a note stating that the check could not be honored through the savings account. I have a savings account with the Merchants National Bank with a balance of about Three to Four hundred dollars (\$300.00 TO \$400.00). But I do not have a checking account in the Merchants National Bank of Indianapolis, Indiana. I was aware at the time I presented the checks to Basham Brothers that I did not have a checking account at the Merchants National Bank of Indianapolis, Indiana." (R 22-24)

The accused was detailed as officer of the guard for 22 December 1949 and undertook the performance of the duty. This duty extended from 1400 on 22 December 1949 until 0800 the following morning. From 0800 to 1200, he was permitted to perform his normal duties on the post but was required to resume his tour of duty as officer of the guard from 1200 until he was properly relieved at 1600 by the new officer of the guard. The guard orders stated that the officer of the guard would not absent himself from the 4th Ordnance Battalion Area during his tour of duty except upon the express approval of the Battalion Commander, and that the officer of the guard would remain in battalion headquarters except when making normal inspections or investigations relating to his normal duties as Officer of the Guard. The Battalion Commander did not give accused permission to be absent from the battalion area during the period 22-23 December 1949 (R 24-28; Pros Exs 7,8). On 22 December 1949 Private First Class Robert B. Larkins, 57th Ordnance Recovery Company, a member of the 4th Ordnance Battalion Guard, received a call at 2030 from the charge of quarters to go to the Paradise Club (NCO Club No. 2), and "pick up" the accused. Larkins saw the accused at the Club sitting at a table with some enlisted men (R 29-32,34).

On 23 December 1949 at about 1300 the accused, before being properly relieved as officer of the guard, in company with Corporal James T. Gatewood, sergeant of the guard, left the battalion area and went to Bashams' Liquor Store, which is located five or six miles from the 4th Ordnance Battalion Area. The accused came out of the store with a package. Upon return to the reservation the two went to the Club where they stayed about one hour. There Gatewood saw the accused take a drink. They returned to the battalion area at about 1530 or 1600. First Lieutenant John F. Munn relieved the accused as officer of the guard at about 1600, 23 December 1949. The Paradise Club and Bashams' Liquor Store are not in the 4th Ordnance Battalion Area. The Club is inspected by the Post officer of the day. Its inspection is not the responsibility of the 4th Ordnance Battalion (R 36,38,41,42,62,63).

b. For the defense.

Accused, after being apprised of his rights as a witness elected to testify under oath. as follows: He and his wife maintained two houses

and lived apart most of the time but they had a joint savings account in the Merchants National Bank, Indianapolis, Indiana, and they both drew on the account. In September 1948 he had deposited \$500.00 in this account and thereafter he sent his wife money and she would deposit it. He did not know how much he had in the account in December 1949, but assumed he had sufficient funds to cover the checks outstanding. After the first of the year (1950), he learned that the balance of his savings account was \$1.00. On 4 January 1950 he went to Bashams' Store and asked Erwin Basham to communicate with him if any of his (accused's) checks were "returned." On two occasions after the accused had been released from arrest in quarters he told Mr. Basham that he intended to make restitution on the checks. In his statement to the CID the accused said he knew his checks would not be honored through his savings account. Notwithstanding this, however, he believed the checks would be honored because he "was under the impression there was enough in the savings account to cover the amount." The accused told the CID agent that he had \$300 or \$400 in his savings account because "I was unaware of the actual condition of the account. I was under the impression it could have been \$300.00 or \$400.00." The last time he made a deposit in the savings account was in 1948 and he did not know when his wife made a deposit. Accused saw his wife in November 1949 but he did not discuss the status of their savings account with her. The accused had gone to the Paradise Club as alleged in Specification 1, Charge II, as the men of the battalion would frequent that place and he believed it was the "responsibility of the OD to keep order wherever the troops may frequent." He had never received instructions to the contrary. Also, on 22 December 1949 the accused went to Bashams' Liquor Store and purchased a bottle of whiskey. On 23 December 1949 at from 1300 to 1400 the accused spent about one hour at the Club where he "probably" took a drink from a glass which contained a dark fluid but it was not an alcoholic beverage (R 51-54,57,59,60).

4. Discussion.

The two specifications of Charge I allege that on or about 22 and 23 December 1949 the accused made and uttered to Basham Brothers with intent to defraud, two checks aggregating \$32.00 and by means thereof did fraudulently obtain merchandise and cash knowing that he did not have and not intending that he should have sufficient funds in the Merchants National Bank, Indianapolis, Indiana, for the payment of said checks.

It is undisputed that accused wrote and cashed the checks described in the specifications and that he obtained their face amount in merchandise or cash. It is also undisputed that accused never had a checking account in the Merchants National Bank at any time and that the checks

were accordingly dishonored. From this factor alone the intent to defraud may be reasonably deduced (CM 236069, Herdfelder, 22 BR 271; CM 280008, Moody, 52 BR 373,378). The accused, however, denies any intent to defraud and asserts that in writing the checks he acted under the impression that there were sufficient funds in his savings account and that the bank would honor his checks through his savings account. The record discloses no basis for his alleged belief. The testimony shows that accused last made a deposit in his savings account in 1948 and "never gave it a thought" as to how much money he had in the bank. He did not know when his wife made her last deposit in the account, nor did he discuss the bank balance with her or make inquiry of the bank as to the status of his account. The accused admitted that he did not have a checking account when he wrote the two checks and also admitted that he had previously been notified by the bank that it would not honor checks through his savings account. The fact is that the accused had a savings bank balance of \$1.00 at the time he issued the checks. Knowledge of this fact is properly chargeable to the accused. Under these circumstances it cannot be said that the accused was acting under an "honest mistake." In the light of these facts the Board concludes that the evidence is sufficient to charge the accused with the knowledge that he did not have sufficient funds in the bank to pay his checks upon their presentation and that there is no showing of any bona fide intent on his part to have such funds. The findings of guilty of the specifications accordingly are sustained (CM 280747, Duncan, 53 BR 305,313; CM 249006, Vergara, 32 BR 5,14; CM 322979, Leonard, 71 BR 357,378. Also see CM 280077, McGhee, 53 BR 21, 26 and CM 202601, Sperti, 6 BR 171,214).

Specifications 1 and 2, Charge II, allege that the accused being the officer of the guard for the 4th Ordnance Battalion for a specified period of time, failed to comply with General Orders Number 14, by leaving his post. Disobedience of standing orders is violative of the 96th Article of War (MCM 1949, Par. 183a).

The prosecution's evidence shows that the accused was detailed to serve as officer of the guard for the 4th Ordnance Battalion on 22 December 1949, until he was properly relieved by his successor the following day, 23 December 1949. General Orders Number 14 provides that the officer of the guard will not absent himself from the 4th Ordnance Battalion Area during his tour of duty except upon the express approval of the battalion commander. The evidence further shows that the accused undertook the performance of his duty on 22 December 1949 and on that evening left the battalion area for the Paradise Club where he was seen by the corporal of the guard, sitting at a table with some enlisted men. The accused testified that he had never received any instructions to the effect that the officer of the guard would not inspect the Club. He believed that because the men of the battalion frequented the Club, "it is the responsibility of the OD to keep order wherever the troops may frequent." On the other hand, Lieutenant Colonel Finley, the 4th Ordnance Battalion Commander,

testified that the Paradise Club is "definitely not" in the 4th Ordnance Battalion Area and the inspection of the Club is the responsibility of the post officer of the day. The accused had not been given permission to go there. Lieutenant Munn, the officer who relieved the accused as officer of the guard, also testified that the Club is not within the 4th Ordnance Battalion Area. The logical effect of these contradictions in the testimony of the accused was to discredit the explanations offered by him for his absence from the battalion area on 22 December 1949.

Corporal Gatewood testified that on 23 December 1949 at 1300 he and the accused left the battalion area and went to Basham Brothers' Store, a distance of five and one half or six miles from the reservation to purchase a bottle of whiskey. The accused states that he purchased a bottle of whiskey at Bashams' on 22 December which is undoubtedly true. Mr. O. H. Basham and Corporal Gatewood, however, state positively that the accused likewise went to Bashams' Store on the afternoon of 23 December 1949, during his tour of duty. There is nothing in the record to indicate any reason for Corporal Gatewood to bear false witness against the accused. A determination of where the truth lay could best be made by those who saw and heard the testimony. Such conduct on the part of the accused is unquestionably prejudicial to good order and military discipline. The evidence, therefore, establishes the commission of the offenses as alleged and fully supports the court's findings of guilty of Specifications 1 and 2 of Charge II (CM 261112, Allen, 40 BR 145,153).

5. The records of the Department of the Army show that the accused is thirty-nine years of age, married and has one child. He completed four years of high school in Kansas City, Missouri, and attended Lincoln Junior College in that city for one and one-half years, majoring in business education. He was employed in civilian life as an interior decorator, post office laborer, and machine operator. He was inducted into the service on 4 March 1942, at Fort Leavenworth, Kansas, and was discharged 7 September 1945 to accept appointment as second lieutenant, AUS, in which grade he was separated on 10 May 1946. He served overseas, in the European Theater of Operations from 11 March 1944 to 18 March 1946, and is authorized to wear the European-African-Middle Eastern Theatre Campaign Ribbon with four campaign stars, the American Theatre Campaign Ribbon, and the Victory Medal. He entered upon his present tour of extended active duty on 24 July 1946, and was promoted to first lieutenant on 5 August 1947.

Records on file in the Office of The Judge Advocate General show that on 4 February 1946 he was found guilty by a General Court-Martial of absence without leave and was sentenced to forfeit \$500.00 of his pay. The report of investigation indicates that he also has a record of one punishment under Article of War 104 for failure to clear property before departing Aberdeen Proving Grounds, Maryland, for Fort Knox, Kentucky. Accused's form 66-1 (authenticated copy) shows one efficiency rating of excellent and

one of superior during his service as a second lieutenant. No recent ratings are available.

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 violations of Article of War 96.

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

Robert B. Bunker, J.A.G.C.

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

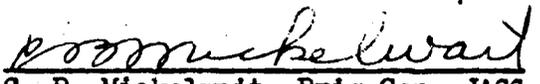
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

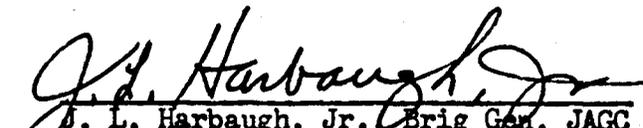
Harbaugh, Brown, and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant
Earl Lewis Wood (O-2029647), 57th Ordnance Re-
covery Company, upon the concurrence of The
Judge Advocate General the sentence is confirmed
and will be carried into execution.

On Leave
Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC

25 May 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

26 May 1950

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

(89)

JAGK - CM 341387

14 JUN 1950

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

v.

Second Lieutenant CLIFFORD S.
PATCH (O-955386), Assigned Head-
quarters and Headquarters Company,
9400 Technical Service Unit, Signal
Corps, Signal Training Regiment,
Fort Monmouth, New Jersey.

SIGNAL CORPS CENTER AND FORT MONMOUTH

Trial by G.C.M., convened at Fort
Monmouth, New Jersey, 21, 22 and
23 March 1950. Dismissal, total
forfeitures after promulgation,
and confinement for two (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 93rd Article of War.

Specification: In that Second Lieutenant Clifford S. Patch, assigned Headquarters and Headquarters Company, 9400 Technical Service Unit, Signal Corps, Signal Training Regiment, Fort Monmouth, New Jersey, did, at or near Oceanport, Monmouth County, New Jersey, on or about 27 January 1950, feloniously and unlawfully kill Private First Class Ernest Dokes, Junior, by striking him on the body with a motor vehicle.

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

Specification 1: In that Second Lieutenant Clifford S. Patch, ***, being the driver of a vehicle at the time of an accident in which he knew or had reason to know that he had struck and seriously injured a human being with the said vehicle which he was then operating, did, at or near Oceanport, Monmouth County, New Jersey, on or about 27 January 1950,

wrongfully and unlawfully leave the scene of the accident without rendering assistance to Private First Class Ernest Dokes, Junior, who had been struck and injured by the said vehicle.

Specification 2: In that Second Lieutenant Clifford S. Patch, ***, having been involved in a motor vehicle accident, did, at Fort Monmouth, New Jersey, on or about 27 January 1950, violate standing orders, to wit: Paragraph 3, Memorandum FMHQ 537.5, Headquarters Fort Monmouth, New Jersey, 20 June 1949, Subject: Motor Vehicle Accident Prevention Program, by failing to report the said accident to the Military Authorities at Headquarters Signal Corps Center and Fort Monmouth, Fort Monmouth, New Jersey.

He pleaded not guilty to all charges and specifications. He was found guilty of the Specification of Charge I, except the words "feloniously and unlawfully kill Private First Class Ernest Dokes Jr by striking him on the body with a motor vehicle," substituting therefor the words "unlawfully kill Private First Class Ernest Dokes Jr by driving a motor vehicle against the said Private First Class Ernest Dokes Jr in a negligent manner," of the excepted words, not guilty, of the substituted words, guilty, and of Charge I, not guilty, but guilty of a violation of the 96th Article of War; and guilty of Charge II and the specifications thereunder. 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 years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

At about 2400 hours, 26 January 1950, accused and Corporal Henry W. Wooldridge left Schroeder's Bar and Grill, Long Branch, New Jersey, in accused's 1949 Buick sedan, and with accused at the wheel proceeded north on Oceanport Avenue bound for Oceanport, New Jersey. Oceanport Avenue is a straight road except for a short left turn about a quarter mile from Schroeder's, at which point a single railroad track crosses Oceanport Avenue. It is surfaced with macadam, is 30 feet 6 inches wide, has no sidewalk, and has gravel shoulders. The speed limit on Oceanport Avenue is 20 miles per hour and a speed limit sign to that effect is posted between Schroeder's and the railroad track on the right side of the street facing traffic in the direction in which accused was moving. As accused crossed the railroad track and made the turn

traveling at about 35 or 40 miles per hour, his car veered to the right of the road causing the right wheels of the car to go onto the gravelled shoulder of the road. After completing the turn, accused and Wooldridge observed a person dressed in a soldier's uniform, about 100 feet up the street, walking on the right side of the street in the same direction as accused's car. The accused's car struck the pedestrian lifting him into the air. At the point of impact, the car was traveling about 30 or 35 miles per hour. After the accident, accused slowed down but did not stop. As they proceeded accused said, "We have had it" and told Wooldridge they were the only witnesses to the accident and that the accused "wasn't going to say anything." Wooldridge then asked the accused, "Are you going to stop?" to which accused did not reply. After continuing down Oceanport Avenue for about 1/2 mile, accused turned the car around and returned to the scene of the accident where he saw his victim lying on the ground at the entrance to the Monmouth Park Race Track, which is on Oceanport Avenue about 200 feet from the railroad track and approximately 60 feet from the point where deceased was struck. Another car was standing at the scene with its door open. Without stopping, accused proceeded to Schroeder's Bar and Grill, turned around, again drove past the scene of the accident without stopping, and then drove to the Turf Club in Oceanport, New Jersey. They did not remain there as the club was closing. Accused asked Wooldridge to take the wheel and they drove to Charlie's Bar where accused drank two bottles of beer. They left Charlie's Bar and, with Corporal Wooldridge driving, were proceeding toward Corporal Wooldridge's home, when two civilian policemen stopped the car and asked them why the right side of the car was damaged. Both Wooldridge and accused told the policemen that they had been in an accident at Tinton Falls, New Jersey, on the morning of 26 January 1950, but did not mention the accident hereinabove described (R 13-16, 20, 22, 25, 27, 30-32, 54-55).

At about 0015, 27 January 1950, Mr. George S. Kinkade, driving north on Oceanport Avenue, stopped his car when he saw the body of a male negro dressed in a soldier's uniform, not wearing shoes, lying in the Monmouth Park Race Track entrance. The body was lying face down, its head toward the gate of the race track entrance and its feet touching the edge of the street. Mr. Kinkade apparently was the first person to arrive on the scene after the accident. Being unable to obtain assistance from passing motorists, Kinkade went to a nearby house and reported the incident by telephone to the Oceanport police. Shortly after Kinkade returned to the scene of the accident, the police arrived, followed shortly thereafter by Criminal Investigation Division agents and an ambulance from the Fort Monmouth Station Hospital. First Lieutenant Selden E. Heatley, Commanding Officer, 1301st Engineer Detachment, Fort Monmouth, New Jersey, arrived at the scene about this time and identified the body as that of Private First Class Ernest Dokes, a member of his organization.

The body was not touched by anyone except Captain John P. Timpane, Medical Corps, Fort Monmouth Station Hospital, who turned it over on its back, checked the heart and pulse, and determined that Dokes was dead. The police and Criminal Investigation Division agents examined the surrounding area and found a laundry bag and the deceased's shoes about five feet from the street. There were tire marks in front of the shoes but no skid marks. The shoes were of the buckle type and the buckles were still fastened indicating that Dokes had stepped out or been knocked out of them. Also found were some black particles of undercoating, glass fragments, and particles of plexiglass about 60 feet from the body between the body and the railroad track. All items were found on the right hand side of the street on the shoulder of the road (R 41-43, 53,56,59,60; Pros Ex 3).

Policeman Clarence W. Cosentino, who examined the roadway at the turn, testified that a car could stay on the roadway when traveling 15 miles per hour, and that at 30 or 40 miles per hour the car would have to swerve to the right and ride the shoulder of the road in order to make the turn (R 56-57).

It was duly stipulated that if John P. Brady were present in court, he would testify that he is a laboratory expert for the State of New Jersey, Bureau of Identification, Division of State Police, Department of Law and Public Safety; that he is qualified by training and experience as an expert in making comparisons between various specimens of automobile paints, undercoating, glass and plastics; that he examined specimens of black particles of undercoating, glass fragments and particles of plexiglass taken from accused's car and of similar items obtained from the scene of the accident hereinabove described; and that in his opinion both came from the same source and are identical in composition and texture (R 61, Pros Ex 21).

It was duly stipulated that if Doctor Julius A. Toren, M.D., County Physician for Monmouth County, New Jersey, were present in court he would testify that, in the performance of his duties, he performed an autopsy on the body of Private First Class Ernest Dokes; that in his opinion death occurred between 2200 hours, 26 January 1950 and 0030 hours, 27 January 1950; that his pathological findings therein were that Dokes sustained injuries to the head and face, a broken left arm, small cuts on both hands, a cut on the back, hemorrhages in the interior of the body and lacerations of the liver, and that the cause of death was fracture of the skull, a broken spine, and rupture of the liver (R 10, Pros Ex 2).

At about 0800, 27 January 1950, accused went to the Office of the Provost Marshal, Fort Monmouth, New Jersey, and reported an automobile accident in which he had been involved at 1000, 26 January 1950 at Tinton Falls, New Jersey, when he ran into an Austin automobile making

a "U" turn in front of him, but did not report any other accident (R 62-64, Pros Ex 23). The court took judicial notice of Memorandum, Headquarters Fort Monmouth, New Jersey, File Number FMHQ 537.5, dated 20 June 1949, Subject: "Motor Vehicle Accident Prevention Program," paragraph 3 of which is as follows: "All military personnel will report promptly to the Provost Marshal any motor vehicle accidents that occur off-post in which they are involved" (R 61-62, Pros Ex 22).

On 26 January 1950, accused had been engaged in certain activities which are hereinafter listed. At about 1000, accused, driving the same car involved in Private First Class Dokes' death, accompanied by enlisted men, struck an Austin automobile as hereinabove described in which his car sustained damages to the right front fender and bumper, and had the right front headlight broken and tilted to the right. The light continued to function but its beam angled to the right. During the day, accused, accompanied by enlisted men, visited several drinking places and drank beer at each place (R 16-17, 24, 32). At about 2100, accused arrived at Schroeder's Bar and Grill where he remained until about 2400. At about 2115, Private First Class Joseph Smith Sanders, a member of accused's organization, spoke briefly to accused at Schroeder's, and described accused's state of sobriety at this time as follows:

"Q From your conversation with Lt Patch at this time, what impression, if any, did you get concerning Lt Patch's physical or mental abilities?

"A Well, I'd say you could tell Lt Patch had been drinking, sir.

"Q Will you please state to the Court what you mean by that?

"A Well, Lt Patch talked a little thick tongued, perhaps, and made meaningless posings with his hands, but I could not say he was drunk but you could tell he had been drinking." (R 33-34)

Accused was apprehended and brought to the Criminal Investigation Division Headquarters at about 1330 hours, 27 January 1950. After intermittent questioning by Criminal Investigation Division agents he made a statement in his own handwriting at about 2030 of the same day. He had been previously warned of his rights under the 24th Article of War, and no promises, threats or coercion were made or used. The accused's statement, admitted without objection as Prosecution Exhibit 10, stated in substance that he had been in an accident on the morning of 26 January 1950 which resulted in damaging the right front part of his car, that he had visited some drinking places during the day; that about midnight he started to go home through Oceanport and while going around a corner "near the race track," he came upon a soldier walking along the road in the direction he was traveling; that he swerved to try to avoid hitting him but was unable to do so; that being "petrified," he "lost control of [his] senses"; that he proceeded to Oceanport, and because the Turf Inn where he intended to stop was closing, he went to "Charlie's" where he stayed for a

half hour and went home (R 38-40).

4. Evidence for the Defense

Dr. Julius A. Toren, who performed the autopsy on the body of Dokes as hereinabove stated, testified that the blood alcohol content in Dokes' system at the time of death was 90 milligrams percent; that this amount of alcohol would have little effect upon a person accustomed to drinking alcohol but would cause a slight stimulation and muscular incoordination to a person not accustomed to drinking alcohol; that in his opinion Dokes was unable to move after the accident; and that Dokes' injuries could have been caused by being struck by an automobile (R 74, 80-81).

Several witnesses testified that they observed accused at various places on 26 January 1950 and he appeared to be sober (R 86,90,98,100).

Accused, after being advised of his rights as a witness, elected to take the stand and testify under oath. He stated that he has been stationed at Fort Monmouth, New Jersey, continuously since 21 February 1949. He related his activities on 26 January 1950, recounting the details of his automobile accident at Tinton Falls and his visits to various drinking places substantially as hereinabove described. He admitted under cross-examination that he had drunk four or five "beers" at the Bordentown Grill, two "beers" at the Oceanport Inn, and one "beer" at Schroeder's Bar and Grill (R 105-108, 111-112). At 2400, 26 January 1950, accused left Schroeder's and drove toward Fort Monmouth, New Jersey, driving north on Oceanport Avenue. Describing what then occurred, accused said:

"*** Suddenly, after I had gone around the corner and across the railroad tracks, I noticed a man in the road with his back to me, where this man came from I do not know. I swerved the wheel in an effort to avoid hitting this man as I applied the brakes. I was unable to swerve the car sufficiently to avoid hitting this man and hit him a glancing blow, which threw him off to the side of the road to some extent. This incident more or less petrified me and made me lose my equilibrium for a moment and it seemed an unreal thing to me, I just can't describe it, but shortly thereafter, long before getting into Oceanport, I realized what had happened and I should return to the scene. I therefore turned the car around at the first available turn around place, which was at the end of the race track fence, and returned to the scene. At this time, while going along further along this fence, several cars had passed me of course, and on my way back to the scene there were several other cars, the number I can't say. When I returned to the scene, I noticed that a car had stopped in front of this man and that this man, that is, there was a man standing there looking at the

Among the grounds of challenge for cause listed in the Manual for Courts-Martial, 1949, paragraph 58e, are:

"Eleventh: Any other facts indicating that he the challenged member/ should not sit as a member in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality. Examples of other facts constituting grounds for challenge are: That he will be a witness for the defense; ***."

As hereinabove stated, to sustain a ground of challenge, it must be shown that the challenged member will be called as a defense witness. The contention by the defense that it might be necessary to call him as a witness, is an indefinite circumstance, which, together with the fact that he was not called as a witness, constitutes no challenge for cause. Nor is there any merit to the assertion that Major Wimberly's position as summary court officer in the manner hereinabove described was a bar to his acting as law member in this case, there being no showing that he was aware of any facts upon which to form any opinion as to the guilt or innocence of the accused.

"Courts shall be liberal in passing upon challenges, but need not sustain a challenge upon the mere assertion of the challenger. The burden of maintaining a challenge rests on the challenging party." (MCM, 1949, par 58f)

In the opinion of the Board, the challenge was properly acted upon by the court (CM 328857, Cockerham, 77 BR 221,246; CM 219135, Stryker, 12 BR 225,243).

Specification of Charge I and Charge I

Accused was charged with involuntary manslaughter in killing the deceased by striking him on the body with a motor vehicle, under Article of War 93, and, by exceptions and substitutions, was found guilty of the lesser included offense of negligent homicide by driving a motor vehicle against the deceased in a negligent manner, in violation of Article of War 96.

The Manual for Courts-Martial, 1949, does not define negligent homicide but specifies that "Among the lesser included offenses which may be included within a charge of involuntary manslaughter are negligent homicide in violation of Article 96" (MCM, 1949, par 180a). Negligent homicide, resulting from the operation of a vehicle, is defined in the District of Columbia Code, at Section 40-606, as follows: "Any person who, by the operation of any vehicle at an immoderate rate of speed or in a careless, reckless, or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of" negligent homicide.

The evidence as presented by the prosecution, corroborated in most particulars by the accused who testified as a witness in his own defense, was that shortly after midnight, 26-27 January 1950, while driving his automobile, accompanied by Corporal Henry Wooldridge, on an unlighted street, the posted speed limit of which was 20 miles per hour, accused made a fairly sharp left turn at about 35 or 40 miles per hour, and after proceeding approximately 100 feet further, struck and killed Private First Class Ernest Dokes, who was walking on the right side of the street facing in the same direction as accused's automobile. The accused's car, traveling at about 30 or 35 miles per hour at the point of impact, threw the body of the deceased into the air and it landed approximately 60 feet away at the entrance of Monmouth Park Race Track just to the right of the edge of the street. Accused slowed down but did not stop although Corporal Wooldridge asked him if he was not going to do so. Shortly after striking the deceased, accused said, "We have had it" and stated to Corporal Wooldridge that he (accused) would say nothing about the accident. Shortly thereafter, accused turned around, returned to the scene of the accident where other automobiles had stopped, and either passing it or stopping briefly, did not dismount from his automobile or otherwise identify himself or render or offer to render aid and assistance. As accused and Corporal Wooldridge were proceeding along the street, two civilian policemen stopped them to inquire about the damage to the right side of the automobile. Accused did not tell them about the accident in which he had just been involved, but informed them about an accident which had occurred at about 1000, 26 January 1950, when accused, driving the same automobile, struck another automobile which damaged the right side of his automobile and tilted the right headlight to the right. From the time of his first accident until just prior to the fatal accident hereinabove described, accused, accompanied by enlisted men, had driven from one drinking place to another, drinking beer. About three hours before the fatal accident, accused was observed drinking beer and under the influence of alcohol.

The evidence clearly shows that the death of the deceased was caused by the negligent driving of the accused. The negligence is shown specifically by the facts that shortly before the accident accused was under the influence of alcohol; that at the time of the accident he was driving at a rate of speed in excess of the posted speed limit, and in excess of that reasonable and proper under conditions then existing; and that he could easily have averted striking the deceased if he had exercised proper attention to anticipate pedestrian traffic on the road (CM 274812, Tracy, 47 BR 293,325). In addition, when accused, knowing he had struck the deceased, proceeded away from the scene without stopping to render aid, his failure to stop and render aid may be considered as a circumstance tending to show guilty knowledge that the homicide resulted from his own fault and that his own negligence caused the accident (CM 236138, Steele, 22 BR 313,318).

There was evidence that at the time of the accident, the deceased may have been under the influence of alcohol and also that he was walking on the right side of the road instead of the left, contrary to regulations, but there is no evidence that either of these facts contributed to the accident. Mere contributory negligence by deceased would not operate as a defense unless it was the sole proximate cause of death. Where a person is killed by an automobile driven in a negligent manner, and such negligence was the proximate cause of death, the driver of the vehicle is guilty of negligent homicide (CM 274812, Tracy, supra, at page 324; CM 217590, Lamb, 11 BR 275,282). It is the opinion of the Board that accused's negligence was the proximate cause of death and that the evidence amply supports the court's findings as to the Specification of Charge I and Charge I.

Specification 1 of Charge II

Accused was charged with and found guilty of being the driver of a vehicle at the time of an accident in which he knew or had reason to know that he had struck and injured a human being and did wrongfully and unlawfully leave the scene of the accident without rendering assistance to the victim. The evidence clearly supports the finding of the court, and the conduct denounced therein is conduct of a nature to bring discredit upon the military service under Article of War 96 (CM 332510, Rawlings, 81 BR 129, 136; CM 326443, Morrison, 75 BR 215,218; CM 264077, Patterson, 41 BR 365,369).

Specification 2 of Charge II

Accused was charged with and found guilty of violating a specified standing order by failing to report an accident in which accused was involved. It was proven not only that accused did not report the accident in violation of the standing order of which accused was aware, but also that he never intended to report the accident as shown by the fact that immediately after the accident he told Corporal Wooldridge, his passenger companion, that he would not talk about the accident; that when two civilian policemen stopped him for an explanation as to the damage to the right side of his automobile, he did not inform them about the fatal accident; and that, on the morning following the fatal accident, he reported an automobile accident in which he had been involved prior to the fatal accident, pursuant to the standing order herein referred to, but did not report the fatal accident. His contention that he did not report the fatal accident because he did not have his "story straight in his own mind *** and wanted to get it straight before reporting it" is unworthy of belief. The logical conclusion to be drawn from accused's action was that he did not report the accident in order to prevent discovery. Disobedience of standing orders is a violation of Article of War 96, and

the conduct of accused in failing to report the accident as alleged is a disorder and neglect to the prejudice of good order and military discipline under Article of War 96 (MCM, 1949, par 183a; CM 332510, Rawlings, supra; CM 326443, Morrison, supra, at page 219).

6. A brief on behalf of accused, submitted by Mr. Edward F. Juska, Counsellor at Law, Long Branch, New Jersey, accused's special defense counsel at the trial of this case, is attached to the record of trial. On 12 June 1950, Mr. Juska appeared before the Board of Review and made oral argument and presented a second brief in this case. The Board has carefully considered the matters presented by counsel in his briefs and oral argument.

7. Department of the Army records show that accused is 27 years of age and married. Prior to entering the Army as an enlisted man on 10 June 1943, accused completed two years at the University of Maine. After being honorably discharged from the Army on 1 April 1946, he graduated from the University of Maine. On 5 June 1948, he was commissioned a second lieutenant in the organized Reserve Corps; on 21 February 1949, he entered on active duty in Category III, and on 15 July 1949 began a competitive tour of duty for the purpose of obtaining a Regular Army commission.

Since 21 February 1949, when he entered on active duty as a second lieutenant, he has been assigned to Fort Monmouth, New Jersey. Only one efficiency report of record, an abbreviated efficiency report for the period of 21 February 1949 to 3 April 1949, shows no numerical or adjective rating, but states the following comment of the rating officer: "Lt Patch is physically qualified for military duty, is above average mentally and morally. He is alert, ambitious, and possesses a high degree of initiative." His ratings relative to "Estimated Desirability in Various Capacities" show two of "Fight to get him," four of "Prefer him to most," two of "Happy to have him," and one of "not rated."

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

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

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

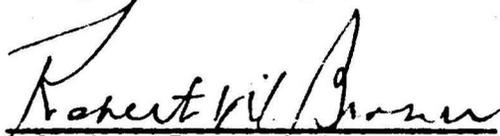
Joseph T. Brack, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

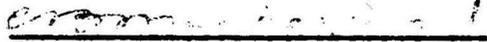
THE JUDICIAL COUNCIL

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

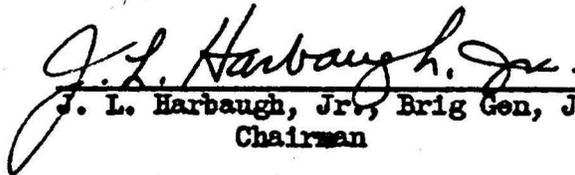
In the foregoing case of Second Lieutenant Clifford S. Patch, O-955386, Assigned Headquarters and Headquarters Company, 9400 Technical Service Unit, Signal Corps, Signal Training Regiment, Fort Monmouth, New Jersey, upon the concurrence of The Judge Advocate General the sentence is confirmed and will 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

14 August 1950

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



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

23 August 1950

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

JUL 19 1950

JAGH CM 3411450

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

v.)

First Lieutenant JEWEL G.
KEMPE (O-1824758), Company
C, 7th Cavalry Regiment
(Infantry), APO 201.)

1ST CAVALRY DIVISION (INFANTRY)

Trial by G.C.M., convened at
Camp Drake, Tokyo, Japan, 10
March 1950. Dismissal.

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NAVY DEPARTMENT

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

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

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

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

Specification: In that 1st Lt Jewel G. Kempe, Company C, 7th Cavalry Regiment (Infantry), did, at the 7th Cavalry Regiment (Infantry) Bachelor Officers' Quarters, McKnight Barracks, Tokyo, Japan, on or about 8 January 1950, wrongfully and knowingly allow Mary Jane Waggoner, the wife of 1st Lt John K. Waggoner, 7th Cavalry Regiment (Infantry), to remain in his quarters overnight, thereby bringing unfavorable publicity to said Lt John K. Waggoner and discredit upon the military service, such conduct unbecoming an officer and a gentleman.

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

Specification: In that 1st Lt Jewel G. Kempe, Company C, 7th Cavalry Regiment (Infantry), did, at the 7th Cavalry Regiment (Infantry) Bachelor Officers' Quarters, McKnight Barracks, Tokyo, Japan, on or about 8 January 1950, wrongfully and knowingly allow Mary Jane Waggoner, the wife of

1st Lt John K. Waggoner 7th Cavalry Regiment (Infantry), to remain in his quarters overnight, to the prejudice of good order and military discipline.

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. 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:

First Lieutenant Jewel G. Kempe, the accused, was billeted in 7th Cavalry, Guidon Hall, the bachelor officer quarters, McKnight Barracks, Tokyo, Japan, where about twelve officers were quartered. At the time of the trial he had known First Lieutenant John K. Waggoner about ten months (R 12,13,25,30,42). Lieutenant Waggoner and his wife, Mary Jane Waggoner, had been quartered in house #12, 7th Cavalry, since 10 November 1949 (R 13,14,25,26,27). He married her, a divorcee, 26 September 1947 (R 26). She testified that the marriage still exists "in a fashion" (R 27). In the early evening of 7 January 1950, the accused accompanied Lieutenant and Mrs. Waggoner to their quarters where they arrived about seven o'clock (R 20). They had a few drinks, and Lieutenant Waggoner and his wife engaged in an argument during which she called him names and told him she wanted to leave him (R 20,21). About 9:30 p.m. Mrs. Waggoner left the house. Lieutenant Waggoner was not "happy" about her leaving but was "amenable" and made no objection. He possibly requested the accused to take her dancing (R 22,23). The accused assured Lieutenant Waggoner that he would bring her back (R 23). Mrs. Waggoner accompanied the accused to the Tokyo General Hospital (R 22). Between 10:00 p.m. and 2:00 a.m. she telephoned her husband twice, at least once from the Officers' Club at the hospital, and the accused telephoned him at least once (R 22, 23). One call was from the Tokyo General Officers' Club (R 23). Lieutenant Waggoner received "several calls that night" (R 24). Lieutenant Waggoner did not remember if the accused stated that Mrs. Waggoner might have had too much liquor and that he was trying to bring her home, which might have occurred, but remembered he was very upset and said to please bring her home. He remembered there was further conversation but did not recall what it was (R 22,23). Mrs. Waggoner did not return home that night and her husband did not know where she spent the night (R 15). Between 10:00 p.m. and 12 o'clock the accused drove his automobile with a lady in the front seat through the gate in front of McKnight Barracks,

approximately thirty feet from the unit personnel building in which are located the bachelor officers' quarters (R 10,11). At six o'clock the following morning Lieutenant Waggoner awoke (R 22). He imagined that he felt something was "radically wrong" (R 24). He dressed and "ran down there and went to the 7th Cavalry, Guidon Hall" (R 22). He had "a .45 revolver with a full loaded clip" and "intended using it" He was in a state of excitement, "some sort of a rage," and did not "remember clearly everything that happened that morning" when he "first went there" (R 24). He entered the quarters of the accused "sometime before 8 o'clock" (R 17). He stated that he saw both his wife and the accused asleep "on a steel cot," the only one in that section of the quarters which consisted of two rooms (R 17,18,30,41). His wife was wearing pajamas; her dress was in the closet (R 18,19). The accused was not in uniform, but Lieutenant Waggoner could not recall how the accused was dressed. He did not know if the accused thereafter took off his shorts, but remembered him putting them on. Lieutenant Waggoner was "very excited" and could not "recall any of the conversation" he had with the accused (R 18,23,24). Lieutenant Waggoner "tried to call the OD," "approximately coincident" with his entry into the room "or within a half hour thereafter," but was unsuccessful. He called the corporal of the guard and told him to find the OD (R 19).

First Lieutenant Anthony J. Sunseri testified in deposition form as follows:

"On or about 0700 hours, 8 January 1950, at Guidon Hall (Officer BOQ), McKnight Barracks, Tokyo, Japan, Lt John K. Waggoner came to my room with a Service Pistol 45 caliber in his hand and took me to Lt Kempe's two room quarters, where I saw Mrs Waggoner in bed in the inter room. In the immediate room adjoining the doorway, I saw Lt Kempe sitting in a chair. Lt Waggoner was in a high state of emotion during this time. About two (2) minutes later Lt Waggoner left the room stating that he was going to contact the officer of the day. During his absence I suggested to Lt Kempe to leave the scene until Lt Waggons emotions subsided. When Lt Waggoner returned I noticed a superficial injury on Mrs Waggoner's head. I then escorted them to the dispensary for medical aid. On further examination it was decided to send Mrs Waggoner to Tokyo General Hospital for further treatment. I took the pistol from Lt Waggoner and immediately examined the chamber. It was not loaded, however the clip contained seven cartridges. I turned the pistol (No. 373102) and the loaded clip over to the Regimental Adjutant (Major Durbin). Lt Waggoner made a statement that he did not intend to use the pistol She was dressed in a complete set of dark blue pajamas Lt Kempe was completely dressed and sitting on a chair The room was orderly

and I noticed nothing unusual about the bed I don't recall any ladies wearing apparel She appeared to be asleep." (Pros Ex 2)

"At about 20 minutes to 7" the corporal of the guard, Corporal Harold D. Carlsen "not over a minute after" his telephone conversation with Lieutenant Waggoner, reported to the quarters of the accused approximately 200 yards distant (R 30,31,32). Lieutenant Waggoner asked the corporal "to act as a witness against Mrs. Waggoner and he yelled out very strong and he said: 'see that Goddam woman, that is my wife' and then he said 'I want you for a witness.' He didn't say nothing much other than that, sir, except hollering to his wife telling her to get dressed" (R 31). Mrs. Waggoner had on a "bras" and a skirt. Lieutenant Waggoner "seemed to be very excited" (R 30). The accused was not present (R 31).

Second Lieutenant John C. Lippincott, whose room is on the first floor of Guidon Hall, was awakened when Lieutenant Waggoner was telephoning for the OD. He saw the accused descending the stairway in Guidon Hall about 0700 hours (R 33). Lieutenant Waggoner came to the room of Lieutenant Lippincott and said: "come with me, I want you to see my wife, I want you to be my witness when I prefer charges." He seemed "excited and upset." Lieutenant Lippincott followed Lieutenant Waggoner upstairs to the room of the accused on the second floor. No one else was there. He saw "a pair of woman's silk pants and a lady's dress" pointed out by Lieutenant Waggoner. He saw Mrs. Waggoner "leaving the latrine in Guidon Hall" "in what appeared to be men's pajamas" (R 33,34,35,36). He also saw and talked to Lieutenant Schrader, Lieutenant Confer, Lieutenant Sunseri and Lieutenant Stone (R 34). It was not until a month later that a rule was "put into effect" restricting ladies from being brought into the BOQ (R 35). Previously it had been the practice for officers to have ladies enter the BOQ and to entertain them there (R 36,37). Lieutenant Lippincott had observed the conduct of the accused at social events and considered that he conducted himself as an officer and a gentleman (R 37).

Second Lieutenant Julius J. Schrader was also awakened by Lieutenant Waggoner trying to make a telephone call about 6:30 or 7:00 o'clock. Lieutenant Waggoner and Lieutenant Lippincott went upstairs. Lieutenant Schrader soon followed. Lieutenant Waggoner showed him "some clothes he said belonged to his wife; a dress, shoes and earrings." "Mrs. Waggoner came from the latrine wearing a pair of pajamas, and she said something about 'It is not what you think,' or words to that effect" He did not see the accused or any enlisted "people" (R 38,39). He saw Lieutenant Sunseri but he did not remember having any conversation with him (R 39). Lieutenant Schrader had seen the accused socially and whenever he had seen him the accused had "always acted as a gentleman" (R 39).

First Lieutenant Rodney R. Confer related his connection with the incident as follows:

"Somewhere between 7 and 7:15, on the morning of the 8th, a Sunday morning, I proceeded to the BOQ from the Headquarters of the 7th Cavalry. As I was going up the front steps of Guidon Hall, Lt Waggoner, Mrs. Waggoner and Lt Sensori came out of the front door. I stopped them on the steps and asked if anything was wrong. Lt. Waggoner told me nothing was wrong, that 'I just picked up a stray wife,' and the 3 of them proceeded down the steps, and I was about half way down the steps and I turned to look back, and when I turned around on the step I was standing on, I saw the back of Mrs. Waggoner's head. She had a blood clot about the center rear of her head that stood out very clearly because her hair was reddish blonde, and I could see it very clearly. It was a red blood spot. I asked Lt Sensori where they were going and he said to the dispensary. They proceeded on their way and I went into Guidon Hall Walking down the hallway I saw the door was open, one of the hinges was broken and the sign The sign said '1st Lt Kempe'. It had been hanging on the door and was laying on the floor when I saw it. The door was ajar so I went into the room. I was unaccompanied at that time. He has 2 rooms in his quarters. The first one you enter would be what you call a sitting room. The door adjacent to it is the bedroom. The sitting room looked to be about normal. I noticed a few coke bottles, and what appeared to be a bottle of sake on the table. I then went to the bedroom. The bedclothes, blankets and top sheet were thrown back as if somebody had gotten out of bed and the bottom sheet and pillow case had blood on it and there was a small table next to the head of the bed and there was a lamp on this table that had been knocked over and was lying on its side and there was a lamp shade underneath the table." (R 40,41)

Lieutenant Confer had known the accused since 1940, had observed him at social functions. The accused conducted himself as an officer and gentleman (R 42).

b. For the defense.

Mrs. Waggoner testified to the following events. In the late afternoon of 7 January 1950 the accused left the 7th Cavalry Officers' Club (Taylor Hall Club) with Lieutenant and Mrs. Waggoner. At their invitation he accompanied them to their quarters where they arrived about seven o'clock. They were all in good spirits. (R 51,52,58). Mrs. Waggoner had an argument with her husband "in a sense. We originally left the 7th Cavalry Club to go home so I could change my clothes to go to the Tokyo General Hospital Officers' Club, but we got home and my husband said he

didn't care to go out, so Lt Kempe and I asked him why not, and he said he was in a bad mood and he would ruin my evening, and I got a little perturbed and I left and went into the car and was there about 15 minutes. Lt Kempe was in the house for about 15 minutes and asked Lt Waggoner if he would like to come and join us" (R 52). Lieutenant Waggoner told his wife and the accused to "go ahead" to the General Hospital Officers' Club, which they did about 8:30 p.m. "This mood suddenly seized" her husband "for no apparent reason" and it was so bad, he then said he would ruin her evening. They left together at the "insistence" of Lt Waggoner. The accused never suggested that he and Mrs. Waggoner leave together without Lieutenant Waggoner. She imagined she said "let's go." During the course of the evening Mrs. Waggoner called her husband twice. The first telephone conversation took place "about 45 minutes to an hour" after they arrived at the club. She told him that if he did not join them she "would join him." She asked her husband if he would like her to come home, to which he replied "I imagine you are having a good time; you might as well have a good time" (R 52-56). Later she called again. The conversation was about the same. She asked if she should come home (R 52-55). Her husband was in "a perpetual bad mood." She stepped outside the telephone booth and the accused took the telephone and conversed with Lieutenant Waggoner. Both of these calls were from the General Hospital Officers' Club (R 53). She did not call her husband later that evening. She left the club with the accused "about 10:30 or 11" but did not "go by home" (R 54). She did not have occasion to telephone Lieutenant Waggoner from "any place other than the Tokyo General Hospital Officers Club." (R 55). On one previous occasion in the United States Lieutenant Waggoner did not care to go out and asked his wife "to go out." On that occasion she returned home at a reasonable hour (R 56).

The accused after being duly warned of his rights as a witness elected to testify under oath. He had arrived at the Taylor Hall Officers' Club at the 7th Cavalry Regiment about 4 o'clock on the afternoon of 7 January 1950. He left there in the company of Lieutenant and Mrs. Waggoner and went to their home as an "invited guest" (R 58).

"Before we left the officers' club they invited me out for a few drinks and we had talked of going dancing somewhere, and I had no date, and I thought they asked me to go along because of the transportation Very shortly after we arrived at the house they began to argue about something -- I don't remember now -- but they became very violent I don't remember the subject of the argument. It just applied to two people cursing each other out. The words they used were not nice and seemed to be about things that happened in the past, and they kept bringing up various and sundry instances and throwing it at each other. That went on for about 15 minutes and I finished my first drink and I asked to leave and told him that would be best, and he said, 'Oh, no; don't go, she will be all right in a few minutes

and then we will go dancing.' So I mixed another drink and went into the kitchen, which is at the far end of the house, and stayed in there by myself and let them do their arguing in the living room. She finally reached a climax and went into the bedroom and closed the door and Lt Waggoner came in and had a drink with me and she came out about 20 minutes later all dressed up and said she was going out and it didn't matter if she ever saw him again and they had another exchange of words and he said 'good riddance', etc, and that was all She bounced out of the front door and said 'goodbye' and she was gone He grabbed me at the time by the arm and said when she goes out like that she never gets back and please take care of her because we are in a strange country and see that she doesn't get in any trouble." (R 59-60)

She had been drinking "quite heavily."

"I tried to kill enough time to give her enough time to get going. She said nothing about going with me at the time. A few minutes later --, Waggoner was upset and begging me to go, and I thought she had already left and I didn't have to hurry to find her, and I said, 'Okay, I will look after her, don't worry about it', because he was terribly upset and mad, and I went out and found her in the car ... I asked her what the heck was going on and she said she wanted to go dancing and if I took her she would behave and go back home, and I said 'okay, if I take you dancing will you be okay and go on back home', and she said 'Yes.' Then I went down to the 49th General Club, and I purposely chose that place, because I knew everyone. I knew that practically everyone from the 7th Cavalry came there, and not only that, I would keep out of trouble and not cause embarrassment and have the people look down their noses at me and say I was going out with somebody else's wife. I took her there to explain that situation. There was only one officer there I knew. That was my Battalion Adjutant." (R 60).

He did not call Lieutenant Waggoner from the club and did not know if she did. She had some drinks against the advice of the accused and she "bought some champagne with her own money" (R 61).

"We left about 11:15 I got into the car I was facing toward Z Avenue and made a 'U' turn on 18th St and went to Utility. I turned right and proceeded to 10th Street. She recognized the corner and objected violently and asked where I was taking her and I said we were going home, and she said 'I am not going home' and I said 'Yes, she was.' That she had promised she would behave and not cause any trouble. When I started to turn left she grabbed the steering wheel and almost drove me into the parkway in the middle of the street ... She was pretty well 'oiled.' We had

words for about 10 or 15 minutes. I stopped between the parking section in the center of the road. I could not turn left after she pulled the steering wheel." (R 60,61)

He kept urging that she go home.

"She said she didn't want to see that blankety-blank husband of hers, and while we were talking at the intersection, I said, 'let's ride around a few minutes' and she said 'then I will go home.' I thought I could ride her around the back way and come in through the 8th Cavalry where she was not familiar, and I got in the middle of the road and continued to drive on and she said she wanted to use the telephone and I said she didn't need a telephone, that she would be home in a few minutes. And she again became very violent about the fact that she was not going home and insisted she wanted to use a telephone. She said she was not going to call her husband; that she was going to call a friend. I don't know who. It was then about shortly after 11:30, maybe 11:40 or 11:45. She was in no condition to be taken into a public place to use the telephone, because she was in a rage herself, and it seemed like the longer she talked about her husband the madder she got, so the only place I could think of where she could talk, without making a public display of herself, was at the 7th Cavalry Regiment. So I drove her there. I didn't want to take her into any of the orderly rooms, where a telephone was available, because the CQs were taking bedcheck about that time, and would have been disturbed if she had come in there and continued acting the way she was acting in the car, so I took her to Guidon Hall to use the telephone. She called her husband and they had a few words over the telephone, arguing and fussing, and again she told him that she would be damned if she came home to him; that he was a no-good so and so. I took the telephone away from her and talked to Lt Waggoner and told him that I was having one 'helluva' time with his wife; she would not come home and I would not be responsible. His exact words, in reply, were: 'Hell, hit her in the head.' I told him she was unruly and I could not drive her home, and it was bad enough trying to drive in Japan, without someone hanging on the steering wheel. While I was trying to drive, she said she wanted to go to the latrine, so when we got to Guidon Hall I took her upstairs to the latrine and she still had this bottle of champagne in her hand which she had bought at the club. In fact she tried to hit me with it once in the car for trying to take her home. She said she wanted a drink and if I had a glass so I would drink with her and then she would go home and behave herself, so I took her to the sitting room of my quarters and poured 2 drinks She drank about a half of a glass of champagne and I told her 'let's go, you can't stay here; you have to go home

like you promised'. And then she put up a big argument that she was not going home She told me: I will go home; if you do this, I will go home and behave myself and be a good girl. We had quite a little heated argument. I was getting pretty damn disgusted and pretty tired So I grabbed her by the wrist and said: 'pick up your purse and let's go' and started pulling her toward the door and she said: 'if you don't let go of my arm I am going to ...' something, I cannot remember the exact words. And she said: 'I am going to holler "rape" and cause you so much trouble you will never get out of jail.' So, needless to say, I dropped her wrist like a hot potato She went on to tell me she was going to stay there, and if I didn't like it I could get the hell out. So I got out I picked up my coat and went downstairs and went into the back seat of my car and covered up with my coat and went to sleep." (R 62,63)

When he left, Mrs. Waggoner was attired exactly as when she came in. The accused did not give her any pajamas (R 66). The accused awoke about 6:15 or 6:30 the next morning. He felt "terrible" about the whole thing. If Lieutenant Waggoner

"had not practically got on his knees and said 'watch out for her and not let her get in any trouble', I would have walked out of the club and forgot it ... I had not thought of facing charges about bringing a woman in my room. It was permissible at the time and other officers had done it quite often. That thought never entered my mind. I was trying to keep her and other people from getting involved so they would know what kind of situation was coming up and I figured if she went to bed and got up the next morning they could smooth up the argument I went to the room.... I changed clothes I had a date at 8 o'clock and was supposed to pick up a girl at 8 o'clock, and we were going sight-seeing in Atami ... I came in and took my blouse off, and my uniform was, of course, mussed up from having slept in it, and I was putting on my fresh uniform and change of underwear and everything, in the living room. I didn't go in the bedroom. I saw her sleeping in the bed. And I put my shoes and socks and underwear and pants and shirt on, and when Lt Waggoner came in I don't know whether I was buttoning up the front of my pants -- I was putting in my shirt tail, and my pants were open, and he said: 'Aren't you ashamed of yourself standing there nude' and he asked me to put my hands up, and naturally, when I put my hands up, my pants fell down ... He didn't threaten me. He had a .45 in his hand and was pointing it in my direction ... he didn't say anymore to me. He walked into the bedroom and I heard a scuffle in there, and a thud, and he was saying something about a 'no-good bitch' or something or other and I heard her cry out a little bit. When he left

the room I was standing in front of the door and I sat down in the chair and my legs were getting weak. When he went into the bedroom I put my pants on and sat down in the chair ... He was in the room just a few seconds -- about a $\frac{1}{2}$ minute, in the bedroom and he was talking and what not and he said 'I want a witness' and he dashed next door to my room and got Lt Sensori ... he came right over and right back in ... While he was gone I began to put my tie on. And he told Lt Sensori; he said: 'Look at my no-good wife', and that he has put up with this for so long, and blah, blah, blah. Nothing good. He was worried, and could hardly see, he was so blind mad. I was afraid he was going to shoot somebody. Lt Sensori was trying to get the pistol away from him, because we could see the hammer was back and I don't know whether there was a round in the chamber or not ... Just a couple of minutes ... Lt Waggoner said, 'I am going to get the OD; I want a witness to this.' He was talking about his wife all the time. He didn't seem to be threatening me in any way whatsoever, and when he went out of the door Lt Sensori said to me 'you had better get out of here, because he is blind mad; he doesn't know what he is doing.' So, I had put my tie on in the meantime and put on my jacket and picked up my coat and went out the door and walked downstairs ... I don't know anything what happened after I went downstairs and went into my car around 7 o'clock, or shortly thereafter. I was upset and drove around a few minutes, and then picked up my date and went to Atami for the afternoon." (R 63,64,65)

The accused did not make any report to anyone else to the effect that "I have this woman on my hands and cannot get rid of her" because "I didn't want to get her involved in a scandal and I thought it would blow over and they would get together the next morning." He denied that Mrs. Waggoner came to his quarters at his invitation (R 67). "Her statement that if I didn't let go of her and get out of there, and she was going to stay, and I got out, and, because there were no rules or regulations prohibiting females from not entering the BOQ: in my opinion she was just as safe there as she was in her own bed. Her husband could have come any time during the night, and I fully expected him to." (R 67)

"I was pretty disgusted by then, and mad and tired, and I had to get up early the next morning and with all the trouble I had with her I just left her there and left them to make up. I thought they would get in touch with each other I could have gone to the OD and requested that he remove her from my quarters. He would have to make an official report and Lt and Mrs Waggoner would have been involved and I would have been involved and I hoped it would turn out the way I figured and if I was not in the room with her it would relieve any suspicion." (R 67,68)

"I could have done a number of things" (R 69). When the telephone call was made from the bachelor officers' quarters, the accused did not tell Lieutenant Waggoner from where he was calling (R 69). The distance from the quarters of Lieutenant Waggoner to the quarters of the accused was "about 5 or 6 miles" (R 69). Lieutenant Waggoner was "lying" when he testified that he found his wife and the accused "in the same bed" (R 68).

The accused is thirty-two years of age and weighs 226 pounds (R 65). He served as an enlisted man from August 1942 to April 1946. He again entered the service in September 1948. He has never been under court-martial charges before (R 58).

Lieutenant Waggoner, age 24, testified that he struck his wife with a revolver on the head on the morning of 8 January 1950 (R 44,45).

First Lieutenant Pleas G. Huckabey testified that he was club officer during December 1949 and January 1950 at the Tokyo General Hospital Officers' Club. On numerous occasions he saw Lieutenant and Mrs. Waggoner at the club (R 46). On one occasion he saw her deliberately break two glasses by throwing them on the floor. He reported her conduct to the commanding officer (R 47). The conduct of the accused at the club has been exemplary as an officer and a gentleman (R 48).

Captain Herman L. West testified that he had seen the accused at the Taylor Hall Officers' Club and during duty hours; his moral conduct appeared above reproach (R 49). While under examination by the court, he was permitted to state: "from hearsay, it has been said he has been out with Japanese girls" (R 49). His reputation for moral conduct is "not good" (R 50).

First Lieutenant Ralph L. Crider, club duty officer at the Taylor Hall Club; testified that he saw the accused at the club upon several occasions and the accused conducted himself as an officer and a gentleman (R 50). His reputation "for good character" had been good; but the witness did not know his present reputation (R 51).

4. Discussion.

The accused is charged under both the 95th and the 96th Articles of War, with wrongfully allowing a woman not his wife to remain in his billet overnight. The word allow may be defined as to approve, or to permit by way of concession, or to authorize. The paramount questions appear to be: did the accused permit the woman to remain overnight, and did the circumstances exist which would characterize this permission as wrongful?

A careful evaluation of the undisputed evidence indicates that the accused did not give his express approval, permission or authorization for his visitor to remain overnight. Can his consent be implied from his actions and conduct? Early in the evening, while in the home of Lieutenant Waggoner and his wife, the accused was aware that he was the third member of a trio planning to go dancing, that as a result of a quarrel between Mrs. Waggoner and her husband this trio was cut to two by the decision of Lieutenant Waggoner not to go, and that Mrs. Waggoner had been drinking. The accused voluntarily assumed the role of befriending Mrs. Waggoner at a time when he knew that the relations between her and her husband were strained. He voluntarily consented to take her from the vicinity of her home. At the Officers' Club, the accused knew she was drinking heavily. He voluntarily drank with her and entertained her by dancing. He was aware that she did not want to go back to her husband. It was under these circumstances that he took her to his quarters. He voluntarily drank with her in his quarters. When she did not leave at a reasonable hour, he failed to take effective steps to take her home or to notify others in an effort to avoid the appearance of wrongdoing. Early in the evening he would have experienced little or no difficulty in keeping Mrs. Waggoner from his quarters. But as the evening progressed, he acquiesced in one situation after another which finally culminated in one, out of which he realized he would experience difficulty in extricating himself. His approval of one circumstance after another resulted in his consenting to the conduct of Mrs. Waggoner to the point that he considered that he was too late in his effort to keep her from staying all night in his billet. His continuing assent throughout the evening to the various happenings and events was a cumulative process. The events as they occurred, and their natural outcome, so reasonable to foresee, indicate an implied consent on the part of the accused for Mrs. Waggoner to go to his quarters and to remain there overnight, if she so desired.

Whether the permission to remain in the quarters of the accused overnight may be characterized as wrongful, depends upon the surrounding circumstances. The event took place in a building set aside as bachelor officers' quarters and in rooms assigned to the accused, a single man. The overnight visitor was a married woman, the wife of a fellow officer. She and her husband were assigned quarters and her husband was waiting there for her return. She had been drinking heavily. The risk of a disorder in the bachelor officer quarters was apparent not alone as the result of her possible conduct but as the result of the probable actions of her husband both in locating her and in exhibiting his resentment and vengeance over the situation. Furthermore, the fact that a married woman spends the night in the quarters of a man not her husband naturally gives rise to suspicions and the appearance of wrongdoing. Adverse publicity resulting from a disorder or the general appearance of such an irregular situation may at any time culminate in a scandal. This may, and in the case under consideration, did redound to the prejudice of good order and

military discipline. The court properly denied the defense motion for a finding of not guilty under the 96th Article of War (JM 242152, Hooey, 27 BR 5).

The accused is charged with allowing Mrs. Waggoner to remain in his quarters overnight. Although it is considered that this was improper and wrongful under the circumstances, the accused is not charged with any other wrongdoing. The wrongful granting of permission to stay overnight is not to be confused with the possible or probable conduct of the accused during the night. However, evidence and suspicions concerning such conduct are relevant in so far as they are elements of the entire situation and in so far as they are factors to consider in viewing the circumstances under which the visitor stayed overnight. They may further be considered as a basis for any resulting unfavorable publicity. Although the conduct of the accused is prejudicial to good order and military discipline, it is not considered that his conduct in granting the permission was dishonorable, or constituted conduct unbecoming an officer and a gentleman.

In the case of CM 333288, Shore, 81 BR 329,346, it was charged that the accused "contemptuously disregarding his obligations as an officer and a gentleman," wickedly and lasciviously shared his bed in the Bachelor Officers' Quarters with a woman known to be the wife of another officer, in violation of Article of War 95. In the opinion of The Judge Advocate General, the evidence indicated that the accused "with a wicked purpose shared his bed with the woman in that in his presence he permitted her to occupy a bed in his quarters while she was extremely drunk under circumstances indicating an intention to occupy the bed with her." His conduct was held to be violative of Article of War 96 but not dishonorable conduct within the purview of Article of War 95.

In the case under consideration the accused is not charged with occupying a bed with Mrs. Waggoner or with any conduct other than wrongfully allowing her to remain in his quarters overnight. It is concluded that the conduct charged and proved, under all the circumstances of the case, does not constitute dishonorable conduct or conduct unbecoming an officer and a gentleman within the purview of Article of War 95. The court improperly denied the defense motion for a finding of not guilty under the 95th Article of War.

Some hearsay evidence was admitted without objection and is not considered prejudicial (R 31).

5. The records of the Department of the Army show that the accused is 32 years of age, divorced, and has one child. He was graduated from high school in Dallas, Texas, in 1935, and attended business college for one year. In civilian life he worked as a cashier, machine operator, and salesman. He enlisted in the Army on 17 August 1942, successfully complete

(111.)

Officers Candidate School and was commissioned second lieutenant on 1 April 1943. He was promoted to first lieutenant on 14 July 1944 and served in that rank until he was separated on 11 May 1946. He was ordered to extended active duty on 23 September 1948 and has served to date. He served in Canada from 23 February 1944 to 6 September 1944, and is entitled to wear the American Theater Ribbon, a Meritorious Service Unit Plaque, and the Victory Medal. His efficiency ratings have been six of excellent, four very satisfactory, and one satisfactory. His last available numerical rating was 064.

6. The court was legally constituted and had jurisdiction of the person and of the offenses. Except as noted, 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 Charge I and its Specification, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

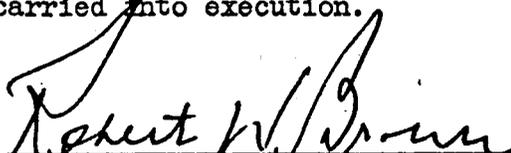
C. F. Hill, J.A.G.C.
C. J. Hauck Jr., J.A.G.C.
Robert Barker J.A.G.C.

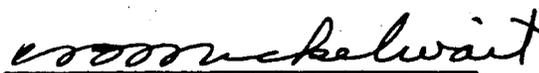
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

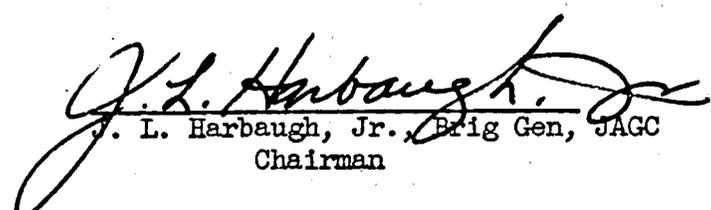
THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant Jewel G. Kempe, O-1824758, Company C, 7th Cavalry Regiment (Infantry), APO 201, upon the concurrence of The Judge Advocate General, the findings of guilty of Charge I and its specification are disapproved, and the sentence is confirmed but commuted to a reprimand and forfeiture of fifty 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

7 August 1950

I concur in the foregoing action.


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

8 August 1950

(GCMO 52, 21 August 1950).

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

(117)

JAGK -CM 341458

18 MAY 1950

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

v.)

Captain HARRY H. ROBERT)
(O-1292943), Headquarters)
and Headquarters Company,)
Motor Battalion, Head-)
quarters and Service Group,)
General Headquarters, Far)
East Command.)

HEADQUARTERS AND SERVICE GROUP
GENERAL HEADQUARTERS, FAR EAST COMMAND

Trial by G.C.M., convened at
Tokyo, Japan, 13 April 1950.
Dismissal and total forfeitures
after promulgation.

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 charge and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Harry H. Robart, Headquarters and Headquarters Company, Motor Battalion, Headquarters and Service Group, General Headquarters, Far East Command, did, at Tokyo, Japan, on or about 13 March 1950, with intent to deprive the owner temporarily of his property, wrongfully and without the consent of the owner, take and use Military Payment Certificates, value of Six Hundred Two Dollars and Seventy-one cents (\$602.71), property of the United States, furnished and intended for the payment of civilians employed by the Department of the Army.

Specification 2: In that Captain Harry H. Robart, ***, did, at Tokyo, Japan, on or about 28 February 1950, with intent to deprive the owner temporarily of his property, wrongfully and without the consent of the owner, take and use Military Payment Certificates of the value of about Thirty Dollars (\$30.00), property of Private Robert B. Tobin, and Military Payment Certificates of the value of about Forty Dollars (\$40.00), property of Private First Class Edward L. Misko,

and Military Payment Certificates of the value of about Nine Dollars and Seventy-five cents (\$9.75), property of Corporal Lee S. Fink, and one check, value of Two Hundred and Fifty Dollars (\$250.00), property of Corporal Lee S. Fink, of a total value of Three Hundred Twenty-nine Dollars and Seventy-five cents (\$329.75).

Specification 3: In that Captain Harry H. Robart, ***, did, at Tokyo, Japan, on or about 8 March 1950, with intent to deprive the owner temporarily of his property, wrongfully and without the consent of the owner, take and use Military Payment Certificates, value of Six Hundred Fifty Dollars (\$650.00), property of Sergeant Edward P. Wenz.

Specification 4: In that Captain Harry H. Robart, ***, did, at Tokyo, Japan, on or about 31 January 1950, wrongfully borrow Military Payment Certificates, value of One Hundred Dollars (\$100.00), from Corporal Walter E. Ober, an enlisted man of Headquarters and Headquarters Company, Motor Battalion, Headquarters and Service Group, General Headquarters, Far East Command, to the prejudice of good order and military discipline.

Specification 5: In that Captain Harry H. Robart, ***, did, at Tokyo, Japan, on or about 31 January 1950, wrongfully borrow Military Payment Certificates, value of One Hundred Dollars (\$100.00), from Corporal Harry A. Nash, an enlisted man of Headquarters and Headquarters Company, Motor Battalion, Headquarters and Service Group, General Headquarters, Far East Command, to the prejudice of good order and military discipline.

Specification 6: In that Captain Harry H. Robart, ***, did, at Tokyo, Japan, on or about 31 January 1950, wrongfully borrow Military Payment Certificates, value of One Hundred Fifty Dollars (\$150.00), from Master Sergeant Oliver C. Bender, an enlisted man of Headquarters and Headquarters Company, Motor Battalion, Headquarters and Service Group, General Headquarters, Far East Command, to the prejudice of good order and military discipline.

Specification 7: In that Captain Harry H. Robart, ***, did, at Tokyo, Japan, on or about 3 February 1950, wrongfully borrow Military Payment Certificates, value of Three Hundred Dollars (\$300.00), from Sergeant William E. Sparkes, an enlisted man of Headquarters and Headquarters Company, Motor Battalion, Headquarters and Service Group, General

Headquarters, Far East Command, to the prejudice of good order and military discipline.

He pleaded guilty to and was found guilty of the charge and all specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

It was stipulated by and between the prosecution, the defense, and the accused that at the time, place and in the manner alleged the accused did take and use, (a) military payment certificates, value of \$602.71, property of the United States (Spec 1); (b) military payment certificates, value of \$30, \$40 and \$9.75, property of Private Robert B. Tobin, Private First Class Edward L. Miske and of Corporal Lee S. Fink, respectively, and one check, value of \$250, property of Corporal Lee S. Fink (Spec 2); (c) military payment certificates, value of \$650, property of Sergeant Edward P. Wenz (Spec 3); and that he did borrow military payment certificates from, (d) Corporal Walter E. Ober of a value of \$100 (Spec 4); (e) Corporal Harry A. Nash of a value of \$100 (Spec 5); (f) Master Sergeant Oliver C. Bender of a value of \$150 (Spec 6); and (g) Sergeant William E. Sparkes of a value of \$300 (Spec 7). It was further stipulated that the accused made restitution, (a) to the United States Department of the Army on 3 April 1950 in the sum of \$602.71 (Spec 1); (b) to Private Robert B. Tobin, Private First Class Edward L. Miske and Corporal Lee S. Fink on 28 March 1950 in the sum of \$30, \$40, and \$259.75, respectively (Spec 2); (c) to Sergeant Edward P. Wenz on 28 March 1950 in the sum of \$100 on account of the alleged indebtedness of \$650 (Spec 3); and (d) to Sergeant William E. Sparkes on 11 March 1950 in the sum of \$300 (Spec 7) (R 10, Pros Ex 1).

4. Evidence for the Defense

The accused was duly advised of his rights as a witness and elected to testify in his own behalf. He stated that during the period of September 1949 to February 1950 he gambled with various occupation personnel in Tokyo in games which required initial stakes of \$100, \$200 and \$300 to participate. In the course of these games he received personal checks from various players amounting to over \$6500. These checks varied in amounts of \$1000, \$2800, \$300, \$600, \$400 and \$600. He deposited them in his bank account and when they were put through for collection checks totaling over \$6000 were dishonored and turned out to be uncollectible. The accused drew his own personal checks against the amount of checks deposited but they were dishonored because the checks deposited were dishonored. During this same period the accused lost between \$1000

and \$1500 of his own cash money in gambling, and became insolvent. When he was called upon to make good his personal checks he borrowed some money from various people to meet his pressing accounts but did not have the means to pay that money back. These people started to press him for repayment of their money in February and when he was unable to raise any more money he started borrowing money from enlisted men. He stopped gambling in February because he had no funds to play with, but when he received his March pay he gambled again and wound up with \$1200 worth of checks. He gave Sergeant Wenz \$600 worth of these checks and \$50 in cash and as it turned out none of these checks were honored by the drawee bank. The accused made the \$600 in checks given to Sergeant Wenz good and retained the bad checks. The accused expressed the opinion that he can be of no future use in the military service because of his financial difficulties and stated that he had been psychoanalyzed by Army doctors who told him that he has certain symptoms that require treatment outside the service because the Army does not have the necessary facilities to accomplish the treatment required (R 18-23).

Major David S. Woodward, Captain Kermit H. Selvig, Corporal William W. Shield, Corporal Robert Pohl, Jr., and Corporal Roger M. Gooddale gave testimony concerning the accused's character, reputation and efficiency as an officer and each classified him, respectively, as excellent, valuable and truthful prior to the alleged incident; as the best officer ever served under; as the very best commanding officer; as a very good officer (R 11,13,14,15,16). It was stipulated that if Corporal Stillman, Corporal Trotter, Corporal Nealigh and Private First Class Stoneman would testify as character witnesses they would testify substantially the same as the previous witnesses (R 17).

5. Discussion

The pleas of guilty, the stipulation adduced by the prosecution, and the accused's judicial confession fully support the findings of guilty. The plea of guilty was advisedly entered and received in evidence and the stipulation was admittedly and obviously concurred in by the accused in conformity with his plea for purposes of extenuation and mitigation of the offenses charged. As such, the stipulation was not inconsistent with the pleas of guilty nor is it indicated that the pleas of guilty were improvidently entered. Accordingly, the pleas and stipulation were properly received in evidence and constitute competent proof of each offense as charged (CM 235496, Arnold, 22 BR 85,91; CM 341028, Pickens, 17 Apr 1950).

Wrongfully taking and using personal property without the consent of the owner with intent to deprive the owner temporarily thereof and borrowing money from an enlisted man by an officer have long been held to be military offenses in violation of Article of War 96 (CM 336639, Cole, 3 BR-JC 159,168,175,182; CM 333085, Crank, 81 BR 289, 298).

6. Department of the Army records show that the accused is 39 years of age, married, and has two daughters, age 16 and 6. He is a high school graduate and, in civilian life, was employed as a supervisor and production manager in the Surgical Dressing, Inc., owned by his father, from 1930 to 1935; as a manager-superintendent in the Sophia Robart Company, manufacturers of cosmetics, owned by his mother, from 1935 to 1940; and as sales manager and treasurer of the Trans-World Television, Inc. and Precision Bilt Company, owned by himself, from 1946 to 1948. No evidence of any civilian criminal convictions is shown. He served as an enlisted man in the Massachusetts National Guard from August 1938 to January 1941 and in the U.S. Army from 16 January 1941 to 7 September 1942. He entered the Officers' Candidate School (Infantry) on 13 June 1942 and received a commission as second lieutenant, Infantry, AUS, on 8 September 1942. He was promoted to first lieutenant on 10 June 1943 and to captain on 1 August 1944. He served overseas from 5 December 1943 to 10 July 1945 as military personnel officer in the 13th Infantry, and was separated from active service on 13 December 1945. During this period of commissioned service his manner of performance ratings include six "Excellent" and two "Superior" and he was awarded the Bronze Star Medal. He again entered on active duty on 10 August 1948 as a reserve officer in Category III and his average, over-all numerical efficiency rating is 099.

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

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

Samuel J. Wopf, J.A.G.C.

Joseph L. 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 Captain
Harry H. Robart (O-1292943), Headquarters
and Headquarters Company, Motor Battalion,
Headquarters and Service Group, General
Headquarters, Far East Command, upon the
concurrence of The Judge Advocate General
the sentence is confirmed and will be car-
ried into execution.

On Leave
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

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

29 May 1950

I concur in the foregoing action.

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

21 May 1950

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

(123)

JAGQ - CM 341487

MAY 2 2 1950

UNITED STATES

9TH INFANTRY DIVISION

v.
Recruit JOSEPH L. GUIMOND
(RA 12325683), Service
Battery, 34th Field Ar-
tillery Battalion.

Trial by G.C.M., convened at
Fort Dix, New Jersey, 27 March
and 5 April 1950. Dishonorable
discharge, total forfeitures
after promulgation and confine-
ment for six (6) months. Post
Guardhouse.

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 50g.

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

CHARGE: Violation of the 65th Article of War.

Specification 1: In that Recruit Joseph L. Guimond, Service Battery, 34th Field Artillery Battalion, did, at Fort Dix, New Jersey, on or about 16 February 1950, strike M/Sgt Michael Kotula, a noncommissioned officer who was then in execution of his office, by hitting him in and about the face and head with his fist.

Specification 2: In that Recruit Joseph L. Guimond, Service Battery, 34th Field Artillery Battalion, did, at Fort Dix, New Jersey, on or about 16 February 1950, strike Sgt Theodore R. Coles, a noncommissioned officer who was then in the execution of his office, by hitting him in and about the body with his fists.

The accused pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to be 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 year. The reviewing authority

approved the sentence, reduced the period of confinement to six months, designated the Post Guardhouse, Fort Jay, New York, or elsewhere as the Secretary of the Army may direct, but not in a penitentiary, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50e.

3. The only question which need be considered is whether the court was legally constituted at the time it met pursuant to adjournment, and thereafter during the trial, in view of the fact that the regularly appointed defense counsel previously had been relieved from active duty and none was appointed in his place.

4. It appears from the record of trial that by paragraph 2, Special Orders Number 55, dated 17 March 1950, the Commanding General, 9th Infantry Division, appointed a general court-martial to meet at Fort Dix, New Jersey. This order appointed Captain Daniel F. Smoak, Junior, JAGC, defense counsel and First Lieutenant Douglas Lapine, assistant defense counsel.

The record further shows that the accused was arraigned on 27 March 1950 at which time the defense stated the accused desired to be defended by the regularly appointed defense counsel and assistant defense counsel, both of whom were present. After a plea of not guilty was entered and before any testimony was received the court was adjourned because of the sickness of the accused.

The court reconvened on 5 April 1950 at which time the regularly appointed defense counsel was not present and was no longer on active duty. After some testimony was taken the following transpired (R 17):

"LAW MEMBER: Is it agreeable with the accused to proceed with the trial in the absence of the regularly appointed defense counsel of this court, who I think has since been relieved from active duty?"

"PROSECUTION: Yes, sir. I failed to announce that in announcing the members present and absent. The regularly appointed defense counsel has been relieved from active duty and returned to his home in Florida. Is the accused satisfied to proceed with the assistant defense counsel?"

"DEFENSE LAPINE: [Assistant defense counsel]: The accused is satisfied.

"LAW MEMBER: Very well."

The Staff Judge Advocate states in his review that "at the time of the reconvening of the court there was actually no regularly appointed

defense counsel in being, the regularly appointed assistant defense counsel * * * was acting as defense counsel."

Department of the Army records pertaining to Captain Smoak reveal that Paragraph 49, Special Orders 58, Department of the Army, dated 24 March 1950, provides:

"E X T R A C T

* * *

"49. CAPT DANIEL F. SMOAK, JR. (1st Lt) 060156 JAGC is reld fr asg and dy Ft Dix, NJ, eff 31 Mar 1950 on which date DP the resignation by DANIEL F. SMOAK, Jr of his com as 1st Lt JAGC RA is accepted and his temp com as Capt AUS is terminated."

5. Although First Lieutenant Douglas P. Lapine, the regularly appointed Assistant Defense Counsel, examined the record of trial before authentication and signed it as "defense counsel", the organization of the court and the statement in the record of trial pertaining to the selection of counsel by the accused indicate that at the reconvening of the court and the taking of all the testimony he was not the appointed defense counsel. The Department of the Army Special Orders relieving Captain Smoak of all assignments and duties at Fort Dix, effective 31 March 1950, and accepting his resignation and terminating his AUS commission, in effect relieved him of his duties of defense counsel. No new defense counsel was appointed in his place.

6. In CM 337855, Watson, 4 BR-JC 157, 8 Bull JAG 187, a somewhat similar state of facts existed. The special orders appointing the court named a defense counsel but subsequent special orders amending the orders appointing the court relieved the defense counsel and at the time of the trial there was no regularly appointed defense counsel. The Board of Review in holding the record legally insufficient stated:

"Article of War 11 provides in part as follows:

'For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and one or more assistant trial judge advocates and one or more assistant defense counsel when necessary ***.'

"Article of War 17 provides in the second and third sentences thereof as follows:

'The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel, duly appointed for the court pursuant to Article 11. Should the accused have counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel.'

"The above quoted provisions of Articles 11 and 17 are, except for one minor change, exactly as written before the Articles of War were amended by Title II, Selective Service Act of 1948 (62 Stat 627). Prior to the mentioned amendments, the Board of Review, in CM 313709, Velarde, 63 BR 237, 241; 5 Bull. JAG 332, considered a case somewhat similar to the one at hand and in so doing, concluded as follows:

'By providing that the accused who provides counsel of his own selection might if he desired have the defense counsel or assistant defense counsel act as his associate counsel the Congress must be held to have had the intent that such defense counsel or assistant defense counsel should be available, otherwise the provision is meaningless.

* * * * *

'The conclusion is inescapable that the provision of the 11th Article of War directing the appointment of defense counsel for a general or special court-martial is mandatory and that failure to appoint a defense counsel for the general court-martial which tried the accused constituted fatal error, that the court was without jurisdiction and its action in trying the accused was void.'

In each of the above cited cases there was a defense counsel appointed in the order appointing the court but there was none at the time of the arraignment and trial. In the instant case there was a regularly appointed defense counsel at the time of the arraignment but none at the time the court reconvened, heard all the evidence and found the accused guilty.

In view of the foregoing, all proceedings in this case subsequent to the relief from active duty of the regularly appointed defense counsel were null and void, inasmuch as the court was thereafter illegally constituted and lacked jurisdiction to try the accused.

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

J. L. Seales, JAGC

Laurel S. Chambers, JAGC

William E. Sitnik, JAGC

(128)

JAGQ - CM 341487

1st Ind

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

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

1. In the case of Recruit Joseph L. Guimond (RA 12325683), Service Battery, 34th Field Artillery Battalion, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50g(3), this holding and my concurrence therein vacate the findings of guilty and the sentence. Further trial 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:

(CM 341487).



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

1 Incl
R/T

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

JAGZ CM 341508

Jul 19 1950

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

FORT KNOX

v.)

Recruit CURTISS CORNETT)
(RA 15112962), Battery A,)
54th Armored Field Artillery)
Battalion, Combat Command A,)
3d Armored Division, Fort)
Knox, Kentucky.)

Trial by G C M, convened at Fort Knox,
Kentucky, 6 April 1950. Dishonorable
discharge, total forfeitures after
promulgation, and confinement for one
(1) year.
Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
WHIPPLE, MICKEL AND BYRNE
Officers of the Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50e.
2. Upon trial by general court-martial convened by the Commanding General, Fort Knox, Kentucky, on 6 April 1950, the accused was tried upon the following charge and specification:

CHARGE: Violation of the 54th Article of War.

Specification: In that Recruit Curtiss Cornett, Battery A, 54th Armored Field Artillery Battalion, Combat Command A, 3d Armored Division, did, at Lexington, Kentucky, on or about 15 October 1949 by willfully concealing the fact that on or about 23 March 1949, he was discharged from the Army because of fraudulent enlistment, procure himself to be enlisted in the military service of the United States by Warrant Officer Junior Grade Robert C. Krebs; and did there after at Fort Knox, Kentucky, receive pay and allowances under the enlistment so procured.

The accused pleaded not guilty to, and was found guilty of, the charge and specification and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for one year. The Commanding General, Fort Knox, Kentucky, approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50e.

3. Evidence.

a. For the Prosecution.

Without objection by the defense the prosecution offered in evidence a letter, Headquarters Third Armored Division, Fort Knox, Kentucky, subject: "Verification of Prior Service", dated 12 December 1949 directed to The Adjutant General, requesting verification of the service of Curtiss Cornett (15379232), who enlisted in the Army in March 1942 and was discharged in March 1949. Attached to this communication was a fingerprint card bearing certain fingerprints, signed by Curtiss Cornett and the signature of Arnold J. Lappin as the person taking the impressions. A stipulation, stating that if Arnold J. Lappin, now separated from the service, were present in court and under oath he would testify that on 12 December 1949 a person appeared before him whose fingerprints he took and whose signature was also placed on the card, was received in evidence. It was stipulated that if Major John W. Hancock, Assistant Adjutant General (3d Armored Division) were present he would testify that the basic communication and the inclosure were returned from The Adjutant General, Department of the Army, Washington 25, D. C. by first indorsement dated 9 February 1950, to the Commanding General, Third Armored Division, Fort Knox, Kentucky, over the signature of Edward Klein, Adjutant General. This indorsement was admitted in evidence without objection as part of prosecution's Exhibit 1. The indorsement in pertinent part states that the inclosed fingerprints of Curtiss Cornett, RA 1537909, who enlisted 15 October 1949, claiming no prior service were identical with those of Curtiss Cornett, RA 15112962, who enlisted 3 April 1942 and was honorably discharged 2 December 1942 because of minority; Curtiss Cornett, 45018445, who was inducted 2 August 1945 and was honorably discharged 26 June 1947 because of inaptness and lack of adaptability for military service; and Curtiss Cornett, 15112962, (serial number changed from RA 15379232) who enlisted 2 November 1948 and was discharged on 23 March 1949 because of fraudulent enlistment (concealment of separation from the Armed Forces).

Prosecution, by stipulation, introduced in evidence an Enlistment Record, NME Form No. 4 (Pros Ex 2) bearing the name of "Cornett, Curtiss" but the stipulation specifically provided that the defense did not admit by the stipulation that this enlistment record pertained to the accused. The serial number shown on this form was originally RA 1537909 and corrected to RA 15112962, in accordance with instructions contained in the first indorsement referred to, supra. The enlistment bore the signature of Curtiss Cornett in two places, and the applicant for enlistment therein declared

that he had no prior service.

Master Sergeant Gerald J. Pohlman, Battery A, 54th Armored Field Artillery Battalion, identified the accused as a Recruit and a member of Battery A, 54th Field Artillery Battalion, and testified that the accused participated in military formations in uniform and he observed him at mess during the period prior to 24 February 1950, while they were in the same company.

It was stipulated that if Major Clayton T. Hathaway, Post Finance Officer, were present in court under oath he would testify that the military pay record of Recruit Curtiss Cornett RA 1537909, Battery A, 54th Armored Field Artillery Battalion, Third Armored Division, Fort Knox, Kentucky, shows that he was paid \$89 on voucher # 16799 on 30 November 1949 by Captain Ray W. Burkett, Agent Officer; that he was paid \$20 on voucher # 18505 on 20 December 1949 by First Lieutenant Walter J. Japiello, Agent Officer, and that he was paid \$37 on voucher # 19573 on 31 December 1949 by Captain Ray W. Burkett, Agent Officer.

Private First Class Richard A. Challis, Battery A, 54th Armored Field Artillery Battalion, Fort Knox, Kentucky, testified that on about 12 December 1949, pursuant to instructions, he directed the accused to report to a clerk in the Discharge Section for the purpose of having his fingerprints taken; that the accused departed alone and returned some time later stating that he had complied with instructions.

b. For the Defense.

The accused having been advised of his rights as a witness by the Law Member elected to remain silent. No evidence was offered by the defense.

4. The accused is charged with fraudulent enlistment which is an enlistment procured by means of either a willful, i.e., intentional misrepresentation in regard to any of the qualifications or disqualifications prescribed by law, regulation or orders for enlistment, or a willful concealment in regard to any such disqualification (Par. 142, MCM, 1949). The elements of proof necessary to establish this offense constitute

- a. The enlistment of the accused in the military service as alleged;
- b. That the accused willfully, i.e., intentionally misrepresented or concealed a certain material fact or facts regarding his qualifications for enlistment as alleged;
- c. That the enlistment of the accused was procured by such intentional misrepresentations or concealment; and
- d. That under the enlistment the accused received either pay or allowances, or both, as alleged (Par. 142, MCM, 1949).

The enlistment of accused and his receipt of pay and allowances are sufficiently established by his enlistment record, the testimony of Master Sergeant Pohlman and Private First Class Challis, both of his organization, and by the stipulated testimony of Major Hathaway in connection with the receipt of pay by the accused.

The identity of the accused as the person named in the specification was established by the testimony of witnesses and also was admitted by the accused's plea to the general issue whereby he admitted his identity as the person charged (CM 296303, Burdick, 58 BR 103, 104; CM 318728, Chmura, 68 BR 23, 24). The identity of the accused as the person whose fingerprints were taken by Arnold J. Lappin at Fort Knox, Kentucky, on 12 December 1949, and which appear on the fingerprint card attached to Prosecution's Exhibit No. 1, is not positively established by parol testimony or by the stipulation between the parties, but is believed that, since the fingerprint card and the enlistment record, both of which were before the court bearing signatures of "Curtiss Cornett", the court was competent to determine that both signatures were made by the same person (MCM, 1949, Par. 129b; CM 330-506, Forsythe, 79 BR 69, 76; CM 330698, Bryan, 79 BR 137, 146). It is further established that all of the records introduced in evidence bear the name "Curtiss Cornett", although there is a dissimilarity of serial numbers. Paragraph 125a of the Manual for Courts-Martial, 1949, specifically provides at page 151 that:

"Identity of name raises a presumption of identity of person. The strength of this presumption will depend upon how common the name is and upon other circumstances."

Accordingly, it is believed that because of the unusual name of the accused, the court was justified in finding that the accused and the person named in the enlistment record claiming no prior service were one and the same person.

It remains incumbent upon the prosecution to establish elements (b) and (c) of the proof, i.e., that accused misrepresented or concealed certain material facts regarding his qualifications for enlistment, and that his enlistment was procured by such intentional misrepresentations or concealment. The misrepresentation alleged was his willful concealment of his previous discharge from the Army on 23 March 1949 because of fraudulent enlistment. The only proof of such prior discharge is a statement to that effect contained in paragraph 1 of the first indorsement from the Office of The Adjutant General, dated 9 February 1950 (Pros Ex 1), to the Commanding General, 3d Armored Division, Fort Knox, Kentucky, which states, in pertinent part, that the accused "was discharged 23 March 1949, a Recruit, because of fraudulent enlistment," giving as the reason therefor his concealment of his separation from the Armed Forces, and that "he was furnished a certificate of discharge, WD AGO Form 53-59 (Undesirable Discharge)". This state-

ment constitutes a resume of information which no doubt appeared in other official records but which is generally inadmissible in evidence (MCM, 1949, Par. 129a).

The Manual for Courts-Martial, 1949, specifically provides that in any case in which the identity of the accused as a member of the Military Service is in issue, his identity may be established, prima facie, by the certificate of The Adjutant General, or one of his assistants, that a duly qualified fingerprint expert on duty as such in his office has compared the fingerprints submitted as those of a person in the military service, described by name, organization and serial number, and that such fingerprints have been found to be those of one and the same person (MCM, 1949, Par. 129a). There is no provision therein that a prior discharge may be established in this manner.

Paragraph 142a of the Manual for Courts-Martial, 1949, specifically provides that if concealment of dishonorable discharge is alleged, the final indorsement on the service record is competent evidence of the dishonorable discharge. In the instant case the undesirable discharge could have been established by such means or by other competent evidence.

The mere fact that a document is an official writing or report does not in itself make it admissible in evidence for the purpose of proving the truth of the matters therein stated. An official writing may be admitted in evidence only when it comes within one of the recognized exceptions to the hearsay rule. (MCM, 1949, Par. 130a).

Since the indorsement of The Adjutant General was introduced specifically to establish the fraud charged and the identity of the accused, to be admissible, it must conform to the statutory exceptions to the hearsay rule. As stated by the Board of Review in CM 318685, Sustaitte, 67 BR 389, 391, "A certified copy must in the absence of statutory authority to the contrary * * * be a transcription in the literal terms, an exact duplication of the original. A mere summary by the certifying officer is inadmissible (Wigmore on Evidence, 3rd, ss 2108, 1678; in re Kostchris Estate, 96 Mont. 226, 29 P (2d) 829, 835)."

The Board of Review confronted with a similar situation in CM 186992, Gentry, stated:

"* * * other direct, though incompetent evidence of identity, consisting of the purported copy of the purported indorsement from the Office of The Adjutant General, containing statements with respect to the identity of James L. Gentry, William J. Roan and Robert J. Sylvester, was received in evidence. Even if genuine this paper was not the certificate of comparison and identity described in paragraph 129 of the Manual for Courts-Martial and was at best hearsay. Its admission was error. Counsel stated that the defense had no objection to its introduction but the record contains nothing to show that either counsel or accused knew of the incompetency of the paper or of

(134)

its possible legal effect, or that the trial judge advocate, counsel, or the accused considered the question of its competency. Under the circumstances, it cannot be said that the action of the counsel amounted to a waiver of objection or a stipulation that the recitals therein were true (C.M. No. 156186, Potter)." (Underscoring supplied).

It was unnecessary for the Board of Review in the Gentry case, supra, to comment on this type of evidence as proof of discharge since that element of the offense was established by photostatic copies of the final indorsement on the service record as provided by the Manual for Courts-Martial.

We conclude from the foregoing that the writing here offered as proof of prior undesirable discharge is hearsay and not admissible in evidence, and that under the circumstances it cannot be said that the action of defense counsel amounted to a waiver of objection or a stipulation that the recitals therein were true. The record of trial is devoid of other competent proof to establish that this accused misrepresented or concealed material facts regarding his qualifications for enlistment, and that his enlistment was procured by such intentional misrepresentation or concealment.

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

Signed, J.A.G.C.

On Leave, J.A.G.C.

Signed, J.A.G.C.

JAGZ CM 341508

1st Ind.

Aug 4 1950

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

TO: Commanding General, Fort Knox, Kentucky

1. In the foregoing case of Recruit Curtiss Cornett (RA 15112962), Battery A, 54th Armored Field Artillery Battalion, Combat Command A, 3d Armored Division, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50 the findings of guilty and the sentence are hereby vacated. You have authority to direct a rehearing.

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

(CM 341508)

Signed

2 Incls

1. Record of trial
2. Opinion of Board
of Review

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

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

JAGK - CM 341604

19 JUL 1950

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

MILITARY DISTRICT OF WASHINGTON

v.)

Colonel RALPH C. TILLEY)
(O-202145), Office of The)
Adjutant General, Department)
of the Army, Washington 25,)
D. C.)

Trial by G.C.M., convened at Fort)
Myer, Virginia, 27 June, 26 October,)
21-22 November, 1949, 6 April, 1,2,)
3 May 1950. Dismissal, total for-)
feitures after promulgation, and con-)
finement for two (2) years.)

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

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

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

Specification: In that Colonel Ralph C. Tilley, Office of The Adjutant General, Department of the Army, did, at La Spezia, Italy, on or about 29 October 1947, wrongfully, unlawfully, and bigamously marry Jonilde (sometimes spelled or translated as Jonilda, Gonilda, Gonilde, Ionilde or Ionilda) Bruno, having at the time of his said marriage to Jonilde (sometimes spelled or translated as Jonilda, Gonilda, Gonilde, Ionilde or Ionilda) Bruno a lawful wife then living, to wit: Elizabeth Louise Tilley.

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

Specification: In that Colonel Ralph C. Tilley, Office of The Adjutant General, Department of the Army, did, at or near Arlington, Virginia, on or about 15 April 1948, wrongfully and unlawfully harbor Jonilde (sometimes spelled or translated as Jonilda, Gonilda, Gonilde, Ionilde or Ionilda) Bruno Tilley, an alien not lawfully entitled to enter or reside within the United States, in violation of Section 144, Title 8, United States Code.

He pleaded not guilty to and was found guilty of both 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 two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

Mrs. Elizabeth L. Tilley, the alleged lawful wife, hereinafter referred to as Elizabeth, identified the accused and testified that she is the wife of the accused, that she was married to the accused at Santa Rosa, California, on 27 January 1940, and that they never have been divorced (R 28-29). A duly attested photostatic copy of a marriage certificate contained in the records of the Office of the County Recorder for the County of Sonoma, California, and authenticated by the seal of the Recorder of Sonoma County, California, was received in evidence without objection as Prosecution Exhibit No. 1 (R 30). This marriage certificate shows that Ralph Clermont Tilley and Elizabeth Louise Richter were joined in marriage by E. E. Ingram, Minister, at Santa Rosa, California, on 27 January 1940, in accordance with the laws of the State of California. During the months of August, September and October 1947, Elizabeth L. Tilley resided with the accused at Viareggio, Italy, while he was stationed there as Adjutant General of Headquarters, Mediterranean Theater of Operations. She left Italy and returned to the United States, unaccompanied by the accused, in October 1947.

The following duly authenticated documents were admitted in evidence without objection: (1) Travel Orders issued on 8 October 1947 by Headquarters, Mediterranean Theater of Operations, United States Army, APO 512, to Mrs. Elizabeth L. Tilley as "Dependent of Col Ralph C Tilley 0202145 AGD AG Sec, Hq MTOUSA" authorizing Government transportation to said dependent to proceed from her present station to the 428th Repl Co, 149th Bn, for processing and transshipment to the United States on a permanent change of station (R 34, Pros Ex 2); (2) Travel Orders issued on 24 October 1947 by Headquarters, 149th Replacement Battalion, Port of Leghorn, APO 782, U.S. Army, to Elizabeth L. Tilley, unaccompanied, "Dependent of Col Ralph C. Tilley O-202145 Wife 634 King St Santa Rosa, Calif." authorizing Government transportation from the Port of Leghorn, Italy, via the USAT George W. Goethel to the New York Port of Embarkation (R 35, Pros Ex 3); (3) three photostatic copies of the pay and

allowance accounts of the accused for the months of October 1947 (Pros Ex 4), November (Pros Ex 5), and December 1947 through January 1948 (Pros Ex 6) wherein the accused lists Mrs. Elizabeth L. Tilley as his lawful wife and dependent (R 35-36).

The accused returned to the United States in December 1947 and resumed residence with his wife Elizabeth in Virginia. Elizabeth first met Jonilde Bruno Tilley when she was introduced to her by the accused as Mrs. Brown at her home at Amandale, Fairfax County, Virginia. Prior to Jonilde's arrival accused told Elizabeth that he received a letter from Jonilde in which she stated that she needed a home and asked that Colonel Tilley "look out for her." Jonilde resided with the accused and Elizabeth for five days (R 31-33).

Jonilde Bruno Tilley, the alleged bigamous wife, hereinafter referred to as Jonilde, identified the accused and testified that she was born in La Spezia, Italy, on 24 January 1923 and first met the accused in La Spezia, Italy, in March or April 1947. She married the accused on 29 October 1947 at La Spezia, Italy, and came to the United States from Italy on 12 April 1948 as the wife of the accused via the Trans World Airlines, landing at La Guardia Airfield. It was stipulated that the accused purchased an airplane ticket at Washington, D.C., from Trans World Airlines at his expense, covering passage from Rome to New York and that Jonilde Bruno traveled on that ticket from Rome to New York (R 52). At the time she entered the United States she was a citizen of Italy and is still a citizen of that country (R 37-39). The accused met her at La Guardia Field and brought her to his home in Arlington, Virginia, where she met Mrs. Elizabeth L. Tilley for the first time when the accused introduced her to Elizabeth L. Tilley as Jonilde Bruno Brown. She assumed the name of Brown because the accused told her to change her name for the reason, as she stated, "Well, if he got wife, I was another wife, two wives impossible have the same name." She resided at the home of the accused and Mrs. Elizabeth L. Tilley for three or four days and then, following arrangements made by the accused, moved to the home of a Mrs. Sorivi on Connecticut Avenue in Washington, D. C., where she stayed for about one week. Her room rent at Mrs. Sorivi's home was paid by accused. Witness left Mrs. Sorivi's home when she secured employment at the home of Miss Wall in Boyds, Maryland (R 39-42). One child, Boris Joseph Bruno Tilley, was born at Wilmington, Delaware, on 25 August 1948 by her marriage to the accused. The accused accompanied her to the hospital at the time of this birth. She and the accused never lived as husband and wife since her arrival in the United States but they did live as husband and wife for about two months after their marriage in Lago, Italy (R 42-43). Witness first learned that she was pregnant about two months after the marriage following a medical examination at La Spezia, Italy, and thereupon wrote to the accused in the United States advising him

that she was expecting a child. The accused told her that he was a divorced man at the time of their marriage and she believed him because she would not have married him if he was not divorced (R 43). She identified a letter dated 24 March 1948 addressed to "Dear Ralph" and signed "Don" as a letter she wrote under the direction of the accused upon her arrival in New York from Italy. She copied its contents from a letter given to her by the accused and then gave it to him. Over objection by the defense this letter was admitted in evidence as Prosecution Exhibit 7 (R 47). The letter reads as follows:

"March 24/ 1948

"Dear Ralph

"As you know my job is such that I cannot go into details but the time has arrived that I move to another and difficult assignment. I cannot take Jonilde with me and cannot leave her here because of conditions of which you are no doubt aware (the contacts on my present assignment would make every effort to get information from her). So for her safety she must leave. I have no relatives and am again counting on your kind help. I'll send her to the United States by airplane Will you meet her and arrange to get her a home. As you know she is a neat house-keeper. If she gets a few dollars a month she will be able to get along. I will not be able to contact her until I finish my next assignment so take good care of her for me. Jonilde will write this letter for me as my arm is in a cast (thanks to the ***) I cannot tell you or Jonilde where I will be for the next year - you understand I am sure! I may have to send Jonilde before I hear from you - every thing depends on the speed with which I learn or brush up on my language.

"Ralph my gratitude cannot be put entirely in writing but I assure you it is deepest - you are my closest friend in the United States and I feel no hesitancy in leaving Jonilde to your care.

Sincerely

Don."

On cross-examination Jonilde related her family, educational and occupational background and then stated that from the time she first met the accused in March or April 1947 until they were married on 29 October 1947 she had never been in his company alone nor did she have any discussion of love, affection or matrimony with him. However, they had embraced each other in gestures of affection on several occasions (R 105-119). She denies that, prior to their marriage, she ever slept

in the same bed with the accused or ever had sexual relations with him or was pregnant. She never consulted a doctor, a midwife or a fortune teller concerning pregnancy prior to 29 October 1947 nor did she ever tell the accused that she was pregnant prior to that time. She did not ask the accused to marry her. It was during the middle of October that the accused first asked her to marry him while they were in a church, the name and place of which she did not remember (R 121-122). She married the accused on 29 October 1947 in a civil ceremony at the City Hall in La Spezia and about seven or eight persons were present including Mrs. Arnaldi, wife of a doctor, Mr. Formentini, Director of Administration of the City of La Spezia, Mr. Scotti, her employer, Mr. Magoni, a city policeman and his wife, the mayor, vice mayor and Mr. Pedrinelli, a lawyer and official of the civil state. The mayor performed the marriage ceremony, but witness did not remember his name or the name of the vice mayor. On this occasion the accused was dressed in a blue civilian suit and was not in military uniform. During the ceremony the mayor asked accused if he wanted to marry her (Jonilde) and accused said "yes." Then the mayor asked her (Jonilde) if she wanted to marry Colonel Tilley and she answered "yes." The accused then gave her a ring and she gave him a ring and both signed their names in the "commune register." The two ceremonial witnesses, Mr. Formentini and Mr. Scotti, and the mayor and clerks also signed the register (R 122-127). After the marriage ceremony she and Colonel Tilley went to Leghorn, Livorno, Italy, where they rented a three-room apartment. She lived in this apartment with Colonel Tilley for about twenty-five days. Colonel Tilley went to work every day but he returned to the apartment every night, slept there and ate breakfast there. Colonel Tilley worked at the Army Headquarters in Leghorn but he never took her to his office or to the Officers' Club and she never met any of his associates either Italian or American. While she was at Leghorn she always went by the name of Jonilde Bruno Tilley. From 25 November until the Colonel left Italy on 14 December 1947 they lived together at a "pensione" (small hotel) in Livorno. Jonilde stated that she is a Roman Catholic but did not have a religious marriage because Colonel Tilley was "a man without religion" and was divorced (R 127-136). Prior to 29 October 1947 she had never met Mrs. Elizabeth L. Tilley and she was never told that Colonel Tilley was a married man but she knew that he was divorced (R 137-138). Witness stated that she was not a member of any political party in Italy, that she was never a member of the Communist Political Party, that she never made speeches for the Communist Party in La Spezia nor did she ever hold a card in the Communist Political Party in La Spezia (R 137). She had been in jail twice, once when she was jailed by the Germans at Aula and once when she was jailed by the Italians at Massa (R 139-140).

An Italian document, together with a translation thereof, purporting to be a copy of a marriage record extracted from the register of the Division of Vital Statistics, Commune of La Spezia, was received in

evidence over defense objection (R 50, Pros Ex 8). This document was subscribed by Dr. Eugenio Pedrinelli, Recorder of Vital Statistics, under the seal of his office and purported to be attested by Gastone Rossi as Chancellor of the Prefecture under the seal of the Civil and Penal Court of La Spezia, which said attesting certificate was duly authenticated by the certificate of Sophia Kearney, Vice Consul of the United States of America, under the seal of office of the American Consulate General at Genoa, Italy. The exhibit states, in pertinent part, that Ralph C. Tilley, age 47, unmarried, an American citizen, born in Crawfordsville, residing in California, and Ionilda Bruno, age 24, unmarried, an Italian citizen, born in Spezia and residing in La Spezia, were united in marriage in a civil ceremony at 11:00 o'clock on the 29th day of October 1947 at the Town Hall by Dr. Ferruccio Battolini, Clerk of Vital Statistics of the Commune of La Spezia, in the presence of witnesses Scotti Nello and Savino Formentini.

Under paragraph 2, Special Orders No. 64, Headquarters Military District of Washington, dated 13 April 1949, the appointing authority designated First Lieutenants Frank J. Traversi, O1799917, Corps of Military Police, and Billy C. Hutcheson, O967360, Judge Advocate General's Corps, to represent the prosecution and the defense, respectively, for the purpose of taking the deposition of any witness in the case of the accused prior to referral of the charges for trial. Pursuant to the foregoing authority and the interrogatories and cross-interrogatories prepared by said counsel on 15 April 1949, the depositions of Signor Ferruccio Battolini, Recorder of Vital Statistics of the Commune of La Spezia, La Spezia, Italy; of Senorina Giovanna Arena of La Spezia, Italy; and of Signor Formentini, Director of Administration, Commune of La Spezia, La Spezia, Italy, each of which was directed to, taken and authenticated by the certificate and under the seal of the Vice Consul of the United States of America at Genoa, Italy, on 17 May 1949, was received in evidence over objection by the defense as Prosecution Exhibits 9, 10 and 11, respectively (R 56-57).

On direct interrogatories in Prosecution Exhibit 9, Signor Battolini testified substantially as follows: That he is the Assessor of the Commune of La Spezia, assigned to Demographic and Statistical Services, and occupies an official government position as Recorder of Vital Statistics at the Commune of La Spezia; that the Civil Code and the "Ordinamento dello Stato Civile" of Italy require that all marriages taking place in Italy be recorded; that as Recorder of Vital Statistics of the Commune of La Spezia he records marriage ceremonies; that he recognized the authenticated copy of the marriage certificate of Ralph C. Tilley and Jonilde Bruno exhibited by the interrogator to him as an integral copy of the Act of Marriages (No. 23, Part I) extracted from the Register of Marriages, Commune of La Spezia, Italy, for the year 1947 of which he is the custodian; and that the document exhibited to him is signed by the Chief of

the Division of Demographic Services, Eugenio Pedrinelli, who was delegated to said office by deponent and signs in the capacity of Recorder of Vital Statistics. On cross-interrogatories he further testified that he has held his present position (Recorder of Vital Statistics of the Commune of La Spezia) since 30 December 1946; that he was elected by popular vote in November 1946 to the position of Communal Counselor, following which he was appointed by the Mayor of La Spezia as Recorder of Vital Statistics and his appointment was then approved by the Procurator of the Republic at the Civil and Penal Court of La Spezia; that under the law of Italy, a civil marriage suffices for a legal and valid marriage and that a religious marriage is valid only when transcribed in the civil records, and that nothing in his records indicates that this marriage was a sham or mock marriage.

The deposition of Senorina Giovanna Arena (Pros Ex 10) recites that she is an employee of the Commune of La Spezia and is acquainted with Jonilde Bruno and Colonel Ralph C. Tilley; that she first met Colonel Tilley, whom she knew to be in the military service of the United States, at the home of Jonilde Bruno about twenty days prior to his marriage to Jonilde, and that, at the request of Colonel Tilley and Jonilde Bruno, she was a witness at the ceremony of their marriage held on 29 October 1947 at the Commune of La Spezia, at which time those present included Mr. Nello Scotti, Mr. Savino Formentini, a Mr. Magoni, Mr. Bruno Vitantonio, father of Jonilde Bruno, and Bruno Bruno, brother of Jonilde. On cross-interrogatories deponent further testified that at the time of the marriage she did not know that Colonel Tilley had a legal wife, nor was it her understanding that this marriage ceremony was a sham and mock ceremony to serve only the purpose of protecting the name and reputation of Jonilde Bruno and the child which she was carrying; that, other than Colonel Tilley, only the bride could speak a little English and that Colonel Tilley knew or could understand a little Italian; that the marriage ceremony was a civil ceremony performed by the Recorder of Vital Statistics and that at the conclusion of the ceremony she was certain that Colonel Tilley and Jonilde Bruno were legally and validly married.

The deposition of Signor Savino Formentini (Pros Ex 11) recites that he is the Director of Administration, Commune of La Spezia, Italy; that he knows the accused and first met him when Jonilde Bruno introduced the accused to him at the latter's office about two or three months prior to their marriage; the accused was wearing the military uniform of the United States when he met him; that at the request of Jonilde Bruno, who was an employee of the Commune of La Spezia, he was a witness to the marriage ceremony of Colonel Tilley and Miss Jonilde Bruno on 29 October 1947 at the Commune of La Spezia; that those present at the ceremony were Mr. Battolini, assessor of the Commune who performed the ceremony, a lady by the name of Arnaldi, a Mr. Scotti and others whose

names he did not remember. On cross-interrogatories the deponent testified that at the time of the marriage ceremony he did not know that Colonel Tilley had a legal wife nor did anyone tell him that this ceremony was a sham and mock ceremony to serve only the purpose of protecting the name and reputation of Jonilde Bruno and the child which she was carrying; that this was a civil ceremony performed by Mr. Ferruccio Battolini, Assessor of the Commune, in his capacity of Recorder of Vital Statistics of the Commune of La Spezia; that it was not a sham or mock ceremony and that he was convinced that the ceremony was real and intended to consummate a legal and binding marriage; that other than the groom only the bride could speak a little English and that Colonel Tilley could understand a few words of Italian.

Mr. John L. Murff, Officer in Charge of the Washington Field Office of the Immigration and Naturalization Service, Washington, D. C., testified that his office investigated the citizenship status of Jonilde Bruno Tilley in the month of April 1949 and found that she was not a citizen of the United States. He stated further that "She is under deportation proceedings" and that he has a warrant for Jonilde which "is being held up pending investigation, looking forward to some sort of relief where she might be granted discretionary authority to remain here" (R 83-85).

Mrs. Francis Sorivi testified that Jonilde Bruno lived at her rooming house at 5109 Connecticut Avenue, Washington, D. C., for about three weeks. The accused brought Jonilde to her rooming house, visited Jonilde a few times and paid Mrs. Sorivi \$60 for Jonilde's room and board. Jonilde told Mrs. Sorivi that her name was Mrs. Jonilde Bruno and that her husband was in Italy and that she was expecting her husband to come from Italy (R 85-89).

The court was requested to and did take judicial notice of the fact that Annandale, Fairfax County, Virginia, and the address 5109 Connecticut Avenue, Northwest, Washington, D. C., are near Arlington, Virginia (R 90-91).

Mrs. Marie Welker, clerk in the Armed Forces Housing Office, Pentagon Building, Washington, D.C., testified that in February or March 1948 the accused came to witness' office to secure housing for a little Italian girl. Concerning this girl the accused told her -

"*** that he had this little Italian girl whom he brought back with him and he was responsible for her. He was her guardian and she was married. Her husband was somewhere in Italy. And he said there was not enough room in his apartment to keep her there. So he had to place her in a home in Northwest Washington. And he had her in a very nice home

with an Italian family. However, he couldn't keep her there very long, and he had to secure a home for her some place else, with some people that would take care of her and provide a home for her; and she didn't speak English very well and for that reason she could not secure a position with an industrial or an agency in town where the knowledge of English was necessary. However, he said she did speak some English and she was learning, an intelligent girl, an accomplished musician, very well educated. He told me she was a teacher in Italy and she could act in the capacity of a housekeeper, a nurse, or a companion. She was very fond of children, knew how to care for them; and as far as any monetary return for her services was concerned, he said that was nominal, that was not the important issue. The important issue was to find her a good home. He said ten or fifteen dollars or any nominal fee would suffice. Did I mention her age? He told me she was about twenty-three or twenty-four. He also showed me a picture of the girl." (R 93)

Thereafter, witness made arrangements for Jonilde to be interviewed for employment in the home of Lieutenant General Wedemeyer (R 91-94).

b. For the Defense

Jonilde Bruno Tilley was called as a witness for the defense and was interrogated relevant to certain statements she made to the pretrial investigating officer, Colonel R. A. Konopaska. She testified that she told Colonel Konopaska she was first introduced to Colonel Tilley by a woman whose name she could not remember; that concerning her knowledge of Mrs. Elizabeth Tilley, the accused's lawful wife, she might have told him, "I know her now," meaning that she met her since her arrival in America; that when she was asked why she had used the name of Brown, she replied, "When I came to the United States, Colonel Tilley told me he was married. I did not believe what he had told me and he said he would take me to his home and prove it. He took me to his home in Arlington and introduced me to his wife. When I found out that it was true, I then requested Colonel Tilley to get me another place to stay and a job"; that when she first met Colonel Tilley she did not know Mrs. Elizabeth Tilley was in Italy; that concerning her civilian police record in Italy she told Colonel Konopaska that she had been arrested by an Italian partisan because she was the fiancée of an Austrian captain during the war. That in 1944 she knew the commander of the zone of operations on the Massa front. He was in love with her and she profited by getting information from him which she brought to the Italians; and that an Italian killed the Austrian captain in 1945, a short time before the liberation because of jealousy; that she also stated she had been in jail twice; that she gave Colonel Konopaska a certificate of good conduct which was awarded to her by the mayor of La Spezia on 10 November

1947 as proof of her good character and reputation. Defense Exhibits C and D were admitted in evidence as documents submitted by Jonilde to Colonel Konopaska. Exhibit C is a photostatic copy of a "Certificate of Good Conduct" issued by the mayor of La Spezia to Jonilde Bruno on 10 November 1947 and certifies that she "Is a person of good and proper civil, moral and political conduct." Exhibit D is a pocket size marriage certificate and shows, in pertinent part, the status of each spouse, namely, Ralph C. Tilley as single, Jonilde Bruno as nubile, and the date of celebration of the marriage at La Spezia as 29 October 1947. Both exhibits bear the official seal of the Commune of La Spezia and purport to be recorded in the official records of said Commune. Jonilde further testified that when Colonel Konopaska asked her whether Colonel Tilley ever introduced her in Italy as Mrs. Brown she told him, "No, I do not remember him ever introducing me to anybody as Mrs. Brown"; that when he obtained an apartment for her in Leghorn, Italy, he gave her name as "Jonilde Bruno Tilley"; that she told Colonel Konopaska she was not married in church because she did not have time to obtain the required documents and because Colonel Tilley was a divorced man; that she said she wanted to go to America with Colonel Tilley in 1947 but that this could not be arranged "Because my passport and other documents were not in readiness at the time." She identified Defense Exhibit E as a photostatic copy of her birth certificate and Defense Exhibit F as a copy of her mother's death certificate, both of which purport to be issued by the Demographic Division of the town of La Spezia under the seal of said town. These exhibits show that Jonilde was born in La Spezia on 24 January 1923 and that her mother died in La Spezia on 22 August 1945. Jonilde was shown a signed statement made by one Annarosa Bartolucci Gargani in which the latter states that Jonilde was introduced to her in Italy by Colonel Tilley as Signora Brown. Jonilde testified that said statement was not true. This statement was received in evidence, over objection, as Defense Exhibit G. Another written statement, signed by Rosa Pracchia-Sideri on 21 April 1950, was received in evidence, over objection, as Defense Exhibit H and Jonilde testified that it was also untrue in part. This exhibit states in substance that an apartment which was rented from Rosa Pracchia-Sideri at Leghorn, Italy, in November 1947 was occupied by Jonilde for about 15 days; that Jonilde often visited her and told her that she was on her honeymoon but was not happy because she was not being treated as a wife should be treated and that she was treated as a maid rather than as a wife; and that Jonilde complained that she was being neglected and said that as soon as her husband would leave for America, she would go back to La Spezia where her relatives were living. The statement further quotes Jonilde as saying,

"My husband told me that he will send me from the United States every month some packages for my maintenance. However, if I see that he is going to neglect me, even in the sending of packages, as soon as I go back to La Spezia I will go back

to an old suitor of mine who has always acted as my guardian and who was present at my wedding, and if I wanted to, he would marry me because in the past he has asked me to marry him."

Jonilde denied that she made the quoted statement and further denied the remaining part of the statement which recites that she (Rosa Pracchia-Sideri) came to understand that Jonilde's marriage was not a regular marriage and that when she (Jonilde) spoke of her old protector she became enthusiastic; that Jonilde told her "even if matters came to the worst, she would go back to doing what she had done before with her protector"; that on some occasions an American colonel visited Jonilde in the apartment and took her to dinner in a nearby restaurant but never introduced her to his friends who he met there which offended her and about which she often complained to Rosa Pracchia (R 212-227). A signed statement of Giovanna Altea, a Catholic nun known as "Sister Luisa," dated 22 April 1950 at La Spezia, Italy, was admitted in evidence over objection as Defense Exhibit I (R 227). This statement recites that Sister Luisa is a teacher at an institution known as the Pious Home of Charity in La Spezia and that Jonilde attended instruction at that institution in piano and embroidery from 1939 to 1940 and a course in the English language in 1946 and 1947; that Jonilde was known to the nun since 1939, was a spirited and vivacious girl desirous to marry; that in the late summer of 1947 Jonilde told her that she had become engaged to an American senior officer who was already married but who was about to get a divorce. Jonilde testified that the nun's statement was all true, "only she knew that he was divorced when I married him, from my part, she knew from me" (R 227-228). Defense Exhibit J was admitted in evidence without objection, which purports to be a Certificate of Marriage issued by the City of La Spezia on 28 March 1950, and which certifies that on 19 December 1946 Vitantonio Bruno, a widower (Jonilde's father), was married to a woman therein named (R 228). Defense Exhibit K, a newspaper article and photograph taken from the Washington Times Herald, was identified by Jonilde as containing a photograph of her and was admitted in evidence over objection (R 229).

Concerning her conversations with Colonel Tilley prior to their marriage ceremony, Jonilde denied that she ever told Colonel Tilley she wanted to go through a marriage registration with him to protect the name of an expected child or that because of her close acquaintance with certain city officials she could arrange a marriage registration even though they could not truly be married (R 230). A copy of an Italian newspaper called "L'UNITA," dated 23 April 1950, was identified by Jonilde as the official organ of the Communist Party in Italy, and was admitted in evidence over objection as Defense Exhibit L (R 231-232). An excerpt from said newspaper pertaining to Senorina Giovanna Arena, a prosecution witness whose testimony was adduced by deposition (Pros Ex 10), was read into the record as follows:

"The Force Division of the Federation of the Italian Communist Party took the following disciplinary action against the persons named below:

"Giovanna Arena, South Arsenal Section, City Employee Unit: expelled from the Party because of her sordid opportunism and because she was at the same time inscribed as a member of the Christian Democratic Party."

A photostatic extract copy of the matrimonial register of the Demographic Services Division, Civil Status, Town of La Spezia, and authenticated by Mr. Ferruccio Battolini, Officer of the Civil Status Office of said town and by Alarico Portacci, The Chancellor Delegate of the President, bearing seals of the Town of La Spezia and of the Civil and Penal Court, was admitted in evidence without objection as a document furnished by Jonilde to the pretrial investigating officer (Def Ex M, R 233). This document states:

"Extract copy of the matrimonial register for the year 1947. The undersigned officer of the Civil Status Office certifies that it appears from the registry of acts of matrimony for the year nineteen hundred and forty-seven, series A, part I, No. 23, that on the twenty-ninth of October, nineteen hundred and forty-seven, there was celebrated in La Spezia the marriage of

1. Ralph C. Tilley, forty-seven years of age, employed, American citizen, son of John and Lena Perkins,
2. Jonilda Bruno, twenty-four years of age, home girl, Italian citizen, daughter of Vitantonio and of Angiola Guidi."

Sergeant Alex Balsler was brought before the witness Jonilde Bruno Tilley for identification and she stated that she did not recognize him or ever see or speak to him (R 236,237).

Sergeant Balsler testified that on Thanksgiving Day, 1947, he was in Colonel Tilley's room in the Palace Hotel, Leghorn, Italy, packing the colonel's silver service set for shipment to the United States. Colonel Tilley introduced Jonilde to him as Mrs. Brown. During their conversation, Jonilde stated that she was the wife of a Major Brown, an American officer who was stationed in Trieste and she inquired of Balsler whether he was packing the silver service set to go to America to Colonel Tilley's wife (R 237-240, 249).

On Thanksgiving Day, 1947, Miss Orestina Rena Berto, a Civil Service employee with the American Graves Registration Unit in Italy, visited the

the accused at his quarters in the Palace Hotel in Leghorn. She testified that when she met the accused, Jonilde was with him in a jeep and the accused introduced Jonilde to her as a Mrs. Brown and as the wife of a friend of his. Then they went to the accused's room in the hotel and in the course of their conversation Jonilde explained that her husband was a Major Brown who had been transferred to Trieste or Austria two weeks previously. Since Miss Berto and Mrs. Elizabeth Tilley, the accused's lawful wife, were mutual friends and she knew that Mrs. Tilley had just left Italy, she inquired about her from accused in Jonilde's presence. Concerning this inquiry Jonilde showed no surprise nor did she react with any comment. On this occasion Sergeant Balser was also in the room packing a silver service set. Jonilde conversed with him but Miss Berto did not hear their conversation (R 193-203).

The testimony of Charles Jones, a building supervisor residing in Rome, Italy, was adduced by deposition in interrogatories numbered 328 to 431, inclusive, of Defense Exhibit B (R 203). This deponent stated that from March to 15 December 1947 he was employed as the Senior Administrative Assistant in the Operations Section of the Office of the Theater Adjutant General at Leghorn, Italy; that Colonel Tilley was the Adjutant General of the Mediterranean Theater of Operations, United States Army, at that time; that he knew the Colonel personally and acted as interpreter and translator in the Italian and English languages for the accused. In October 1947, the accused asked Jones to locate an apartment in Leghorn, Italy, for a Mrs. Brown, wife of an officer in the United States Army. Jones located an apartment as requested, took the accused to the apartment, which the accused accepted and for which he paid the rent to the landlady. Jones acted as interpreter between the accused and the landlady and through him the accused told the landlady that the apartment was to be occupied by a Mrs. Brown, wife of an American Army officer. A woman, identified by Jones as Jonilde Bruno, lived in the apartment for about six weeks during November and December 1947. He visited at the apartment with Colonel Tilley. Jonilde was introduced to him by the accused as Mrs. Brown. Subsequently Jones met Jonilde on the street when she was alone and on other occasions when she was with Colonel Tilley and always greeted her as Mrs. Brown, which greeting she always acknowledged. Jones never greeted Jonilde as Mrs. Tilley; never heard her referred to by any name other than Mrs. Brown, and never heard Jonilde refer to herself as Mrs. Tilley. Whenever he saw Jonilde and the accused together Jones never observed any action on the part of either of them or heard anything spoken by either of them indicating that they were husband and wife. Jones had met Mrs. Elizabeth Tilley, wife of the accused, prior to her departure to the United States from Italy and had known that she was the accused's wife. During the period of November-December 1947 he heard Colonel Tilley always refer to Mrs. Elizabeth Tilley as his wife and heard such references made in the presence of

Jonilde. At no time did he hear Jonilde express any contradiction of or surprise at Colonel Tilley's reference to Mrs. Elizabeth Tilley as his wife. Jones further stated that from October to December 15, 1947, Colonel Tilley's quarters were located in the Palace Hotel at Leghorn and he never observed or heard anything that would lead him to believe that Colonel Tilley was residing any place other than at his quarters in the Palace Hotel.

The testimony of Mario Beltramo, an Italian subject, was adduced by deposition over objection in response to interrogatories 432 to 521, inclusive (Def Ex B). Deponent states that he is a practicing lawyer residing in Rome, Italy; a graduate in law from the University of Rome, and a member of the Bar of the City of Rome; that he is fluent in the Italian and English languages and has acted as technical interpreter, translator and consultant in Italian legal and governmental matters and practice to the U. S. Armed Forces in Italy from August 1945 to July 1949. During said period he had been employed by the United States Claim Service in the Office of the Theater Judge Advocate, and the American Graves Registration Service. At the instance of George J. Banigan he conducted an investigation in Italy concerning Jonilde Bruno, who formerly resided in La Spezia, Italy, which revealed that Jonilde Bruno was first employed by the city government of La Spezia in October 1942 and worked as a clerk in the Food Rationing Bureau until May 1945. From May 1945 to October 1945 she worked in the Bureau of Vital Statistics and from October 1945 to 11 December 1947, when she resigned her employment, she worked as a secretary to Mr. Nello Scotti in the "Municipal Agencies Employees Association." The Italian police records show that Jonilde was arrested by the Italian authorities on 12 August 1945 for collaborating with the German armed forces in violation of the decrees promulgated by the Royal Italian Government and was released from said arrest on 8 September 1945. In the course of an interview with Jonilde's father, brother, sister-in-law, six members of the Stuttgart family who were neighbors of Jonilde in La Spezia, Mrs. Maria Finocchio, a neighbor, Mr. Ferruccio Battolini, who performed the wedding ceremony, Mr. Celestino Ciufardi, and Mrs. Anna Schitzer, employees of the city administration, and Sister Luisa Altea, a Catholic nun, Jonilde's former teacher, and many other persons, among them shopkeepers, city employees and neighbors, it is the deponent's opinion that Jonilde's reputation for truth and veracity prior to October 1947 was bad and that her reputation for chastity was bad. That by public repute she was an "easy" girl known to have associated with many men, including members of both the German and American armies during the periods when La Spezia was occupied by them and that she is accepted by general public reputation as having been either a member of or in association with the Communist Party from about September 1945. Deponent further states that as a result of the last municipal elections held in the City of La Spezia on 24 November 1946, the Communist Party won a majority of seats in the City Council and that most of the principal

officials, including the mayor and vice mayor, are publicly known to be Communists; that Mr. Ferruccio Battolini who performed the marriage ceremony is a Communist member of the City Council, the appointed Director of the Bureau of Vital Statistics and an officer in the Chamber of Labor, a local branch of the national Communist association of labor unions; that Mr. Nello Scotti, a witness to the marriage ceremony and Jonilde's immediate employer, was a known Communist and chief officer of the "Municipal Agencies Employers Association", while Mr. Savino Formentini, the other witness to the marriage ceremony, was an employee in the city accounting and bookkeeping department but his political affiliation was not known; that Mr. Eugenio Pedrinelli who signed the extract copy of the marriage certificate (Pros Ex 8) is a lawyer employed as Vice-Director of the Bureau of Vital Statistics, but he is not reputed to be a member of any political party; that Mr. Franco Magoni, who attended the marriage ceremony is a corporal in the Municipal Police Force and a known member of the Communist Party; that Jonilde's father, Vitantonio Bruno, was, prior to October 1947, a petty officer of the Italian Navy in the Navy Musical Corps and was retired therefrom on 30 June 1945; that her brother, Bruno Bruno, was at that time and still is a fourth category workman in the Service Shop of the Italian Naval Arsenal at La Spezia; that in November and December 1947 there never existed a hotel or "pensione" by the name of "Olivetti," "Alvetti," or any similar name, but that from 23 November to 29 November 1947 Jonilde Bruno resided at Livorno, Italy, at a hotel known as the Albergo Cremoni and was there registered under the name of Jonilde Bruno and not under the name of Jonilde Tilley or Jonilde Bruno Tilley; that she lived alone in that hotel; that no other person was registered as occupying or living there with her; and that Colonel Ralph C. Tilley was never registered in said hotel.

An affidavit of the same Mario Beltramo which was subscribed and sworn to before the Vice Counsel of the United States in Genoa, Italy, on 24 April 1950, was received in evidence over objection as Defense Exhibit N (R 254). The affiant states that, as a matter of common knowledge in La Spezia, Italy, the customary period of mourning observed by a child for a deceased parent is one year, and that in rare instances it may be extended to eighteen months but no longer; that the official school records at La Spezia show that Jonilde Bruno attended a total of eight years of formal education consisting of five years compulsory elementary school and three years in the lower course of a normal school. She did not graduate from the normal school but from 1939 to 1940 and again from 1946 to 1947 she attended a Catholic institution where she received instruction in piano, embroidery and in the English language.

The depositions of Rosanna, Maria Guala, Miranda and Lola Giomi Stuttgart were received in evidence without objection as Defense Exhibit O (R 255). Rosanna Stuttgart testified therein that she first met the accused in May 1947 on a trip from La Spezia to Pisa, Italy, at which

time she learned from the accused that he was married but was contemplating divorce proceedings because he was not getting along well with his wife. She invited the accused to dinner at her home the following Sunday, which invitation accused accepted. Jonilde was present at the dinner, became attached to the accused and invited him, her brother, her sister-in-law and Rosanna to her home that evening. Rosanna saw Jonilde kiss the accused on this occasion. The accused invited Jonilde and Rosanna to visit him the following Sunday at Viareggio, Italy, but although Rosanna advised Jonilde not to visit the accused because he was married, Jonilde accepted the invitation. Jonilde later told Rosanna that she received an engagement ring from the accused while she was at Viareggio. In September 1947, Jonilde asked Rosanna to visit her and at that time confided that she had become pregnant by the accused and was contemplating an abortion. Rosanna saw that Jonilde was pregnant but advised her against the operation. Jonilde asked Rosanna to accompany her to a midwife to have the abortion performed. Jonilde told Rosanna that when her father learned she was pregnant he demanded that she marry the accused and threatened to kill her if she did not arrange a marriage with Colonel Tilley; that her father and brother wrote to Colonel Tilley to come to La Spezia, which he did, at which time they told Colonel Tilley he had to marry Jonilde and that they also threatened Colonel Tilley with a revolver. Jonilde also told Rosanna that she was in despair because since Colonel Tilley was already married, marriage with her was impossible and she did not know what to do. One day in October 1947, Rosanna learned indirectly that Jonilde was being married at the Vital Statistics Office in the City Hall. She proceeded to that office to attend the ceremony, but an usher, posted in front of the door, did not permit her to enter the room because, as the usher told her, the marriage was private and no one could enter. Rosanna waited in the hall until Jonilde came out. Others who emerged from the room with Jonilde were her father and brother, the accused, Mrs. Arnaldi, Mr. Nello Scotti and Mr. Magoni. Rosanna embraced Jonilde and asked her why she was not informed of the marriage and Jonilde said, "Because the marriage was very hurriedly arranged," that it was an "improvised affair" and that her father had threatened Colonel Tilley so Colonel Tilley arranged to marry her at once. At the ceremony Colonel Tilley wore a blue civilian suit and Jonilde wore a beige street dress with maroon accessories. Sometime in December 1947, Rosanna saw Jonilde with her brother Bruno and Jonilde told her that she had been to Munich with Colonel Tilley; that Colonel Tilley had sent her back to Italy to care for the wife of her brother who was about to have a child; and that Colonel Tilley had no intention of taking her to America with him. Jonilde then resumed her former job in the City Hall and Rosanna saw Jonilde from time to time while she was so employed. On these occasions Jonilde told her that Colonel Tilley had gone to America, that he did not write to her or send her any money and that he did not intend that she join him in America because he was already married. In 1948, however, Rosanna met Bruno

Bruno, Jonilde's brother, who told her that Colonel Tilley had sent money to Jonilde for her passage to America and that she had gone to America. Rosanna further deposed that Jonilde told her that she was in sympathy with the Communist Party, and that she was a registered and card holding member of the Communist Party.

The deposition of Maria Guala Stuttgart states that she is the mother of Rosanna and Miranda Stuttgart; that they are friends of Jonilde Bruno and that she has known Jonilde for nine years. During the period of May to October 1947, Jonilde told Maria Guala that she believed herself to be pregnant by Colonel Tilley but because her father was not aware of her pregnancy she asked Maria Guala to take her to a midwife for an abortion which deponent refused to do. Jonilde wanted to marry Colonel Tilley at any cost but she considered it impossible and did not know what to do because he already had a wife. She said she was mainly interested in Colonel Tilley giving his name to her expected child and to save her honor. On another occasion Jonilde stated that Colonel Tilley told her that if it was absolutely necessary he would give his name to her prospective child but that then he would leave her and they would not see each other any more. Subsequently, Jonilde told the deponent that Colonel Tilley had married her to give his name to the child and was returning to America and leaving her in Italy. Jonilde said she was satisfied inasmuch as she had accomplished her purpose because her child would not be a "bastard." During the German occupation of La Spezia Jonilde stated that she was the mistress of a German Army captain who she referred to as "Wilfried of Frankfort." Maria Guala was with Jonilde in Massa, Italy, in August 1945 at the time the latter was arrested by the Italian police as a German collaborationist. During the Allied occupation of Italy Jonilde told the deponent that she was staying at a small "pensione" in Genoa with an American officer. She despised Italians and said she would never marry one.

The deposition of Miranda Stuttgart states that she is 19 years of age and a friend of Jonilde whom she has known since 1945. In the spring or early summer of 1947 Miranda and her sister Rosanna accompanied Jonilde to the Terminus Hotel at Leghorn, Italy, where Jonilde was to meet an American junior officer by the name of "Cardi" to whom she was engaged. At that time the Terminus Hotel was occupied by American Army officers. Miranda and Rosanna went home leaving Jonilde at the hotel, but later that evening Miranda and her uncle went back to the hotel to induce Jonilde to return home with them. At the hotel they asked for Jonilde to be called down to the lobby of the hotel. Jonilde came down in an excited condition and was crying. They asked her to come home but she refused, saying she must stay there and that he, referring to the American Army junior officer, who came down to the lobby after Jonilde, "will have to marry me now." This officer told Jonilde to go upstairs and she followed him to his room. In September 1947 Jonilde told Miranda that

this same officer had called on her unexpectedly but when she confessed to him that she was pregnant by Colonel Tilley he became very angry and said that he would have forgiven her had she had relations with a younger man but that he would not have anything to do with her now that she had slept with "that old fool."

The deposition of Lola Giomi Stuttgard, daughter-in-law of Maria Guala Stuttgard, states that she is 26 years of age and has known Jonilde since 1943. On several occasions between May and October 1947 Jonilde had discussed her relationship with Colonel Tilley in the presence of Lola and had told her that she was pregnant by Colonel Tilley. She said Colonel Tilley was married but that he hoped to obtain a divorce from his wife; that Colonel Tilley could not marry her because he was already married to an American woman who was at Viareggio, who she had seen and who was a good-looking woman. When Lola met Jonilde on the street one day Jonilde told her that she could not continue to walk with a newspaper before her and that she wanted a marriage ceremony performed between herself and Colonel Tilley to protect her honor and to give a name to the bastard child to whom she expected to give birth.

A further affidavit of Mario Beltramo, subscribed and sworn to on 26 April 1950 before the Consul of the United States at Rome, Italy, was received in evidence over objection as Defense Exhibit P (R 256). Therein the affiant states that as a practicing attorney in Rome and as a matter of common knowledge there does not exist now and at no time during the past thirty years has there existed in Italy a law prohibiting the employment of a married woman either in government or in private employment, or providing that an employed unmarried woman who becomes married in the course of her employment should be released or dismissed from such employment because of her marriage.

Mr. George J. Banigan, individual defense counsel, was sworn as a witness for the defense and testified substantially as follows relevant to his personal interview with Jonilde's father Vitantonio Bruno on 10 September 1949 at La Spezia, Italy, concerning a letter received by Jonilde's father from Jonilde and read by the witness: Vitantonio told Mr. Banigan that he received the letter on 7 September 1949. It was addressed to members of the Bruno family in La Spezia including her father and brother, Bruno Bruno. The first paragraph dealt with Bruno Bruno's desire to obtain employment with an American controlled Italian oil refinery. In this connection, Jonilde stated in the letter that she had written again to one Mr. Macormick in New York recommending Bruno Bruno for employment. In the latter part of the letter Jonilde mentioned her present situation involving espionage charges pending against her, stating, "I am all right but a little worried about this espionage trial. Anyhow, let us wait for the outcome of the next hearing which will take place on September 26" (R 256-260).

It was stipulated that if the Chief of Police of La Spezia were called as a witness he would testify that a letter in his files and addressed to him referring to one Jonilde Bruno, who formerly resided at Via Oldoini 9, La Spezia, Italy, among other things states: "Under the Fascist Republican Government she" -- meaning Jonilde Bruno -- "had had love affairs with several German soldiers" (R 172-173).

Seven officers of field and general grade who had known or served with the accused for various periods of time since 1935 testified to his good reputation as a gentleman and his efficiency as an officer (R 157, 159, 161, 163, 173, 175, 206). It was further stipulated that eleven other officers of like grade would testify to the same effect (R 166 to 172).

Accused was advised of his rights as a witness by the defense counsel and the law member, and elected to remain silent (R 262).

4. Discussion

a. Specification, Charge I

Under the offense charged the accused was found guilty of bigamy in violation of Article of War 95. In military jurisprudence, it is a violation of Article of War' 95 for an officer wrongfully, that is intentionally and without color of right, to purport to marry another while a former marriage is still subsisting and this has been held to be so without reference to the statutory or other definition of the crime of bigamy, if there be such, in the particular jurisdiction in which the act of marriage decried took place (CM 328250, Lunde, 77 BR 29, 34, citing CM 272642, Bailey, 46 BR 343, 347, and cases therein cited). The instant specification alleges that the accused bigamously married Jonilde Bruno at La Spezia, Italy, on 29 October 1947. Therefore, in view of the foregoing authority, proof of the Italian law pertaining to bigamy or reference to its statutory or judicial definition, if there be such, is irrelevant to the issue here presented. The only issue presented by the charge and subject to proof is whether the accused willfully and knowingly contracted a second marriage when he knew that his first marriage was still subsisting, the elements of proof incident to which are:

- (1) a valid marriage entered into by the accused prior to and undissolved at the time of the second marriage;
- (2) survival of the first spouse to the knowledge of the accused;
- (3) a subsequent marriage to a different spouse (CM 326147, Nagle, 75 BR 159, 173, citing CM 258630, Reynolds, 5 BR (ETO) 259, 263).

As to the first two elements of proof, above, the evidence is clear and undisputed. Prosecution Exhibit 1, the duly authenticated certificate of marriage from the office of the County Recorder for the County of Sonoma, California, proves beyond doubt that the accused was validly married to Elizabeth Louise Richter on 27 January 1940 at Santa Rosa, California. The testimony of Elizabeth Louise Tilley (nee Richter) corroborates such fact and further establishes that that marriage was never dissolved by divorce and that on the date of the alleged bigamous marriage she was the accused's subsisting wife. The testimony of an accused's lawful wife against him on a charge of bigamy is recognized as competent evidence in court-martial proceedings (MCM, 1949, par 134d). The fact that the accused was fully aware of his subsisting marriage to Elizabeth Tilley prior to and at the time of his alleged bigamous marriage, while not disputed, is clearly shown; (a) by the fact that Elizabeth lived with the accused in Viareggio, Italy, as his lawful wife until her departure for the United States a few days before the date of the alleged bigamous marriage; (b) by the fact that in the official military travel orders issued to her in Italy in October 1947 she is described as the dependent wife of the accused (Pros Exs 2 and 3); (c) by the fact that, subsequent to the alleged bigamous marriage, in his pay vouchers for the months of October, November and December 1947 (Pros Exs 4, 5 and 6) the accused listed her as his dependent lawful wife; and (d) by the fact that the accused continued to live with her as his wife upon his return to the United States in December 1947. It must be determined, however, whether the third and last element of proof pertaining to the alleged bigamous marriage is legally established by competent evidence. The evidence adduced by the prosecution to prove this element includes an extract copy of a foreign marriage certificate, together with a translation thereof in the English language, purportedly representing a recorded entry of said marriage in the register of marriages of the Bureau of Vital Statistics at La Spezia, Italy, the place where the marriage is alleged to have been celebrated, and the testimony of the following witnesses, namely, Jonilde Bruno Tilley, the alleged bigamous wife; Ferruccio Battolini, the celebrant of the marriage; Savino Formentini, an official witness to the marriage; and Giovanna Arena, a guest at the ceremony. In addition thereto, some evidence adduced by the defense lends support to such proof but, in view of the nature and number of defense objections to the admissibility of prosecution's evidence and in view of defense counsel's contentions on a motion for findings of not guilty, all of which were overruled, consideration of the competency and probative value of the prosecution's evidence is essential to the determination of the issue in question.

Counsel for the defense objected to the admissibility of the foreign extract copy of the purported marriage record of the bigamous marriage and to the English translation appended thereto (Pros Ex 8) on the grounds that the English translation of the Italian document is not an accurate

translation; that the document does not appear to be an extract from the marriage register or other official permanent record of the City of La Spezia; that it is merely a hearsay, ex parte statement of one Ferruccio Battolini, a witness not before this court; that it does not state that it is an extract copy of the original record; that it does not bear the signature of the person who purportedly performed the marriage; and that it is not properly authenticated (R 49, 148). As concerns the certificate of Sofia Kearney, Vice Consul of the United States at Genoa, Italy, which purports to be an authenticating certificate attached to Prosecution Exhibit 8, counsel further objects that it is insufficient because it merely authenticates the fact that Gastone Rossi, whose signature and seal appear on the document, "is what he says he is, clerk of a certain court," which proves nothing, and that the Vice Consul's authentication makes no reference to Pedrinelli whose signature appears on the document but who is not the person who purports to have gone through this alleged marriage ceremony, for which reasons counsel contends that Prosecution Exhibit 8 is not a copy, authentic or otherwise, of the original record in La Spezia, and also as he stated, "because I saw the original record in La Spezia" (R 50).

From our examination of the basic foreign document in question (Pros Ex 3) and of the translation thereof adduced in court, as well as of a translation thereof sought and obtained by the Board, it is our opinion that the objections of counsel to said document are without merit and that it was sufficiently authenticated to be acceptable in evidence.

Copies of foreign official records and their authenticating certificates or statements, if written in a language other than English, should be translated through the testimony of one having knowledge of the language concerned (MCM, 1949, p. 166). However, where, as in the instant case, the basic foreign document is before the court and objection is raised to the accuracy of the translation of the interpreter or translator, the court as well as the appellate tribunal may, incident to its powers, enlist the aid of any reliable source of information to determine the true construction, interpretation or meaning of the written instrument in issue in order to determine its true context and admissibility (Wigmore on Evidence, Vol. IX, Secs 2556, 2567, 2569, and cases therein cited; Shapleigh v. Mier, 299 U.S. 468, 81 L. Ed. 355, 57 Supp. 261; People v. Mayes, 113 Cal. 618, 45 Pac. 861; Saloshin v. Houle, 85 N. H. 126, 155 Atl. 47). Accordingly, incident to the authority of the Board of Review to weigh evidence and determine controverted questions of fact (AW 50(g)), and incident to the exclusive function of the court and its appellate agencies to judge the construction, interpretation and meaning of all written instruments in issue, the Board of Review has, in the exercise of its prerogative, informed itself, de hors the record, of the correct translation of the basic document in issue (Pros Ex 8), for the purpose of judging its admissibility and probative value.

We have determined that Prosecution Exhibit 8, the document purporting to be an extract copy of an act of marriage recorded in the official records of the Bureau of Vital Statistics, Commune of La Spezia, Italy, as ad-
duced in evidence, reads as follows:

"COMMUNE OF LA SPEZIA
Demographic Services Division
Vital Statistics

Complete copy of

MARRIAGE CONTRACT (or Record)

Extracted from the Register for the year 1947
No. 23, First Part

"In the year one thousand nine hundred and forty-seven, on the twenty-ninth day of the month of October, at eleven hours, in the Town Hall (Casa Comunale) of La Spezia, in a room open to the public:

"Before me, Dr. Ferruccio Battolini, Recorder of Vital Statistics of the Commune of La Spezia by delegation duly received and having been invested in official form, there have personally appeared:

TILLEY, Ralph C., unmarried,
government employe, aged 47,
born in Crawfordsville,
resident in California,
American citizen,
son of John
and Lena Perkins

BRUNO, Ionilda, marriageable,
aged 24, unemployed,
born at Spezia,
resident in La Spezia,
Italian citizen,
daughter of Vitantonio
and Angiola Guidi

who have asked me to join them in matrimony and to this end have presented to me the document described below which, provided with my O. K., I insert in the volume of annexes to this register, together with those previously produced at the time of the request for publication (of the bans?). From an examination of all the aforesaid documents it appearing to me that no obstacle exists to the performance of the marriage ceremony, I have read to the bride and groom articles 143, 144 and 145 of the Civil Code, and have then asked the groom if he proposes to take as his wife the here present Ionilda Bruno, and the latter if she proposes to take as her husband the here present Ralph C. Tilley, and each having answered me in the affirmative, with the full knowledge also of the witnesses below mentioned,

I have declared that the same are joined in matrimony.

"Present as witnesses at this ceremony were: Nello Scotti (son of Antonio, deceased), fifty years of age, clerk, resident in La Spezia, and Savino FORMENTINI (son of Erminio, deceased), fifty-nine years of age, accountant, resident in La Spezia.

"The document presented is the certificate of publication (of the bans?), which was done in La Spezia from the fifth to the twelfth day of October of the current year, without opposition.

"The present certificate has been read to those participating, all of whom sign it together with me.

Signed: Ralph C. TILLEY
Ionilda BRUNO
Nello SCOTTI
Savino FORMENTINI
F. BATTOLINI

"The present complete copy is issued for the use and at the request of the American Consulate in Genoa.

La Spezia, 17 May 1949.

(Stamp of the Bureau of
Vital Statistics
Commune of La Spezia)
The responsible employe
(initials)

The Recorder of Vital Statistics:
Dr. EUGENIO PEDRINELLI

"After inspection, the signature of Dr. E. Pedrinelli, Recorder of Vital Statistics of the Commune of La Spezia, is hereby authenticated.

La Spezia, 17 May 1949.

The Chancellor Delegate of the (Prefect?)

GASTONE ROSSI

(Stamp of the Civil and Penal
Court of La Spezia)"

Whether or not Prosecution Exhibit 8 is sufficiently authenticated to be admissible in evidence depends, therefore, upon its inherent nature, as revealed by the above translation, and by the rules of evidence and practice recognized in court-martial procedure.

Concerning the admissibility of official records, the Manual for

Courts-Martial, 1949, provides:

"In the case of an official record required by law, regulation, or custom to be preserved on file in a public office, a duly authenticated copy is admissible to the extent that the original would be, without first proving that the original has been lost or destroyed, and without otherwise accounting for the original. Only an exact copy of the official record is admissible under this rule, although it may consist merely of an extract of those portions material to the case" (par 129a, at p 163).

The Manual further provides:

"An official statement in writing *** 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 or to know, or to ascertain through customary and trustworthy channels of information, the truth of the matters recorded. Any such record, *** is competent prima facie evidence of the fact or event, without calling to the stand the officer or other person who made it." (par 130b)

And further:

"It may be presumed, prima facie, that records emanating from official sources, foreign and domestic, concerning facts and events generally recorded by public officials of civilized states and nations, such as records of births, deaths and marriages, are records required by law, regulation or custom to be kept and that the person recording any such fact or event had the official duty to know or ascertain the truth thereof"(par 130b).

Concerning the authentication of official records it is provided:

"**** Official records are generally proved by authenticated copies thereof. *** In the case of a copy of an official record, an 'attesting certificate' is a signed certificate or statement indicating that the paper in question is a true copy of the original and that the signer is the custodian of the original, or his deputy. An 'authenticating certificate' is a signed certificate or statement indicating that the signer of the attesting certificate is who he purports to be or that the attesting certificate is in proper form, or containing words of like import" (par 129b).

The Manual prescribes three modes of authentication of copies of foreign official records, any one of which is considered sufficient for the reception in evidence of such records. One of these modes of authentication, pertinent to the document in issue, is by:

"(3) An authenticating certificate signed by a *** vice consul, or by any officer in the foreign service of the United States stationed in the foreign country in which the record is kept under the seal of his office" (par 129b, at p 165).

"In addition to the methods of authentication above provided, an official record or a copy thereof may be authenticated by the testimony of any person, based on his personal knowledge, to the effect that the proffered document is a particular official record or that such document is a true and exact copy of the official record, as the case may be" (par 129b at p 166).

Since the proffered document purports to be a copy of a record of marriage emanating from an official source, namely, the Demographic Services Division of Vital Statistics in La Spezia, Italy, and further purports to be issued under the signature and seal of the Recorder of that agency, it may, in the absence of evidence to the contrary, be presumed prima facie, that it is a copy of a record required to be kept by the laws of Italy and that the person who recorded the marriage had the official duty to know or ascertain the truth thereof (MCM, 1949, par 130b, supra). That the document as thus issued is a true or exact copy within the requirements of paragraphs 129a and b, MCM 1949, supra, is, in our opinion, sufficiently shown by the caption on the document and in the recorder's subscribing statement that it is a "Copia, integrale" of the marriage contract or record extracted from the register for the year 1947, No. 23, First Part, in the Demographic Services Division of Vital Statistics, Commune of La Spezia. The Italian term "integrale," as thus used imports the English meaning of "true" and "exact" in the strictest sense as indicated by the foregoing translation of the document wherein the term is interpreted as meaning "Complete," or as indicated in Webster's New International Dictionary, Second Edition, wherein the adjectival definition of the word "integral" is given as "Composed of constituent parts making a whole; composite; lacking nothing of completeness; complete; entire." Furthermore, since the signer of the proffered document, Dr. Eugenio Pedrinelli, signed it in the capacity of "The Recorder of Vital Statistics" under the seal of that office, such showing, in the absence of proof to the contrary, constitutes prima facie proof of the fact that as the recorder of vital statistics he is the official custodian of the original document, or his deputy, and invested with authority to make and issue such official document. In view of such showing we conclude that the signed statement of Dr. Eugenio Pedrinelli as "The Recorder of Vital Statistics," given under the seal of his office, and indicating that the document he has subscribed is a "copia integrale" (complete copy) of the record therein referred to is competent prima facie evidence of the fact or event therein stated (par 130b, MCM, 1949, supra). Similarly, the signed statement of Gastone Rossi as Chancellor Delegate of the (Prefect) or (Prefecture) given under the seal of the Civil and Penal Court of La Spezia, indicating

that the signature of Dr. E. Pedrinelli, Recorder of Vital Statistics of the Commune of La Spezia, is genuine, constitutes, in the opinion of the Board of Review, a sufficient attest of the said custodian's signature and official capacity to impart verity and full faith to Prosecution Exhibit 8 as a true and exact copy of a foreign official record.

Finally, the certificate of Sophia Kearney, Vice Consul of the United States at Genoa, Italy, which is given under the seal of her office and appended to Prosecution Exhibit 8, certifies

"that, Gastone Rossi, before whom the annexed instrument has been authenticated, was, at the time he signed the annexed certificate, Clerk of the Civil and Penal Court at La Spezia, Italy."

In the matter of foreign official records, the authenticating certificate of an officer in the foreign service of the United States stationed in a foreign country is, by definition, properly directed to the status and authority of the "attestor" or signer of the attesting certificate (par 129b, MCM, 1949, supra). Since the certificate of Gastone Rossi purports to show that he made an inspection of that document, thereby determining the authenticity of the document, and that, as the Chancellor or Clerk of the Civil and Penal Court of La Spezia, Italy, under the seal of that court, he authenticated the signature of Dr. E. Pedrinelli, Recorder of Vital Statistics of the Commune of La Spezia, it is evident that Gastone Rossi was the attestor to the document and attached his statement thereto as an attesting certificate. Consequently, the authenticating certificate of Sophia Kearney, which further exemplifies the fact that the attested copy of the document was authenticated before Gastone Rossi and thus confirms its authenticity, constitutes a valid authenticating certificate within the definition and requirements prescribed in paragraph 129b, MCM, 1949, supra.

Since the Manual for Courts-Martial specifically prescribes the essential requirements of proof incident to the authentication and admissibility of official records, both foreign and domestic, the admissibility of such documentary evidence is necessarily governed by the rules so prescribed. However, so far as not otherwise prescribed in the Manual, the rules at common law, when not inconsistent with the court-martial rules, may be applied (MCM, 1949, par 124). Therefore, in determining whether there has been a proper authentication of official copies of documents found in foreign registries or public offices under the rules prescribed in the Manual consideration of the principle and objective purpose of authentication as laid by the rules of common law or the usages of nations furnish reliable guidance to such determination. Thus, in Barber v. International Company (73 Conn 587, 48 A 758, 764) and cited in CM 326147, Nagle, supra, the court stated:

"*** The object of any such authentication is to afford satisfactory evidence that the document offered is in fact certified by the official custodian of the original of which it purports to be a copy, having due authority to make such certification. Any evidence is sufficient for this purpose which is calculated to give reasonable assurance of the facts in question. Of this nature is whatever legitimately tends to prove that the document was obtained from the office where the original is kept; that the signature of the certificate was made by the individual whose name is thus subscribed; that he held, at the time, the official position indicated by his subscription, and that it was one of the functions of those holding that position to certify to such copies ***."

In our opinion, the extract copy of the foreign marriage certificate (Pros Ex 8) was adduced in substantial compliance with the rules of evidence prescribed in the Manual for Courts-Martial and, therefore, was properly received in evidence. The certifications and seals of office attached to the document legitimately tend to establish the official character of each subscribing officer and that each was acting in a manner conformable to the usages of nations. The proof made was therefore calculated to give reasonable assurance that the document was a true copy of an original record on file in the official register of the Demographic Services Division, Bureau of Vital Statistics, Commune of La Spezia, and constituted prima facie evidence of the facts shown therein. Accordingly, no evidence having been adduced to refute the facts evidenced thereby, Prosecution Exhibit 8 is deemed legally sufficient to establish that the accused entered into a marriage contract with and was married to Jonilde Bruno in a civil ceremony at La Spezia, Italy, on 29 October 1947.

When the celebration of the marriage is once shown, every fact necessary to its validity will be presumed until the contrary is shown (CM 279757, Jones, 52 BR 329, 333; Com. v. Renney, 120 Mass 387; People v. Calder, 30 Mich. 85; Fleming v. People, 27 N. Y. 329; Weinberg v. State, 25 Wis. 370). Accordingly, proof of the authority of the officer issuing the marriage license or of the authority of the person who performed the marriage ceremony is unnecessary (Warren v. State, 156 Tenn. 614, 3 S.W. 2d 1061; People v. Graves, 357 Ill. 605, 192 N.E. 680). However, while it has been held that the subsequent marriage must be of such a character that but for the existence of the prior legal marriage it would be valid, the weight of authority is that, where the form of ceremony of marriage with another person is performed, there is a sufficient marriage on which to predicate a charge of bigamy, the view being taken that the word "marries," when applied to a subsequent marriage, means going through a form of marriage, and does not mean a valid marriage (CM 238173, Hutchins, 24 BR 189, 191).

The testimony of Jonilde Bruno, the alleged bigamous wife, corroborates the proof established by Prosecution Exhibit 8, the duly authenticated copy of the bigamous marriage record, but apart therefrom, furnishes competent, primary and independent proof of her bigamous marriage to the accused at the time and place alleged, notwithstanding the fact that she was a party in interest (Wharton's Crim. Law (12th ed.), Vol. 2, sec. 2068; MCM, 1949, par 134d). Both record and oral proof are of primary evidential nature and neither is to be excluded, under the best evidence rule by reason of the availability of the other (CM 326147, Nagle, supra).

While the depositions of Ferruccio Battolini, Seniorina Giovanna Arena and Savino Formentini (Pros Exs 9, 10 and 11), the celebrant and eyewitnesses to the marriage, respectively, would be, if determined to be legally admissible, merely cumulative and corroborative proof of the bigamous marriage, otherwise established by primary evidence, we deem it unnecessary to discuss defense counsel's objections thereto or the admissibility thereof since such proof or rejection of it would neither enhance or detract from the evidential nature of the facts already established.

Considering, therefore, the competent evidence hereinabove reviewed, we conclude that the record shows beyond doubt that the accused was validly married to Elizabeth Louise Richter, his alleged lawful wife, on 27 January 1940 at Santa Rosa, California, and that he cohabited with her in the United States and in Italy until the latter part of October 1947, when she returned to the United States pursuant to preparations for the withdrawal of American troops and their dependents from Italy. Thereupon he took a fancy to Jonilde Bruno, the alleged bigamous wife, and, without telling her that he was already married, but rather that he was divorced, he went through a marriage ceremony with her in the City Hall at La Spezia, Italy, on 29 October 1947, and thereafter supported her, lived with her, had a child by her, and finally, after he had returned to the United States on change of station, without arranging for her passage with him, he provided for her transportation to the United States on the Trans World Airlines. When Jonilde arrived at the New York airport, he met her and took her to his home in Annandale, Virginia, where he introduced her to his lawful wife, albeit under the false or assumed name of Mrs. Brown, which identification had been previously and designedly arranged to conceal her true identity from his lawful wife. Jonilde resided with the accused and his lawful wife for three or four days, but then, through force of circumstance and tension, felt constrained to seek separate abode. The accused secured separate quarters for Jonilde in a boarding house in Washington, D. C., called upon her on several occasions, paid her room and board, and, subsequently, procured private employment for her with a spinster in Boyds, Maryland, under the fictitious name above mentioned. On 25 August 1948, during the period of this employment, accused accompanied Jonilde to a hospital in Wilmington,

Delaware, where she gave birth to a child, Boris Joseph Bruno Tilley. Since the testimony of Elizabeth Louise Tilley shows that she is living; that she and the accused were at no time divorced, and since the record shows affirmatively that they were validly married on 27 January 1940, it follows that the accused's purported marriage to Jonilde Bruno on 29 October 1947 was a bigamous marriage as alleged.

The evidence introduced for the defense is primarily of a nature purporting to discredit the character and veracity of Jonilde, the accused's bigamous wife, as an unchaste, immoral, designing woman of questionable character, who, as an employee in the city government of La Spezia, which was reputed or known to be under a Communist regime, inveigled the accused into a clandestine marriage ceremony with the surreptitious aid and collusion of her Communistic superiors and associates. In this respect, such evidence is designed to impeach the credibility of her testimony as a prosecution witness and to create a reasonable doubt as to the validity of prosecution's evidence establishing the bigamous marriage ceremony, impliedly conceded thereby to have been performed. This evidence consists, in large measure, of depositions of Italian witnesses in La Spezia who were acquainted with Jonilde and who testified to their knowledge of Jonilde's reputation largely acquired by them from conversations with Jonilde. Since Jonilde was not on trial in the instant case such testimony was obviously irrelevant to the issue of bigamy and in no wise was competent to refute or diminish the competency of prosecution's evidence establishing the essential elements of proof. No evidence was adduced by the defense to disprove the facts established by the prosecution's evidence nor does the evidence adduced, in the opinion of the Board of Review, impeach the evidential value thereof.

b. Specification, Charge II

The offense of which the accused was found guilty under this specification states, in pertinent part, that he

"*** did, at or near Arlington, Virginia, on or about 15 April 1948, wrongfully and unlawfully harbor Jonilde *** Bruno Tilley, an alien not lawfully entitled to enter or reside within the United States, in violation of Section 144, Title 8, United States Code." (Underscoring supplied.)

Section 144, Title 8, United States Code, provides:

"Any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States, by vessel or otherwise, or shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, or shall conceal or harbor or attempt to conceal or harbor, or assist or abet another to conceal or harbor, in any place, including any

building, vessel, railway car, conveyance, or vehicle, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 and by imprisonment for a term not exceeding five years for each and every alien so landed or brought in or attempted to be landed or brought in. (Feb. 5, 1917, ch. 29, sec 8, 39 Stat. 880.)"

Since the act complained of is alleged, specifically, as a violation of a Federal statute and is charged under Article of War 96, the specification apparently purports to charge an offense under the "all crimes or offenses not capital" clause of that article. The clause "crimes or offenses not capital" is defined in paragraph 183c, Manual for Courts-Martial U. S. Army, 1949, as follows:

"Crimes or offenses, not capital, which are referred to and made punishable by Article 96 include those acts or omissions not made punishable by another article which are denounced as crimes or offenses by enactments of Congress or under authority of Congress and made enforceable in the Federal civil courts." (Underscoring supplied.)

Accordingly, unless the Federal statute alleged to have been violated is one which is "made enforceable in the Federal civil courts," the act alleged to be a violation of that statute is not punishable under the "crimes or offenses not capital" provision of Article 96.

In United States v. Evans (Cal. 1948, 68 S. Ct. 634, 333 U.S. 384), the Supreme Court of the United States, in a unanimous decision, has held that under Section 144 of Title 8, United States Code, so much of the statute as denounces the concealing or harboring of aliens not entitled to enter or reside in the United States does not constitute a punishable offense because of the ambiguity therein as to the scope of the offense and the penalty which Congress intended to prescribe; and that although Congress intended thereby to make criminal and to punish concealing or harboring of aliens, the uncertainties as to the nature of the offense or offenses intended to be prescribed and as to the applicable penalty poses a problem which is outside the bounds of judicial interpretation which can only be solved by Congressional action.

We conclude, therefore, that since the Federal statute herein alleged to have been violated by the accused is not "made enforceable in the Federal civil courts," according to the foregoing Supreme Court decision, the alleged violation does not come within the purview of the

"crimes or offenses not capital" clause as defined in paragraph 183c of the Manual and is not punishable under that clause of Article 96.

It remains to be considered whether the act alleged is such that it may, without regard to the statute, be prosecuted and sustained under the first or second clause of Article 96 as a disorder to the prejudice of good order and military discipline or as an offense of a nature to bring discredit upon the military service. If it may, the essential elements of proof of the alleged offense would be that the accused did, at the time and place specified, (a) wrongfully and unlawfully harbor Jonilde; and (b) that she was an alien not lawfully entitled to enter or reside within the United States.

The gravamen of the offense obviously hinges on the interpretation of the allegation "wrongfully and unlawfully harbor." However, whether the term "harbor" is to be interpreted in a general or limited sense obviously must depend on the manner in which it is pleaded in the specification. Since that term is pleaded in connection with the violation of a particular statute, it follows that the interpretation of that term as implying wrongfulness and unlawfulness must necessarily be construed in the sense pertinent to the scope and purpose of the statute. However, in view of the decision in United States v. Evans, supra, which renders so much of the statute as pertains to harboring of aliens null and unenforceable, for the reasons above stated, that statute can no longer be resorted to for the interpretation of the term "harbor" as thus pleaded. In this connection, it is noted that the term "harbor" as contained in the statute had been construed by the Federal courts to mean only that aliens "shall be sheltered from the immigration authorities and shielded from observation to prevent their discovery as aliens" (see United States v. Smith, C.C.A. N.Y. 1940, 112 F. 2d 83; Susnjar v. United States, 6 Cir., 27 F. 2d 223), but in view of the nullifying effect of the decision in the Evans case on the statute, the interpretation of the term "harbor" in the Federal cases referred to above is no longer considered binding. Consequently, since the gravamen of the instant offense cannot be determined except by reference to the particular statute pleaded in the specification, and since that statute has been determined to be unenforceable by the Supreme Court of the United States, it is our opinion that the act complained of does not present a proper case for prosecution under the first or second clause of Article 96.

In addition to the problem above stated, the record of trial fails to establish the second element of proof, namely, that Jonilde was an alien "not lawfully entitled to enter or reside in the United States."

The only competent evidence in the record of trial relevant to such proof is found in a stipulation and in the testimony of Jonilde

and John L. Murff. Jonilde testified, in pertinent part, that she was an Italian national; that she came to the United States on the Trans World Airlines, arriving at La Guardia Field on 12 April 1948; that the accused met her at the airfield; that she accompanied him to his home in his car where she stayed three or four days; that she came to the United States, not on a quota allotted to the Italian government but because she was the wife of the accused; that when the accused met her he told her that he was married and that she had to change her name because he could not have two wives with the same name; and that after she left the accused's home (three or four days after she arrived) she moved to the home of a Mrs. Sorivi in Washington, D. C., where she stayed for a week prior to her taking employment with a spinster in Boyds, Maryland. The accused secured the quarters for Jonilde at the home of Mrs. Sorivi, paid the rent and also secured the employment for her with the spinster in Boyds, Maryland, under the name of Jonilde Bruno Brown. The stipulation concedes that the accused paid the air transportation for Jonilde's passage from Rome to the United States. The testimony of Mr. Murff merely shows, in substance, that he is an officer of the Immigration and Naturalization Service; that his office investigated Jonilde's citizenship status; that records in his office show that she is not a citizen of the United States; that she is under deportation proceedings; and that he now has "a warrant" for her.

While Jonilde's testimony shows clearly that she was an alien and that she came into the United States via legitimate means of transportation at the accused's expense as a non-quota Italian immigrant and as the accused's wife, there is not a scintilla of evidence in her testimony to indicate that her entry into the United States on 12 April 1948 was unlawful or that at that time she was residing here unlawfully. Similarly, while it is shown that she used the fictitious name of Brown instead of Bruno or Tilley when she was introduced to the accused's lawful wife upon her arrival, it is clear that such misrepresentation was employed wholly for the purpose of deceiving the accused's lawful wife and to preclude discovery of her bigamous relationship with the accused, but, in the opinion of the Board, such evidence is not sufficient to support the inference that she thereby must have entered the country surreptitiously or illegally. Jonilde was a prosecution witness and if her entry was in fact surreptitious or illegal the best evidence of such fact was obviously contained in her passport or visa which it may be assumed was available to the prosecution and, in the absence of a satisfactory explanation, the burden of producing such evidence was on the prosecution. In any event, there is no showing that such misrepresentation was conceived or used to perpetrate a fraud upon the immigration authorities or that it was designed to conceal or did conceal any unlawful entry on her part. When Jonilde arrived at the La Guardia Airport, she necessarily exhibited to the immigration officials her authority to enter and reside in the United States. There is no evidence in the record of trial to show in what manner her entry was effected.

Likewise there is no evidence to show under what authority she was to remain in the United States. On the other hand, the testimony of Mr. Murff, the immigration officer, supplies no probative evidence whatever that Jonilde entered the United States unlawfully or that she was not lawfully entitled to reside in this country. His statement that a "warrant" had been issued against Jonilde and that deportation proceedings were pending against her at the time of trial likewise has no probative value on the issue alleged since there was no showing on what ground the deportation proceedings were based. Deportation proceedings, and a warrant issued pursuant thereto, which were instituted (date unknown) at some time after her entry into the United States does not necessarily show that her entry was unlawful or that she was not entitled to reside in the United States at the time the accused was alleged to have harbored her. For all that may appear, such proceedings may have been instituted for reasons not inconsistent with lawful entry as stated in Section 155, Title 8, United States Code. Suffice it to say, therefore, that in the absence of any substantial evidence purporting to show that on 15 April 1948, the date alleged, Jonilde was an alien "not lawfully entitled to enter or reside within the United States" the act as alleged cannot be sustained as a punishable act under any clause of Article 96.

It is well established law that where, as in the instant case, the only competent evidence is circumstantial it must, in order to support conviction, be of such a nature as to exclude every reasonable hypothesis except that of accused's guilt (CM 329843, Eger, 78 BR 181; CM 323349, Henry, 72 BR 213; 317430, Veronko (1947); CM 260828, Parker, 40 BR 34; CM 238485, Rideau, 24 BR 263). A conviction cannot be sustained on suspicion, surmise, or conjecture (CM 323349, Henry, supra; CM 317430, Veronko, supra; CM 274812, Tracy, 47 BR 337).

In the opinion of the Board of Review the finding of guilty of Charge II and the specification thereunder cannot be sustained.

The only punishment authorized under a finding of guilty of a violation of Article of War 95 is dismissal. Since the finding of guilty of Charge II and the specification thereunder is not sustainable, so much of the sentence as provides for confinement at hard labor for two years is illegal.

4. Records of the Department of the Army show that accused was born 5 July 1896 at Crawfordsville, Indiana. He graduated from high school in 1918, is married for a second time, has two grown children by his first wife, and no children by his second wife. He enlisted and served in the 54th Pioneer Infantry as private and corporal from 26 July 1918 to 5 July 1919. He served as Army field clerk, United States Army, from 22 July 1919 to 28 April 1926, and as warrant officer, Regular Army, from 29 April 1926 to 10 October 1940 when he was honorably

discharged to accept active duty as a captain, Adjutant General's Department, in the Officers Reserve Corps. He was promoted to major on 18 April 1941, to lieutenant colonel on 13 February 1942, and to colonel, Army of the United States, on 9 March 1944, in which grade he has served continuously since that time.

He was awarded the Legion of Merit in 1945; Commander, Crown of Italy in 1945; Medalha de Guerra (War Medal) of Brazil in 1945; Medal of Reconnaissance (Argent) of France in 1946; Commendation Ribbon with Oak Leaf Cluster in 1946; and Order British Empire in 1946. He is authorized to wear the American Defense Service Medal, European-African-Middle Eastern Campaign Medal with one Bronze Service Star, American Campaign Medal, Army of Occupation Medal, and World War II Victory Medal.

His efficiency reports from 1 July 1944 to 30 June 1947 average 6.3. His overall efficiency ratings show 127 for the period 1 July 1947 to 14 December 1947; 110 from 1 January 1948 to 31 May 1948, and 073 from 1 June 1948 to 31 May 1949.

5. At a hearing held on 16 June 1950 before the Board of Review, Mr. George J. Banigan and Mr. Edward F. Huber, Attorneys at Law, 55 Broadway, New York 6, New York, appearing on behalf of the accused, presented oral argument contesting the legal sufficiency of the record of trial to support the findings of guilty and the sentence. A brief of the argument presented and submitted by said counsel has been attached to the record of trial. The Board has given due consideration to the matters so presented.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 its specification, legally insufficient to support the findings of guilty of Charge II and its specification, and legally sufficient to support only so much of the sentence as provides for dismissal and to warrant confirmation thereof. A sentence to dismissal is mandatory upon conviction of a violation of Article of War 95.

Carlos E. McAfee, J.A.G.C.
Samuel S. Luep, J.A.G.C.
Joseph L. Brack, J.A.G.C.

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

(171)

JAGU CM 341604

10 1950

UNITED STATES

MILITARY DISTRICT OF WASHINGTON

v.

Colonel RALPH C. TILLEY,
O-202145, Office of The
Adjutant General, Department
of the Army, Washington 25,
D. C.

Trial by G.C.M., convened at Fort
Myer, Virginia, 27 June, 26 October,
21-22 November 1949, 6 April, 1, 2
and 3 May 1950. Dismissal, total
forfeitures after promulgation,
and confinement for two years

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

- - - - -

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

2. Upon trial by general court-martial the accused pleaded not guilty to, and was found guilty of, wrongfully, unlawfully and bigamously marrying Jonilde Bruno, at La Spezia, Italy, on or about 29 October 1947, having at the time of the marriage a lawful wife then living, to wit: Elizabeth Louise Tilley, in violation of Article of War 95 (Charge I and specification); and wrongfully and unlawfully harboring Jonilde Bruno Tilley, an alien not lawfully entitled to enter or reside within the United States, in violation of Section 144, Title 8, United States Code, at or near Arlington, Virginia, on or about 15 April 1948, in violation of Article of War 96 (Charge II and specification). No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its specification, legally insufficient to support the findings of guilty of Charge II and its specification, and legally sufficient to support only so much of the sentence as provides for dismissal and to warrant confirmation thereof.

3. We find the evidence to be substantially as set forth in the opinion of the Board of Review. It is deemed appropriate to consider herein certain representations and contentions, oral and written, by counsel for the accused with respect to the legal sufficiency of the record of trial to support the findings of guilty and the sentence.

4. With respect to Charge I and its specification, counsel contend that since there is no proof of a standard of conduct constituting the offense known as bigamy under the law of Italy, and since the offense of bigamy is not defined by the Articles of War, the court must have created its own standard of conduct, that in doing so it attempted to "legislate" an offense, thereby exceeding its jurisdiction, and that the finding of guilty of bigamy was therefore beyond the court's jurisdiction and void. It is argued that since foreign law must be proved as a fact (MCM, 1949, par 133b, p 173), the failure to prove the Italian law on the subject of bigamy is a fatal deficiency.

Articles of War 95 and 96 denounce in general terms certain types of conduct on the part of persons subject to military law, without attempting to specify instances thereof. What conduct constitutes a violation of one or both of these articles is the subject of numerous authoritative decisions by competent military authorities. Examples of such offenses are set forth and maximum punishments prescribed in the Manuals for Courts-Martial, 1928 and 1949 (MCM, 1928, pars 151, 152, pages 186-191; MCM, 1949, pars 182, 183, pages 254-261; par 117c, pages 132-142). The failure of Articles of War 95 and 96 to enumerate or describe instances of the conduct therein denounced does not violate the due process clause of the Fifth Amendment to the Constitution (Carter v. McCloughry (1902), 183 U.S. 365, 397-400; CM 307097, Mellinger, 60 BR 199, 213-214, and cases there cited).

It is well settled in military jurisprudence that certain conduct on the part of persons subject to military law, described as bigamy, constitutes an offense under Article of War 96, and in the case of an officer also under Article of War 95, without reference to the law of the place where the conduct occurs, which law is irrelevant (Winthrop's Military Law and Precedents, Reprint 1920, p 718, n. 54, citing GCMO 14 of 1879; CM 245278, Yagel, 29 BR 153, 156, citing CM 128111, Barry; CM 256886, Wilber, 36 BR 373, 375; CM 272642, Bailey, 46 BR 343, 347; CM 335052, Venerable, 2 BR-JC 19, 24). In CM 256886, Wilber, supra, the Board of Review stated:

"Bigamy has long been recognized as an offense under Article of War 96 without reference to state laws * * *. It is committed when one party enters into a contract of marriage while a former marriage of that party still exists, undissolved and the spouse of that marriage remains alive (Dig. Op. JAG, 1912-40 sec 454 (18))."

In CM 328250, Lunde, 77 BR 29, 34, the Board of Review elaborated upon the definition of bigamy in military law as follows:

"* * * Accused was found guilty of the crime of bigamy as that offense is known to military law. In military jurisprudence, it is a violation of Article of War 96, and of Article of War 95 in the case of an officer, for one wrongfully, that is intentionally and without color of right, to purport to marry another while a former marriage is still subsisting and this is so quite without reference to the statutory or other definition of the crime of bigamy, if there be such, in the particular jurisdiction in which the act of marriage decreed took place." (Citing Bailey case, supra).

In the Yagel case, supra, the specification was similar to that under consideration here. It alleged that the accused wrongfully and unlawfully married a certain woman, the accused then being married to a living, undivorced wife. The Board of Review pointed out that under a charge of bigamy allegedly committed in Chicago, the receipt in evidence at the trial held in New York City, of a stipulation as to the Illinois law of bigamy and the court's application of the theory that that law applied, were erroneous. It thus appears that in the instant case the court recognized and applied the definition of bigamy which was already a firmly established part of military jurisprudence. The court clearly did not create its own standard for determining what conduct constitutes that offense and was not guilty of judicially "legislating," as contended by counsel. Proof of the Italian law on the subject of bigamy was unnecessary.

It is argued that, whatever the Italian law, it is an elementary principle that there can be no bigamy unless there be a second marriage which is not void but for the subsisting marriage. In support of this contention counsel quote from the opinion of Allen, J. in the case of Hayes v. People (1862), 25 N. Y. 390, 398, as follows:

"* * * the inquiry is * * * as to the first marriage, whether it was valid as a marriage in fact, and as to the second whether it would have been valid but for the first, which rendered the accused incapable of contracting * * *. The bigamist, although he is not capable of contracting the second marriage may, nevertheless, 'marry another person' so as to incur the penalty denounced against bigamy * * *. And he may do this in any form, or by any words, which, but for the legal bar, would constitute a good marriage."

But they failed to include the next sentence in the opinion, which is deemed most pertinent:

"In Rex v. Pierson (5 C.& P., 414), it was held, that, although the second marriage was to a woman who assumed a name not her own, which would have rendered a first marriage void, the party was, nevertheless, guilty of the crime of bigamy; that the parties could not be allowed to evade the punishment for an offence by contracting a concededly invalid marriage. And to the same effect, see Rex v. Allison (R. & R.C.C.R., 109)."

Obviously when a person is already legally married he cannot legally marry another. The most he can do is "purport to marry" another (see CM 328250, Lunde, supra), or as stated in CM 238173, Hutchins, 24 BR 189, 191, go "through the form of a second marriage" with another. The second marriage is always necessarily void, or it is not bigamous. Military jurisprudence follows the rule representing the weight of authority, i.e., that it is no defense to a bigamy prosecution that the second marriage was void on other grounds as well. This is the rule followed in Rex v. Pierson and Rex v. Allison, cited in Hayes v. People, supra, on which case counsel relies. In CM 238173, Hutchins, supra, the accused's second marriage was performed by a chaplain in a chapel at Camp Tyson, Tennessee, "pursuant to a Tennessee license." Following the marriage, the accused and his second wife lived together as man and wife for about five days. The Board of Review held that it was unnecessary to determine the question raised by the defense whether the chapel where the marriage was performed was within that portion of the camp which was under the exclusive jurisdiction of the United States. The reason was that it was immaterial whether the bigamous marriage would have been legal and valid but for its bigamous character. The Board quoted the following:

"While it has been held that the subsequent marriage must be of such a character that but for the existence of a prior legal marriage it would be valid, the weight of authority is that where the form of ceremony of marriage with another person is gone through, there is sufficient marriage on which to predicate a charge of bigamy, the view being taken that the word "marries", when applied to a subsequent marriage, means going through a form of marriage; and does not mean a valid marriage; * * *' (10 C.J.S. Bigamy, sec. 5a).

"It is no defense that the second marriage was void on other grounds than that of bigamy (Wharton's Criminal Law, secs. 2037 and 2078)."

In CM 258630, Reynolds, 5 BR (ETO) 259, a bigamy case, the accused testified as follows: During a drinking party his host "kidded" him and asked him why he didn't marry a Miss Matthew "and make an honest woman of her." Both the accused and his host agreed that it was "impossible," but the conversation resulted in a bet that the accused

could not marry her. There was "some sort of ceremony. There were pictures taken and frankly we had one royal big time." Not until several days later did the accused learn of the existence of a marriage license and certificate. He had not procured a license. He considered the marriage ceremony a joke, a part of the evening's fun, and believed everyone in the party so regarded it and would know it was a "phoney." The man who performed the ceremony was participating in the party, but the accused did not understand that he was a minister. Miss Matthew knew the accused was married. It was "in fact a mock ceremony," which did not last over five minutes. But four days later the new "wife" wrote the accused that she needed money, and since they were married she thought it his duty to take care of her. He "blew up." They never lived together as man and wife. He referred to himself as her husband in subsequent letters to keep her happy until he could get himself "out of that thing."

The Board of Review cited authority to the effect that neither cohabitation under the second marriage nor criminal intent is requisite to bigamy. Knowledge of the first marriage by the second "wife" is no defense. (On this point, see also CM 269057, Muir, 44 BR 373, 378; Bethany v. State (1922) 91 Tex Cr. 59, 237 SW 262). After quoting the rule set forth in the Hutchins case, supra, the Board stated:

"Consideration of the accused's testimony in the light of the authorities cited leads to the conclusion that, accepted at its face value, it presents no legal defense to the charge." (5 BR (ETC) 266)

The Board evidently was of the opinion that even if there was no legal marriage because of the character of the ceremony, this was no defense to bigamy.

People v. Brown (1876), 34 Mich 339, a leading decision by a famous jurist, is significant on this point. There the defense was that the defendant was a negro and the other party to the alleged bigamous marriage was a white woman, with whom under the statute it was impossible for him to contract marriage at all. Chief Justice Cooley stated in effect that it was unimportant "that there are two elements of illegality in the case instead of one," and that the party should not "be relieved from the consequences of violating one statute because the act of doing so was a violation of another also." His opinion continues:

"The authorities sanction no such doctrine. There are loose statements in some of the cases that the second marriage must have been one that, but for the existence of the first, would have been valid; but these evidently relate to the acts and intent of the parties, and not to the legal ability to unite in a valid relation. It was decided in Rex v. Penson [sic], 5 C. & P., 412, that bigamy was committed in marrying a woman under an assumed name, though by law such a

marriage between persons capable of contracting would be void. The case of Regina v. Brawn, 1 C. & K., 144, was similar to the present in its facts, and Lord Denman in summing up said: 'It is the appearing to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy, otherwise it never could exist in ordinary cases, as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime of the other. Whether therefore the marriage of the two prisoners was or was not in itself prohibited, and therefore null and void, does not signify, for the woman, having a husband then alive, has committed the crime of bigamy, by doing all that in her lay by entering into marriage with another man.' These cases are recognized in the case of Hayes v. People, 25 N.Y., 390, which is relied upon by the respondent, but which affords no countenance for his exceptions."

As pointed out in Allen v. State (1906), 17 Ga. App. 431, 87 S.E. 681, 682:

"But the crime of bigamy is based entirely upon the proposition that the second or bigamous marriage is not, and cannot be, legal. * * *

"Bigamy * * * consists in the making of the unlawful contract and the abuse of the formality which the law has enjoined as requisite to the creation of the marital relation."

The court quoted from State v. Patterson, 24 N.C. 355:

"And it is the abuse of this formal and solemn contract, by entering into it a second time, when a former husband or wife is yet living, which the law forbids because of its outrage upon public decency, its violation of the public economy * * *. A man takes a wife lawfully when the contract is lawfully made. He takes a wife unlawfully when the contract is unlawfully made, and this unlawful contract the law punishes."

Assuming, therefore, without deciding, that the purported marriage between the accused and Jonilde would have been void even had the accused not been legally married already, this would not constitute a defense, under the weight of authority and the rule of military jurisprudence.

It is also contended that the record contains no proof that the accused "married" Jonilde Bruno, hereinafter referred to as "Jonilde". It is urged that whether a given state of facts constitutes a marriage depends upon the law of the place of their occurrence, and that this rule requires proof of the Italian law relating to marriage, which is alleged to be lacking. The argument involves the competency of the

parties to be married, the competency of the official performing the ceremony and other formal requirements of a marriage. As to the competency of the parties to the marriage, the Italian law is immaterial because as pointed out earlier in this opinion, even if the marriage were void on other grounds including incompetency of the parties it would still be a bigamous marriage. As to the competency of the official performing the marriage and other formal requisites pertaining to the marriage, it has long been held that every fact necessary to the formal validity of the marriage may be presumed (subject of course to rebutting evidence) from the proof that there was in fact a form of marriage celebration (which proof is contained in the instant record, as discussed below) (CM 279797, Jones, 52 BR 329,333; Fleming v. People (1863), 27 N.Y. 329; People v. Calder (1874), 30 Mich. 85; Com. v. Kenney (1876), 120 Mass. 387; Barber v. People (1903), 203 Ill. 543, 68 N.E. 93, 94; Warren v. State (1928), 156 Tenn. 614, 3 SW 2d 1061; People v. Graves (1934), 357 Ill. 605, 192 N.E. 680). It may also be presumed, in the absence of evidence to the contrary, that persons shown to have been acting as public officers were legally in office and performed their duties properly (MCM 1949, par 125a, p 151). The application of these presumptions in this case, there being no evidence in the record to rebut them, obviates the necessity of proving the Italian law concerning marriage. Formal compliance therewith by all concerned could properly be presumed from the evidence, hereinafter discussed, that a form of marriage ceremony was performed. The cases cited by counsel (Regina v. Savage (1876), 13 Cox 178; Bater v. Bater, L.R. Prob. Div. 1907, 333; Brown v. Brown (1917), 116 L.T.R. 702; Rex v. Naguib (1917), 1 K.B. 359; United States v. Tuttle, 12 F. 2d 927; People v. Lambert, 5 Mich. 349; and State v. Horn (1870), 43 Vt. 20) are thus not controlling.

It is strenuously urged that the record contains no competent evidence that any form of marriage ceremony occurred. It is claimed that Jonilde's testimony that she married the accused in La Spezia on 29 October 1947, cannot properly be considered as evidence on this issue. Such is not the law. Testimony of eye witnesses to marriage (CM 325636, Devine, 74 BR 387, 404, quoting from Wignore on Evidence, 3d Ed., sec 2088) and of the second "wife" (CM 228971, Tatum, 17 BR 1, 3) is thoroughly acceptable as proof of a marriage ceremony. Whatever credibility may be accorded to Jonilde's testimony, its admissibility, for what it is worth, cannot be doubted.

Probably counsel's most important argument is that the purported record of the marriage between the accused and Jonilde (Pros Ex 8) was inadmissible and hence may not be considered as evidence upon the issue. It is not contended that a properly authenticated marriage certificate is inadmissible on the issue of marriage. Generally, a marriage certificate, or other marriage record, is competent

prima facie evidence of the marriage (V Wigmore on Evidence, secs 1642, 1644, pages 560-562, 565-583; CM 220518, Quigley, 13 BR 7, 8; CM 228971, Tatum, supra; CM 296366, Sherman, 58 BR 107, 109; CM 326147, Nagle, 75 BR 159, 174; see MCM 1949, par 130b, pages 166-167). The Board of Review has independently determined the correct English translation of the document here in question (Pros Ex 8), which is in Italian, and the translation is appended to the exhibit.

It is objected that the copy of the marriage certificate (Pros Ex 8), which is not self-proving apart from authentication, was not authenticated as required by the Manual for Courts-Martial, 1949, paragraph 129b, pages 164-165. We concur with the Board of Review, whose opinion (pages 23-27) contains a full discussion of the matter, in its conclusion that the copy of the marriage certificate was authenticated in substantial compliance with the rules of evidence prescribed in the Manual and was thus properly admitted in evidence. Counsel point to certain alleged deficiencies in the authentication which may be considered briefly. It is claimed that the copy does not purport to be certified or attested by the custodian of the original and that it is not certified as a true copy of the original. Under the Manual for Courts-Martial, 1949 (par 129b, p 164), the attesting certificate need only indicate that the paper is a true copy of the original and that the signer is its custodian. We are of the opinion the fact that the copy is signed by Dr. Eugenio Pedrinelli as "The Recorder (ufficiale) of Vital Statistics" under the seal of "the Bureau of Vital Statistics, Commune of La Spezia," indicates and is prima facie proof that as such official, he was the official custodian of the original document, purporting to show the vital statistic of a marriage (see MCM 1949, par 129b, p 165, top). A contrary conclusion would be unrealistic and over technical. So also, Pedrinelli's identification of the document as a "Copia, integrale" imports and indicates that it is a true copy of the original. The attesting certificate by Pedrinelli is given further authenticity by the statement signed by Gastone Rossi, "The Chancellor Delegate of the (Prefect) or (Prefecture)", under the seal of "the Civil and Penal Court of La Spezia," "after inspection," authenticating the signature of Pedrinelli, "Recorder (ufficiale) of Vital Statistics of the Commune of La Spezia."

The next objection is that the United States Vice Consul failed to certify that the copy was certified by the lawful custodian. But the authenticating certificate need only indicate that the signer of the attesting certificate is who he purports to be or that the attesting certificate is in proper form, or contain words of like import (MCM 1949, par 129b, p 164). The authenticating certificate by Sophia Kearney, the Vice Consul, given under the seal of her office, states that Rossi, "before whom the annexed instrument has been

authenticated, was, at the time he signed the annexed certificate, Clerk of the Civil and Penal Court at La Spezia, Italy." The Vice Consul's certificate thus serves to indicate that Pedrinelli, who signed the attesting certificate, was who he purported to be. This method of authentication of copies of foreign records is quite usual (see CM 326147, Nagel, 75 BR 159, 169-172, and authorities there cited; *New York Life Insurance Company v. Aronson* (DCWD, Pa 1941), 38 F. Supp. 687). As indicated by the Board of Review in its opinion, there was thus substantial compliance with the requirement of authentication of the attesting certificate, which gave reasonable assurance, prima facie, of the authenticity of the copy of the marriage certificate. Such prima facie authenticity stands un rebutted by any evidence in the record.

Counsel cite United States v. Grabina (CCA 2, 1941), 119 F. 2d 863, but this case is distinguishable on the ground that it would not be a logical presumption or inference that the mayor of a Polish town would be the custodian of records of vital statistics. Likewise, the case of CM A-501, Lyons, 1 BR (A-P) 155, III Bull JAG 469, cited by counsel, does not support their argument, for two reasons, first, the County Clerk's certificate concerning a marriage did not purport to be a certified copy of a public record, but merely stated that public records in his possession revealed certain information. Second, the certificate by the County Judge, attached to a purported copy of the marriage certificate, did not show he was custodian of the original and this could not be presumed since it would involve presuming that he was ex-officio clerk and thus custodian. Moreover, the seal was the individual seal of the County Judge - not the seal of the court. In the instant case, as indicated, it may be inferred that the Recorder of Vital Statistics had custody of the records of the Bureau of Vital Statistics; and the seal affixed here is that of the Bureau. It is apparent that the Lyons case is not, as counsel urge, controlling.

Since the marriage certificate or record was properly admitted in evidence, the question remains whether it constitutes sufficient proof of the bigamous marriage. According to the English translation verified by the Board of Review, it purports on its face to be an official record of the Bureau of Vital Statistics, Demographic Services Division, Commune of La Spezia, and a complete copy of the marriage record extracted from the Register for 1947 "No. 23, First Part." It recites the personal appearance before the then Recorder of Vital Statistics of the Commune of La Spezia, "having been invested in official form," at "eleven hours" on 29 October 1947, of the accused and Jonilde, and sets forth the steps in the marriage ceremony culminating in the Recorder's declaration that they were joined in matrimony. It concludes with a recital of the names of witnesses present, the presentation of proof of publication, and the reading and signing of the certificate itself by the participants. The authenticating certificates have been described above.

The following provisions of the Manual for Courts-Martial, 1949 (par 130b, pages 166-167) are applicable to this document:

1. An official statement in writing concerning a fact or event is admissible when the person making the writing had an official duty, imposed on him by law, regulation or custom, to record the fact or event and to know or ascertain through customary trustworthy channels the truth of the matters recorded.

2. It may be presumed, prima facie, that records emanating from official sources, foreign and domestic, concerning facts and events generally recorded by public officials of civilized states and nations, such as records of marriages, are records required by law, regulation or custom to be kept and that the person recording any such fact or event had an official duty to know or ascertain the truth thereof.

3. Any such statement or record is competent prima facie evidence of the fact or event, without the testimony of the person who made it.

Thus, in the absence of evidence to the contrary, it may be presumed that the official certificate, a duly authenticated copy of which was admitted in evidence, on file in the Demographic Services Division, Bureau of Vital Statistics, Commune of La Spezia, Italy, concerning the purported marriage between the accused and Jonilde, was a record required by law, regulation or custom to be kept and that the person who recorded it had an official duty to know or ascertain its truth. Accordingly this certificate is prima facie evidence of the bigamous marriage. The defense was at liberty to rebut this prima facie case but in our opinion it failed to do so. This view of the case disposes of counsel's contention that "there was no marriage in fact."

There were admitted in evidence, over objection by the defense, the depositions of Ferruccio Battolini, the celebrant of the alleged bigamous marriage (Pros Ex 9) and Giovanna Arena and Savino Formentini, eye witnesses thereto (Pros Exs 10 and 11). These depositions had been taken before the charges were referred for trial under the provisions of the last proviso of Article of War 25. The principal objections may be summarized as follows: (1) In the framing of the cross interrogatories on the depositions the accused was not effectively represented by appointed counsel. (2) In support of this objection the court refused to permit the defense to submit evidence in addition to that of the accused. (3) Although the deponents were Italian, the interrogatories and cross interrogatories, and the answers thereto were in English without any authentication of the translation of the English questions into Italian, and the Italian answers into English.

We find that the depositions were incompetent and therefore inadmissible. All interrogatories and cross interrogatories and purported answers thereto are in the English language. Beneath each of the deponent's signature is a certificate of Sophia Kearney, Vice Consul of the United States, bearing the official seal of her office, that the deposition was duly taken by her in the Italian language and that the sworn witness gave the answers in the Italian language to the several interrogatories and "prescribed" the depositions in her presence at La Spezia, Italy, on 17 May 1949. The certificate fails to reflect that Sophia Kearney made the translations and does not exclude the possibility that another person unknown to the record made the translations, and, finally, the certificate does not show that the person serving as interpreter was sworn. The testimony of the deponents as translated by an unsworn interpreter becomes the interpreter's unsworn statement of his version of what was stated by the deponents. Such statements of the interpreter are inadmissible hearsay. Our conclusion that the depositions are incompetent on the grounds above stated, and therefore inadmissible, makes it unnecessary in this connection to consider the remaining objections.

It is now necessary to determine whether any of the hearsay statements contained in the depositions injuriously affected the substantial rights of the accused. We find, as in effect did the Board of Review, that these statements were merely cumulative to and corroborative of the competent and compelling proof of the bigamous marriage otherwise in the record and that their receipt in evidence constituted harmless error within the rule enunciated in Kotteakos v. United States (1946), 328 U.S. 750, 757, 759 which we followed in CM 335123, Green, 2 BR-JC 58, 64-66.

In arriving at the above conclusion we have not overlooked the first objection to the depositions and argument that the admission in evidence of these depositions invalidated the entire proceedings. Assuming arguendo that the ineffectiveness of counsel in connection with the depositions made them incompetent and inadmissible, it does not follow that their erroneous receipt in evidence constituted fatal error. We are aware that within the juridical sphere wherein the Sixth Amendment is definitive of the rights of an accused, an accused is entitled to the effective assistance of counsel in the entire proceedings (Powell v. Alabama (1932), 287 U.S. 45). In the Powell case during perhaps the most critical period of the proceedings - from the arraignment until the beginning of the trial, a period of six days - the accused did not have the effective assistance of counsel. Substantially the same rights as are conferred by the Sixth Amendment on an accused person accrue to an accused under military law irrespective of that amendment. Thus, it has been held that "where the disloyalty or gross carelessness of defense counsel directly aids the prosecution, the conviction should be set aside." (CM 320168, Gardner, 70 BR 71, 78); that "The right of counsel is so fundamental that encroachment thereupon constitutes a lack of due process of law which cannot be cured by clear and compelling evidence of guilt * * *." (CM 332704, Bilbo, 81 BR 185);

that, nevertheless, the principle here discussed is to be applied "to the measure of the prejudicial irregularities revealed in the record of trial consistent with Article of War 37." (CM 328104, Best, 76 BR 281, 283). These cases and those cited therein involve the inadequacy of counsel at or subsequent to arraignment. That is not the situation here. The record shows that the accused was represented by able, effective and adroit counsel of his own selection not only during the entire trial, which due to long continuances granted at his request, covered the period from 27 June 1949 to 3 May 1950, but also, prior to arraignment, at the Article of War 46b investigation on 30 April 1949. The depositions here involved were pretrial depositions authorized by the last proviso of Article of War 25. This procedure was designed to preserve testimony after the charges are preferred and before the charges are referred to trial when it appears that the witnesses will not be available after the latter time. (Testimony of Brigadier General Hoover, The Assistant Judge Advocate General, on 21 April 1947 before the Subcommittee of the House of Representatives' Committee on Armed Forces in connection with H.R. 2575.) The depositions were dispatched, with the knowledge of the accused, to Italy on 15 April 1949, accomplished by the witnesses in Italy on 17 May 1949 and received in evidence on 21 November 1949. Individual counsel was selected by the accused at some time prior to 30 April 1949 and it may be assumed that the accused advised him as to the depositions at or about that time. Neither at the trial nor on appellate review did counsel claim surprise with respect to these depositions, and it may also be assumed that the depositions were returned in due course and were furnished to the accused or his individual counsel early in the course of the proceedings in accordance with the provisions of paragraph 106f, page 119, Manual for Courts-Martial 1949. It thus appears that individual counsel had timely and sufficient knowledge of the depositions to enable him to render effective assistance to the accused in all the essential phases of the court-martial proceedings.

We do not here decide whether the Sixth Amendment applies to trials by courts-martial. Nevertheless whether we apply the test of the Powell case, supra, or that applied in military law, we conclude that the accused was represented by effective counsel of his own selection during all the essential phases of his court-martial proceedings, and that under the circumstances of this case no prejudicial error resulted even if we assume that he did not have the effective assistance of counsel in connection with the preparation of the cross interrogatories on the pre-trial depositions.

On appellate review, counsel also argued that the receipt in evidence of the three pre-trial depositions deprived the court of its jurisdiction in the case because of the ineffectiveness of counsel appointed to represent the accused in the framing of the cross interrogatories. We do not agree that jurisdiction is lost by reason of the ineffectiveness of counsel (Hiatt v. Brown (1950), 339 U.S. 103, 110-111).

The evidence introduced by the defense pertaining to the bigamy charged had for its obvious purposes the showing of the bad character of Jonilde and contrariwise, the good character of accused. The good character of an accused person is always relevant and material in a criminal prosecution, and may, in and of itself, be legally sufficient to create a reasonable doubt of guilt. We are cognizant that accused's service prior to the offenses here charged had been lengthy and honorable and that incident thereto he has enjoyed a good reputation as to those attributes requisite to an officer of the Army. Further, the record is subject to the inference that accused's participation in the bigamous marriage was at least in part for the honorable purpose of giving his name to the child Jonilde was bearing. Evidence of accused's good character was before the court but failed to instill in the minds of the members a reasonable doubt of accused's guilt, and in view of the evidence, we are of the opinion that such failure was warranted.

In the impeachment of Jonilde's testimony, the rules of evidence were somewhat relaxed. In this connection there was evidence indicating that Jonilde in turn was a Fascist and a Communist and an associate of Communists, the mistress of an officer of the invading German Army and a mistress successively to a junior officer of the United States Army and to accused. It was indicated that Jonilde was disdainful of Italian suitors, that her reputation for truth, veracity, and chastity were bad, that contrary to her testimony, after her purported marriage to accused, the latter commonly introduced her as Mrs. Bruno and Mrs. Brown and not as Mrs. Tilley. It was also indicated that she was aware of accused's valid subsisting marriage to Elizabeth although at the trial she claimed she thought he was divorced. Nevertheless, in view of all the evidence, the court was fully warranted in finding Jonilde and the accused contracted a bigamous marriage.

In our opinion the record of trial convincingly establishes the accused's guilt of bigamy, as alleged in the specification of Charge I.

5. The specification of Charge II alleges that the accused did wrongfully and unlawfully harbor Jonilde Bruno Tilley, an alien not lawfully entitled to enter or reside within the United States, in violation of Section 144, Title 8, United States Code, at or near Arlington, Virginia, on or about 15 April 1948, in violation of Article of War 96. The Board of Review has concluded that this specification fails to state an offense in violation of Article of War 96, whether as a crime or offense not capital, as a disorder to the prejudice of good order and military discipline, or as conduct of a nature to bring discredit upon the military service. We deem it unnecessary to decide this question in any of its aspects in view of our conclusion with respect to the evidence relating to the specification.

Even assuming, without deciding, that the specification alleges an offense in one or more of the three categories embraced by Article of War 96, the evidence of record is legally insufficient, in our opinion, to support the findings of guilty.

The verb "harbor" is defined as -

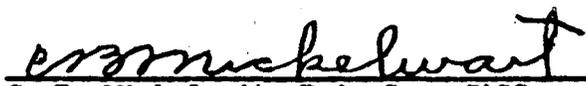
"To receive clandestinely and without lawful authority a person for the purpose of so concealing him that another having a right to the lawful custody of such person shall be deprived of the same. * * * It may be aptly used to describe the furnishing of shelter, lodging or food clandestinely or with concealment * * *." (Black's Law Dictionary, 3d Ed, p 876).

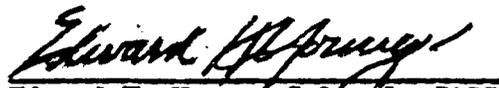
Applying the principle that the specification, like a civil indictment, should be considered and read as a whole, the verb "harbor" should be construed not only in the light of its definition, but also in connection with and in the light of its direct object in the sentence, here described as "an alien not lawfully entitled to enter or reside within the United States." In our opinion the fair meaning of "harbor" in this specification is substantially as stated by the Federal courts in construing Section 144, Title 8, United States Code, notwithstanding the unenforceability in the Federal courts of that section so far as it relates to concealing and harboring aliens. In United States v. Evans (1948), 333 U.S. 483 (see United States v. Smith (CCA 2, 1940), 112 F. 2d 83; Susnjar v. United States (CCA 6, 1928), 27 F. 2d 223) "harbor" is defined in substance as "to shelter from the immigration authorities and shield from observation to prevent discovery as an alien." The record contains no substantial evidence that the accused sheltered Jonilde from the immigration authorities or shielded her from observation to prevent her discovery as an alien.

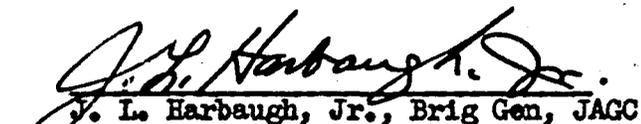
Even assuming, however, that the evidence established the requisite acts and intent on the accused's part to constitute "harboring," and that the definition of that term need not be limited as above indicated, the evidence does not support the allegation that Jonilde was "not lawfully entitled to enter or reside within the United States" on or about 15 April 1948. The evidence on this issue is purely circumstantial and consists of a stipulation that the accused purchased an airplane ticket covering Jonilde's passage from Rome, Italy, to New York (R 52); Jonilde's testimony that she was an Italian citizen and entered the United States on 12 April 1948, not on a quota allotted to the Italian government but because she was the accused's wife (R 38); and the testimony of an officer of the Immigration and Naturalization Service that on 21 November 1949 Jonilde was an Italian citizen under deportation proceedings and that he then had a warrant for her, which was suspended pending investigation, "looking forward to some sort of relief where

she might be granted discretionary authority to remain here" (R 85). We are in accord with the conclusion of the Board of Review that this evidence is legally insufficient to establish beyond a reasonable doubt that Jonilde's entry into, or residing in, the United States on or about 12 April 1948 was illegal. Failure to prove this vital element of the specification is fatal to the conviction thereunder.

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 of Charge I and its specification, legally insufficient to support the findings of guilty of Charge II and its specification, and legally sufficient to support only so much of the sentence as provides for dismissal from the service, and to warrant confirmation of such portion of the sentence.


C. B. Mickelwait, Brig Gen, JAGC


Edward H. Young, Colonel, JAGC


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

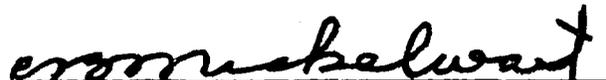
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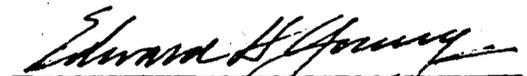
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

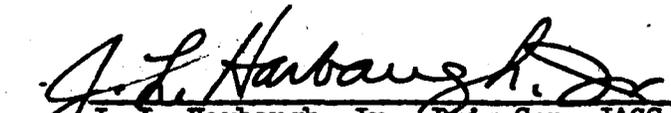
Harbaugh, Mickelwait and Young
Officers of The Judge Advocate General's Corps

[In the foregoing case of Colonel Ralph C. Tilley, O-202145, Office of The Adjutant General, Department of the Army, Washington 25, D. C., upon the concurrence of The Judge Advocate General, the findings of guilty of Charge II and its specification are disapproved and only so much of the sentence as provides for dismissal from the service is confirmed and will be carried into execution.

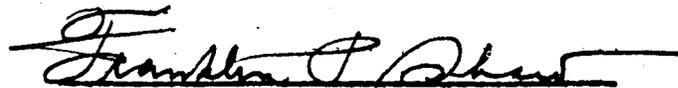

C. B. Mickelwait, Brig Gen, JAGC


Edward H. Young, Colonel, JAGC

SEP 11 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

17 Nov 1950

(GCMO 91, 26 Dec 1950).

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

(167)

JUN 12 1950

JAGH CM 341672

U N I T E D S T A T E S	)	ANTIAIRCRAFT ARTILLERY AND
	)	GUIDED MISSILE CENTER
v.)	
	)	Trial by G.C.M., convened at
Second Lieutenant HARRIE LOUIS	)	Fort Bliss, Texas, 11 April
KIRK (O-2014676), Leaders Course	)	1950. Dismissal and forfeiture
Detachment, 4052 Area Service	)	of One Hundred Dollars (\$100.00)
Unit, Fort Bliss, Texas.	)	pay per month for three (3)
	)	months.

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

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

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

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

Specifications 1,9,10,11: (Findings of not guilty).

Specification 2: In that Second Lieutenant Harrie Louis Kirk, 4052 Area Service Unit, did, at El Paso, Texas, on or about 20 January 1950, with intent to defraud, wrongfully and unlawfully make and utter to the Quality Store Number 2, El Paso, Texas, a certain check, in words and figures as follows, to-wit: 'No. 52-50 San Antonio, Texas, 20 January 1950, National Bank of Fort Sam Houston, at San Antonio, pay to the order of Quality Store #2 \$10/00, Ten and No/100 Dollars, Lt Harrie L. Kirk, O-2014676,' and by means thereof did fraudulently obtain from Quality Store Number 2, El Paso, Texas, merchandise and lawful money of the United States of a total amount of about Ten Dollars (\$10.00) lawful money of the United States, he, the said Second Lieutenant Harrie Louis Kirk, 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 at San Antonio, Texas, for payment of said check.

Specification 3: (Identical to Specification 2, except the date of the offense and the check "21 January 1950," the number of the check "53-50," the amount of the check "\$11.00," and the payee of the check "Bob Major Service.").

Specification 4: In that Second Lieutenant Harrie Louis Kirk, 4052 Area Service Unit, did, at El Paso, Texas on or about 14 February 1950, with intent to defraud, wrongfully and unlawfully make and utter to the Alta Vista Liquor Stores, El Paso, Texas, a certain check, in words and figures as follows, to-wit: 'Southwest National Bank of El Paso, El Paso, Texas, 14 February 1950, No. ----, pay to the order of Cash, \$15/00, Fifteen and No/100 Dollars, Lt. Harrie L. Kirk, O-2014676, CAC,' and by means thereof did fraudulently obtain from the Alta Vista Liquor Stores, El Paso, Texas, merchandise and lawful money of the United States of a total value of about Fifteen Dollars (\$15.00), lawful money of the United States, he, the said Second Lieutenant Harrie Louis Kirk, then well knowing that he did not have and not intending that he should have sufficient funds in the Southwest National Bank of El Paso, Texas, for payment of said check.

Specification 5: (Identical to Specification 4, except the date of the offense and the check "18 February 1950," and the payee of the check "Pioneer Liquor Store.")

Specification 6: (Identical to Specification 4, except the date of the offense and the check "18 February 1950," and the payee of the check "Chuck's Drive-In Bar.")

Specification 7: (Identical to Specification 4, except the date of the offense and the check "19 February 1950," the amount of the check "\$10.00," and the payee of the check "Chuck's Drive-In Bar.")

Specification 8: (Identical to Specification 4, except the date of the offense and the check "23 February 1950," the amount of the check "\$10.00," and the payee of the check "3900 Liquor Store.")

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

Specifications 1,9,10,11: (Findings of not guilty).

Specifications 2 through 8 are identical to the correspondingly numbered Specifications of Charge I.

CHARGE III: Violation of the 95th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 1,9,10,11 of Charges I and II, guilty of Specifications 2 through 8 of Charges I and II, and guilty of Charge I and Charge II. He was found not guilty of the Specification of Charge III and Charge III. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit one hundred dollars pay per month for three months. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

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

Second Lieutenant Harrie L. Kirk, the accused, was an instructor assigned to the Leaders Course being taught at the Artillery School, Fort Bliss, Texas (R 128,166,173,174).

As to Specification 2 of Charge I and Specification 2 of Charge II.

On 20 January 1950, the accused, without requesting any postponement in its negotiation, gave his check of that date in the sum of \$10.00 and drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, to Quality Store #2, El Paso, Texas. He received one bottle of whiskey for \$4.10 and \$5.90 cash money in return (R 20,21,24-25,26; Pros Ex 1A). At that time the accused had a balance of \$44.10 in his account, but on 26 January 1950, when the check was presented to the bank for payment in the normal course of business, the balance was \$6.10 after a check of \$10.00 had been charged against the account on the same day. The check was dishonored by the bank and returned to the payee for lack of sufficient funds (R 18,19,21,22,24; Pros Ex 1). The check has never been "honored" although the accused had an active account in the drawee bank from 1 October 1949 to 21 March 1950 (R 24; Pros Ex 1). Prior to the issuance of this check, and on 4 January 1950, the accused had given his check in the sum of \$50.00 and drawn on the Southwest National Bank of El Paso, El Paso, Texas, to Champs Flying Service (R 77,81,84; Pros Ex 7). He was credited with \$45.32 on his account at the flying school and given cash in change (R 79). At that time the accused had a balance of \$79.36 in his bank account, but on 9 January 1950, when the check was presented for payment, the balance

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was \$14.81. The check was dishonored by the bank and returned to the payee for lack of sufficient funds (R 91,92). At the request of the accused the payee again presented the check for payment but it was "returned the second time" (R 78-82).

As to Specification 3 of Charge I and Specification 3 of Charge II.

On 21 January 1950, the accused, without requesting any postponement in its negotiation, gave his check of that date in the sum of \$11.00 and drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, to Bob Major Service, El Paso, Texas. He received merchandise and cash in return (R 29,30,32,33; Pros Ex 1B). At that time the accused had a balance of \$41.10 in his account, but on 9 February 1950 when the check was presented to the bank for payment in the normal course of business, the balance was \$8.10, after a check of \$15.00 had been charged against the account on the same day. The check was dishonored by the bank and returned to the payee for lack of sufficient funds (R 19,31; Pros Ex 1). It has not been "made good" (R 31,33; Pros Ex 1).

As to Specification 4 of Charge I and Specification 4 of Charge II.

On 14 February 1950, the accused, without requesting any postponement in its negotiation, gave his check of that date in the sum of \$15.00 and drawn on the Southwest National Bank of El Paso, Texas, payable to "cash," to the Alta Vista Liquor Stores, El Paso, Texas. He received "a bottle of liquor and the change" in return (R 34-37; Pros Ex 2). At that time the accused had a balance of \$.35 in his account, but on 17 February 1950, when the check was presented at the bank for payment in the normal course of business, the balance was \$.10. The check was dishonored by the bank and returned to the payee for lack of sufficient funds (R 38,39,89,90). The payee has not received payment (R 40).

As to Specification 5 of Charge I and Specification 5 of Charge II.

On or about 18 February 1950, the accused gave his check of that date in the sum of \$15.00 and drawn on the Southwest National Bank of El Paso, Texas, to the Pioneer Liquor Store, El Paso, Texas. He received "a fifth of whiskey, a carton of mix and the balance in cash" in return (R 49-51,54,88; Pros Ex 5). At that time and on 21 February 1950, when the check was presented at the bank for payment in the normal course of business, the accused had a balance of \$.10 in his account. The check was dishonored by the bank and returned to the payee for lack of sufficient funds (R 55,88,90,91). The payee has not "received the \$15.00" (R 56).

As to Specification 6 of Charge I and Specification 6 of Charge II.

About 18 February 1950, the accused, without requesting any postponement in its negotiation, gave his check of that date in the sum of \$15.00

and drawn on the Southwest National Bank of El Paso, Texas, payable to "cash," to the Chuck's Drive-In Bar, etc., El Paso, Texas. He received \$15.00 cash in return (R 43,46-48; Pros Ex 3). At that time the accused had a balance of \$.10 in his account. The check was presented for payment in the normal course of business on 23 February 1950. It was dishonored by the bank and returned to the payee for lack of sufficient funds (R 43-47,90). The payee has not "recovered the money" (R 44).

As to Specification 7 of Charge I and Specification 7 of Charge II.

On 19 February 1950, the accused, without requesting any postponement in its negotiation, gave his check of that date in the sum of \$10.00 drawn on the Southwest National Bank of El Paso, Texas, payable to "cash," to the Chuck's Drive-In Bar, etc., El Paso, Texas. He received \$10.00 cash in return (R 42,44-48; Pros Ex 4). At that time and at the time the check was presented to the bank for payment in the course of business on 23 February 1950, the accused had a balance of \$.10 in his account. The check was dishonored by the bank and returned to the payee for lack of sufficient funds (R 44,45,90). The payee has not "recovered the amount" (R 46).

As to Specification 8 of Charge I and Specification 8 of Charge II.

On 23 February 1950, the accused, without requesting any postponement in its negotiation, gave his check of that date in the sum of \$10.00 drawn on the Southwest National Bank of El Paso, Texas, payable to "cash," to the 3900 Liquor Store, El Paso, Texas. He received a pint bottle of liquor for \$2.65 and "the balance in cash," in return (R 57-61,89; Pros Ex 6). At that time and at the time the check was presented to the bank for payment in the course of business on 25 February 1950, the accused had a balance of \$.10 in his account. The check was dishonored by the bank and returned to the payee for lack of sufficient funds (R 59,91). The payee is "out the \$10.00" (R 60).

In general.

The accused was indebted to the Southwest National Bank, El Paso, Texas, pursuant to the conditions of a promissory note dated 31 August 1949. This obligation was renewed on 10 November 1949 in the form of a demand note for \$300.00 payable \$50.00 per month by charges against his checking account (R 92-94; Pros Ex 8). This account was opened on 1 September 1949 and although it was "closed out" on 20 March 1950 the "final closing" was 3 April 1950 (R 88,90,95). The deposit in this account on 30 November was \$268.00. Of the sum of \$207.00 deposited 31 December 1949, only \$107.00 was credited to his account and \$100.00 was placed to the credit of his promissory note (R 95,108). The duplicate

deposit slip sent to the accused would show the amount of the deposit less the "credit on his note" (R 96,104). The first payment on the note was understood to be on 10 December 1949, but at that time there were not sufficient funds in the account to cover the charge. It was added to the 10 January payment and both were deducted on 31 December when the deposit was made (R 98-101). A further payment was "taken out" when the deposit was made on 31 January (R 98). The bank accepted \$50.00 for deposit in the account on 1 April 1950 but immediately charged the account \$50.00, credited the note in this amount, and closed the checking account (R 107,109).

During the first part of February 1950 the accused discussed his "entire financial situation" with the Brigade Executive who testified that the accused appeared sincere in his desire to pay off his obligations of about six hundred dollars. It appeared that the accused could pay them off at "a rate of approximately fifty dollars a month." He was sending money home for "a medical bill" (R 165,166,170-172).

b. For the defense.

The accused after being duly warned of his rights as a witness elected to testify under oath with respect to certain matters, and thereafter made an unsworn statement (R 134-136,177).

While under oath the accused testified that prior to giving his check on the 4th of January 1950 to Champ's Flying Service, he telephoned the Southwest National Bank in El Paso and was told that his allotment check for the month of December in the amount of \$207.00 had arrived at the bank. "That amount, deducting my \$50.00 a month payment on the note would leave me \$157.00. I verified that before writing the check on the 4th of January, 1950" (R 136,137,153). It was not until after the 8th or 9th of January that the accused learned that the bank had "deducted \$100.00 instead of \$50.00" from the allotment for payments on his note. He was not sure whether the deductions of \$50.00 per month were to be made on the 10th of the month or on the 31st. When the check was issued on the 4th of January he anticipated that the check "would clear in sufficient time to be valid on the 10th of the month" in the normal course of business. He was not aware that no deduction had been made about the 10th of December, but assumed that it had been made (R 136,137,143-146, 161,163). The accused had had a checking account for six or seven years and knew how to read a bank statement. He "wouldn't say for sure" but apparently there were "other checks around the 4th of January that got there before this \$50.00 check got there that caused it to bounce." He kept note in his checkbook when checks were issued. The "discrepancy" resulted from his "impression" that there was \$157.00 remaining in the account instead of \$107.00. He knew two payments to the bank were due (R 153,154). He received the December bank statement about the 11th or

12th of January showing a balance of \$2.36 as of 28 December 1949. He received a bank deposit slip covering the above mentioned allotment check about the 8th or 9th of January, dated 31 December. It showed the deduction of \$100.00 for the note payments. On the 31st of December there was a balance of over \$90.00.

"Q Well, that, coupled with the fact that you then had an outstanding check for \$50.00 with other checks you had written, didn't you then realize that your account would then fall short of being sufficient to satisfy these checks?

A I did at the time, yes, sir.

Q What did you do about it?

A I did all I could, sir. I tried to take up the checks which they had" (R 158-161).

Shortly after the 10th of March the accused was sent to the hospital for observation and examination (R 179). (A negative report of this examination is included among the allied papers in the case.)

In his unsworn statement the accused explained the "circumstances surrounding" his "critical financial condition."

"It seemed to all begin about, on or about, the 1st of October, 1949, in that the car in question in the Fulwiler case was traded in to another agency for another automobile. I was financially all right at the time I did. On the 6th of October when I received word that my sister was in a hospital for an operation, I received a VOCO seventy-two hours from Director of Administration, Triple A and GM Branch, TAS, to go home, which I did. On the way home the automobile which I had just purchased was wrecked in an accident. I continued on my way by other means of transportation and I wired for an extension from the AA and GM Branch, which was granted. I took care of my affairs as best I could. My sister was in the hospital; she had been sick for approximately two years, very badly sick, and she had to have this operation which took a specialist. My folks are not too well financially; they couldn't afford it. My sisters and brothers are all married and they have their own families and they helped what they could but most of the brunt of it was on me, not that I am begrudging anything at all, but due to that and the fact that the automobile was wrecked and a loss to me, I got into financial difficulties, sending money home to my folks, trying to pay off the hospital bill of my sister, doctor bills; I renewed the note at the Southwest National Bank which you know about, which helped me over the financial difficulties, and it just kept building up, I guess, and it finally caught up with me.

* * *

"around the 1st of February or thereafter when things were coming to a head and I was getting under to where I couldn't get out, I made attempts to secure part-time work in El Paso in the evenings to supplement my regular pay. I was unable to do that immediately, of course; work is not too easy to get; but I did try and I finally secured a couple of promises from different people that I have met and know that just as soon as anything comes their way I can have a part-time job working in the evening from six to ten or eleven o'clock, making enough to help pay off this indebtedness and also take care of my other obligations at home." (R 177,178)

4. Discussion.

The accused had checking accounts in two banks and wrote checks against both accounts. At least one full week prior to the issuance of the first check involved in the findings of guilty herein, drawn on the Fort Sam Houston bank, the accused was aware of the following facts: his "critical financial condition," his several obligations, the condition of each bank account, the dishonor of the fifty dollar "Champ" check by the El Paso bank for lack of sufficient funds following the application of deposit funds on note payments, the issuance of other checks against the El Paso bank which the account could not "satisfy." In the face of these conditions, the deliberate issuance of a check on the Fort Sam Houston bank on 20 January 1950 in the sum of \$10.00, which was subsequently dishonored by the bank, is evidence of an intent to defraud. The issuance of several NSF (not sufficient funds) checks from 20 January to 23 February 1950 is further evidence of this intent (CM 260755, McCormick, 40 BR 1; CM 332879, Boughman, 81 BR 223; CM 337978, Gallo, 4 BR-JC 193, 201). The accused knew what had happened in regard to his NSF "Champ" check drawn on the El Paso bank. Following this, his disregard for the consequences in connection with the \$10.00 check drawn on the Fort Sam Houston bank is more than mere carelessness under the circumstances. He was put upon strict notice with respect to every check he was issuing. He was chargeable with responsibility for the certain consequences of his actions and the intent to accomplish the certain results - the defrauding of the payee of each check dishonored for lack of funds.

The fact that at the time a particular check was given there were adequate funds in the account against which the check was drawn is not conclusive that there was an absence of a fraudulent intent at that time.

"When three of the checks were written, or within a few days thereafter, he had sufficient funds in his account to pay the checks but not on the dates they were presented for payment. Under these circumstances fraudulent intent could be inferred" (CM 337978, Gallo, 4 BR-JC 193,200).

The evidence establishes the making and uttering of the seven checks charged, on the dates they respectively bear, under Specifications 2 to 8, inclusive, under Charges I and II. The accused makes no denial of this. Neither does he offer any proof to refute the evidence that the checks were given for a present consideration in each case.

It is, therefore, considered that the evidence supports the findings of guilty of Specifications 2 to 8, inclusive, both under Article of War 95 and Article of War 96.

5. Department of the Army records show that the accused is 27 years of age and married. He completed one year of college and in civil life was employed as a bookkeeper. He served from September 1940 to January 1941 in the Illinois National Guard. In February 1941 he enlisted in the Regular Army and after engaging in the campaigns of Normandy, Northern France, Ardennes, Rhineland and Central Europe, was discharged in October 1945. He reenlisted in February 1948 for three years. He attended the officers' candidate school at Fort Riley and was commissioned a second lieutenant in Coast Artillery Officers' Reserve Corps in July 1949. He completed the Associate Basic Course at the Artillery School in November 1949. He was then assigned to the Leaders Course, Fort Bliss, Texas, as an instructor. His AGCT score is 146.

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 dismissal is mandatory upon conviction of a violation of the 95th Article of War. A sentence to dismissal and forfeiture of one hundred dollars pay per month for three months is authorized upon conviction of a violation of the 96th Article of War.

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

Robert B. Baker, J.A.G.C.

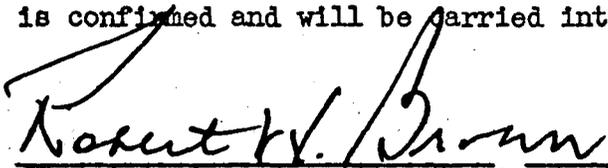
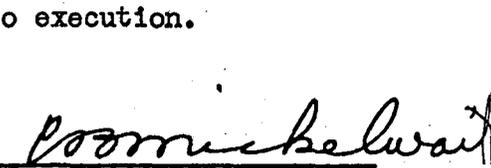
W. J. Aronson, J.A.G.C.

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 Second Lieutenant Harrie
Louis Kirk, O-2014676, Leaders Course Detachment,
4052 Area Service Unit, Fort Bliss, Texas, 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

18 July 1950

I concur in the foregoing action.


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

18 July 1950

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

JAGZ CM 341786

AUG 1 1950

UNITED STATES	)	1ST CAVALRY DIVISION (INFANTRY)
v.	)	Trial by G. C. M., convened at Camp Drake,
Corporal MAX EUGENE BUSSARD	)	Tokyo, Japan, 21 February 1950. Confine-
(RA 17204971), Headquarters	)	ment for eight (8) months and forfeiture
Detachment, IX Corps, APO 309.)	)	of \$53.33 per month for a like period.
	)	Army Stockade.

HOLDING by the BOARD OF REVIEW
WHIPPLE, MICKEL and BYRNE
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 Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Corporal Max Eugene Bussard, Headquarters Detachment IX Corps, APO 309, did, at Tokyo, Honshu, Japan, on or about 7 November 1949, unlawfully kill Ichichi, a Japanese National, by driving a motor vehicle against the said Ichichi in a negligent manner.

Specification 2: In that Corporal Max Eugene Bussard, Headquarters Detachment IX Corps, APO 309, did, at Tokyo, Honshu, Japan, on or about 7 November 1949, wrongfully and unlawfully operate a motor vehicle upon a public street while under the influence of liquor.

The accused pleaded not guilty to the Charge and Specifications and was found guilty of the Charge and Specification 1, but not guilty of Specification 2. He was sentenced to be confined at hard labor for eight months and to forfeit \$53.33 per month for a like period. No evidence of previous convictions was introduced. The reviewing authority approved the sentence and ordered it executed. The Eighth Army Stockade, APO 343, was designated as the place of confinement. The result of trial was published in General Court-Martial Orders No. 87, Headquarters, 1st Cavalry Division (Infantry), APO 201, Camp Drake, Tokyo, Japan, 29 April 1950.

3. Evidence.

a. For the prosecution.

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

Ichichi, a Japanese National, aged 53, in good health, left his home at approximately 4:00 P. M., 7 November 1949, to visit his nephew who lived near Ikebukuro, apparently an outlying district or suburb of Tokyo, Japan, (R 10 - 12). At approximately 7:25 P. M., the same date, two Japanese policemen who heard sounds of an accident or had it reported to them found him in front of or near the Ikebukuro police station lying on the sidewalk near the curb at the left edge of Kawogoe Highway, a national highway leading into Tokyo. He was, "bleeding from the hair" apparently having been involved in a traffic accident. It "was pretty dark at the time"; the weather was dry (R 12 - 14, 16 - 17, 20, 25 - 27, 28 - 29, 31 - 33, Prox Exs 3 and 4). The only evidence of injury sustained was the above statement in the record "bleeding from the hair" and Pros Ex 1, indicating injuries to the face (R 26, 31, Pros Ex 1). His bicycle was found a few meters from him not badly damaged; the luggage carrier was bent to the right, the rear mud guard slightly twisted and reflector glass missing (R 13, 15, 17 - 18, 21, 26 - 27, 31 Pros Ex 2). At about 9:30 P. M., the same date, automobile tire marks were found at the scene on the sidewalk and pavement starting about one meter from the point where the victim was found and extending for about ten meters on the walkway and over the curb on the pavement for about two meters in the direction of Tokyo (R 17, 20 - 23, 27, 31 - 32, 38 - 40, Pros Exs 3 and 4). Traffic in Tokyo drives to the left (R 64). The following day a CID agent found a small piece of mirror glass at the upper edge of the curb a short distance beyond the point where the victim was lying and on the side away from the tracks (R 33, 40 - 41, 43 - 44, Pros Exs 4 and 6). He also found at the scene several pieces of orange reflector glass (R 34). The particle of mirror glass was established by spectrographic analysis to be of the type and kind as a larger piece of mirror glass taken by the CID agent from a broken rear view mirror of a wrecked vehicle at the impounding pool of the Provost Marshal's office in Tokyo assigned to the Kanto Civil Affairs team, but did not match in contour (R 34, 42, 54 - 61, Pros Exs 5, 8, 9). The rear view mirror from which the larger piece of glass was taken extended out on a bracket from the left side of the jeep from which it was taken (R 42).

It is believed appropriate to summarize more fully the evidence pertaining to the spectrographic analysis of the glass.

Miss Julia Hornsby, Chief Chemist, Criminal Investigation Laboratory, Far East Command, after being qualified as an expert, testified that Prosecution's Exhibits 5 and 6, the larger and smaller pieces of glass respectively, were referred to the CID laboratory for spectrographic analysis. The examination showed that both pieces of glass were the same thickness, that similar elements appeared such as aluminum, calcium and magnesium; that these are indications that the glass was derived from a similar origin (R 54 - 56). On cross examination Miss Hornsby admitted that since jeep mirrors are about four inches in diameter, one mixing would undoubtedly cover several thousand mirrors (R 57). The concentric lines do not fit since the two pieces of glass were not originally joined side by side (R 57). The constituents of Prosecution's Exhibits 5 and 6 were checked and no difference could be found (R 58). The spectrograph was a perfect match (R 58). She further testified that as to her opinion she "would have a tendency to say very probably" that Prosecution's Exhibits 5 and 6 came from the same mirror (R 60). However, "we can't prove that they did" (R 60) and "there is a possibility they didn't, however, we gave them a good going over to make sure everything matched" (R 60).

To connect the accused with the vehicle from which the piece of rear view mirror glass was taken the following testimony was adduced from the CID agent:

"Q I show you Prosecution Exhibits 5 for identification and 6 for identification, Prosecution Exhibit 5 being the larger piece of glass, and ask you what they are, if you have ever seen them before and, if so, under what circumstances?

"A Yes. This small piece is the one that I found on the scene in front of the Ikebukuro Police Station and I marked it on the back with my initial.

"Q And the other piece was found where?

"A The other piece was taken by myself from a wrecked vehicle in the impounded pool of the Provost Marshal's Office in Tokyo.

"Q To what organization, if any, was the vehicle that was allegedly wrecked assigned?

"A The Kanto Civil Affairs Team at that time.

"Q In the course of your investigation, did you determine who was responsible for that vehicle or who might or might not have been the driver of this vehicle on 7 November?

"A Yes, I did.

"Q Please tell the court.

"LAW MEMBER: Please state the basis of your information, whether it is hearsay, whether it is based upon your own knowledge and things like that before we get the final answer.

"Q How do you know it was assigned to the accused?

"LAW MEMBER: He didn't say it was, did He? How do you know it was assigned to the Kanto Military Government Team?

"WITNESS: The marks on the bumper were from the Kanto Military Government Team and it was, to the best of my knowledge, Vehicle No. 22.

"Q In your subsequent investigation, did you check with the Kanto Military Government Team?

"A Yes, I did.

"Q What, if anything, did you find out then with regard to who was responsible for the vehicle on or about 7 November?

"A At that time, I talked to, I believe, a Lt. Tilletson—it may be mispronounced. I think that was the name he told me.

"DEFENSE: We object to anything said unless it was said in the presence of the accused.

"LAW MEMBER: Sustained.

"Q In your investigation, was any reference made to official records in determining who was or might have been responsible for this vehicle?

"A This was told to me, that the trip ticket taken out . . .

"DEFENSE: We object to anything told to him.

"LAW MEMBER: Did you examine the trip ticket yourself?

"WITNESS: At that time, no.

"LAW MEMBER: So to your knowledge, you don't know who was driving that vehicle on 7 November 1949 except from what people told you?

"WITNESS: Other than the trip ticket which was made out to another party.

"LAW MEMBER: You did see the trip ticket then?

"WITNESS: It was a trip ticket made out to the vehicle.

"PROSECUTION: It is not present, sir. It wasn't included as part of the investigation." (R 34 - 36).

* * *

"Q Did you just arbitrarily pick that vehicle with the broken glass to get that piece from?

"A No, I did not. It was because I found that Corporal Bussard had taken this vehicle and had driven it on that night and had later had a wreck with this vehicle. That is how it happened that this was obtained.

"Q Is this later wreck a matter of official record?

"A Yes, it is.

"Q Then you do know, of your own knowledge or of an official record that you had access to, that Corporal Bussard was the driver of that vehicle?

"A Well . . .

"DEFENSE: I object.

"LAW MEMBER: Objection sustained. The court will disregard the prosecutor's statement with respect to public records." (R 43).

* * *

"Q Did you take a picture of this jeep that you say you got the glass from?

"A A picture was taken of the jeep but I did not take it.

"Q Do you have the picture?

"A No. It was entered in a second case by an MPIS Investigator who handled that particular phase." (R 43).

A pretrial statement, dated 17 November 1949, voluntarily made by the accused, not amounting to a confession, offered by the prosecution, was received in evidence. In this statement accused told of having arrived in Japan on the morning of 7 November 1949 from the United States where he had been on furlough; of having been met in Yokohama by a Kanto jeep and proceeding to Kanto; of arriving in Kanto and turning in his service record and going to his room. He accounted for his activities during the day, and at approximately 1800 hours he and Sergeant Gabriel drove to Grant Heights where they saw Sergeant Moran, and he started back to Kanto. His recollection was vague, but he recalled leaving Grant Heights and proceeding down Cavalry Boulevard. He missed his turn and proceeded toward what he found later to be Ikebukuro. He traveled on some rough roads, and his jeep stalled. He talked to a Japanese policeman and met Sergeant Skaggs in another jeep and succeeded in getting his jeep started. He did not know exactly where he was as the section of town was relatively unknown to him. Later he was in an accident with a Japanese taxi. He remembered nothing from the time of the accident until the next morning in the hospital (R 54; Pros Ex 7).

b. For the defense.

The accused was advised of his rights and elected to remain silent. However, evidence was introduced in his behalf of which the following is a summary:

Sergeant Virgil Skaggs testified that he first saw the accused on 7 November 1949 at 7:30 P. M. The accused's jeep was stalled at Cavalry Circle, near Ikebukuro, the accused was some twenty-five steps away talking to a policeman in a Japanese Police box. Private First Class Lloyd had picked him up at the station upon his arrival from Yokohama at 6:00. They had not come directly from the depot to Cavalry Circle, but had gone "to some Colonel's house to take a package out there and we came back headed toward the Kanto Civil Affairs Camp." They came across the accused's stalled jeep and stopped to see what was the matter. Lloyd pushed the accused's vehicle to get it started. He rode with the accused while the accused's jeep was being pushed. He left Lloyd and went with accused after the vehicle started. There was nothing to indicate the accused's jeep had been in an accident. Accused appeared to be normal. Since the witness was not driving he did not notice the rear-view mirror. They were in an accident later that evening between 8:00 and 9:00 o'clock; accused appeared to be driving properly at the time (R 62 - 67).

Sergeant Earl A. McCall testified that he was personnel sergeant; that he had known the accused for two years; that accused worked in the message center. He considered the accused a person of good character and a man of responsibility (R 68).

4. The offense with which the accused was charged is negligent homicide. Proof of the offense consists in showing that the accused killed the person named or described in the Specification, that the killing was by the means alleged, that the person alleged to have been killed is dead, that he died in consequence of an injury received by him, that such injury was the proximate result of the act of accused, and that the facts and circumstances were such that the act amounted in law to negligence.

The Manual for Courts-Martial, 1949, provides that:

"In order to convict of an offense the Court must be satisfied beyond a reasonable doubt that the accused is guilty thereof. * * * The meaning of the rule is that 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; what is required being not an absolute or mathematical certainty but a moral certainty. * * *

"The rule as to reasonable doubt extends to every element of the offense. * * *

* * *

"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).

It is well established that when circumstantial evidence is relied upon for conviction,

"the circumstances must not be consistent with innocence within a reasonable doubt. They must be inconsistent with, or such as to exclude, every reasonable hypothesis or theory of innocence. If the circumstances tending to show his guilt are as consistent with the defendant's innocence as with his guilt, they are insufficient" (Wharton's Criminal Evidence, 11th Ed., Vol. 2, Sec. 922, p. 1608).

Where all the substantial evidence is as consistent with innocence as with guilt, a conviction cannot be sustained (20 American Jurisprudence, Evidence, Sec. 1217; Garotta v. United States, 77 F2d 977, 981; Karn v. United States, 158 F2d 568).

It is thus apparent that the burden was upon the prosecution to establish a set of facts by competent evidence excluding every fair and rational hypothesis except that of accused's guilt of the offense charged. The prosecution relied solely on the circumstantial evidence adduced to establish the alleged offense.

The evidence is sufficient to establish that the person named in the specification is dead and it may reasonably be inferred that he died as a result of injuries sustained in a traffic accident at the time and place alleged. It remains to determine whether the evidence is legally sufficient to connect the accused with that accident and if so, to establish negligence on his part as the proximate cause of the death. The only evidence tending to connect the accused with the offense here charged is that he was shown to have operated a jeep in the general vicinity at about the time of the accident, that the jeep he had been operating was involved in an accident later in the evening, and that a small piece of mirror glass was found at the scene of the accident which under the evidence was reasonably established as being of the same type and kind as a piece of mirror glass taken from a wrecked jeep found at the impounding pool of the Provost Marshal's office in Tokyo assigned to the Kanto Civil Affairs Team. It is the theory of the

prosecution that the vehicle which the accused was driving and the vehicle from which the piece of glass was taken were one and the same. It is obvious that the testimony of the CID agent intended to connect the accused with the latter vehicle is wholly hearsay and incompetent for any purpose. The evidence, although not conclusive, was sufficient for the court, as triers of fact, to determine that the piece of mirror glass found at the scene of the accident came from a wrecked vehicle found in the Provost Marshal's impounding pool, but there is no proof that the vehicle was the one that the accused was driving other than it was alleged to have been wrecked, and the accused's vehicle was shown to have been in an accident with a taxi cab on the evening in question. There is no proof that the rear view mirror in the accused's vehicle was or was not broken in the taxi cab accident. There is no evidence as to the extent of the damage sustained by accused's vehicle or that the jeep from which the glass was taken bore evidence of similar damage. There is no evidence that the accused's vehicle was impounded after the taxi cab accident or that there was not more than one damaged jeep in the impounding pool. The evidence is vague as to where the accused's accident with the taxi occurred, but there is no competent evidence as to when and where the jeep from which the glass was taken was wrecked or other evidence sufficient to infer that it was the same vehicle. Although accused was shown to have operated a jeep in the vicinity, his was not the only jeep operated in the vicinity at the time. At least one other jeep, that of Private First Class Lloyd, was shown to have been equally near the place of the alleged offense at the same time, with equal opportunity to have been involved in the accident. Indeed, such may well have been the reason for Sergeant Skaggs' leaving the jeep furnished for his transportation and riding with the accused. There was nothing in accused's demeanor or conduct at the Cavalry Circle to indicate that he had been in a serious accident within the past five minutes. It is hardly likely that he would have stopped at a police box under such circumstances. It is not shown as to what route the accused traveled in arriving at Cavalry Circle, the point where he met Sergeant Skaggs. It appears that he reached that point after having missed his turn and traveling on some rough roads, whereas, the bicycle accident was shown to have occurred on a paved main highway. Therefore, it is obvious that there was no competent evidence that the jeep from which the glass was taken was the one which accused was driving. That the accused's jeep had been shown to have been damaged in an accident with a taxi cab and that the glass had been taken from a wrecked jeep in the impounding pool without some further showing is not enough. At most, such facts could give rise to no more than a mere conjecture or surmise that the vehicle from which the piece of rear-view mirror glass was taken was the vehicle the accused was operating on the evening in question. That the accused was shown to have operated a jeep in the general vicinity of Ikebukuro shows no more than mere opportunity on his part to have been involved in the accident.

Even assuming that the accused was the driver of the motor vehicle involved in the collision in which the deceased met his death, if, indeed, a motor vehicle was involved, it is apparent that negligence on the driver's part as the proximate cause of the death, has not been established. The circumstances are wholly consistent with unavoidable accident on the part of the driver. It is as reasonable to infer from the evidence that the deceased met his death through his own negligence as from the negligence of the driver of the motor vehicle. Indeed, the driver of the motor vehicle may have resorted to every possible means to have avoided the collision, including driving the vehicle off the road and on to the walkway in order to avoid it. For aught that appears the deceased negligently may have turned his bicycle into and against the motor vehicle in such a manner that the collision could not have been avoided by the driver. It is to be noted that the only proof of any point of contact with the motor vehicle was the rear view mirror or near it. Since a piece of rear view mirror not coming from a bicycle was found at the scene of the accident it is reasonable to infer that the deceased struck or was struck by a rear view mirror protruding from a motor vehicle. There is no evidence before the court of any other specific part of the motor vehicle coming in contact with the deceased or his bicycle. Absence of extensive damage to the bicycle would indicate that the bicycle did not come in collision with the front of the motor vehicle. Injuries to the face of deceased reasonably may have been caused by contact with a protruding rear view mirror from a motor vehicle. Thus, the evidence is insufficient to establish negligence on the part of the driver as the proximate cause of the death of the deceased; at most it can give rise to no more than a surmise or conjecture that there may have been negligence on the driver's part.

Circumstantial evidence giving rise to suspicion, conjecture or surmise, or merely showing opportunity but not excluding a reasonable hypothesis of innocence is insufficient to support findings of guilty. While it is well established that all the elements of the offense may be proved by circumstantial evidence (16 CJ 766), proof of mere opportunity to commit a crime is not sufficient to establish guilt (CM 216004, Roberts, et al, 11 BR 69, 71; CM 313466, Daniels, et al, 63 BR 91, 94). A conviction cannot be sustained on suspicion, surmise, or conjecture (16 CJ 779 and authorities cited therein; CM 207591, Nash, et al, 8 BR 359, 363; CM 216004, Roberts, et al, supra; CM 277983, Robinson, et al, 51 BR 281, 282; CM 313466, Daniels, et al, supra; CM 330388, Liston, 79 BR 9, 13; CM 337-089, Aikins, et al, 25 November 1949).

We conclude that the evidence fails to meet the standard established for the sufficiency of circumstantial evidence reflected by the cited authorities.

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

Admond V. Whipple, J.A.G.C.

On Leave, J.A.G.C.

Grant E. Byrne, J.A.G.C.

SEP 16 1950

JAGZ CM 341786

1st Ind.

JAGO, Department of the Army, Washington 25, D. C. ²¹⁶

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

1. In the case of Corporal Max Eugene Bussard (RA 17204971), Headquarters Detachment, IX Corps, APO 309, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under Article of War 50e(3) this holding and my concurrence therein vacate the findings of guilty and the sentence.

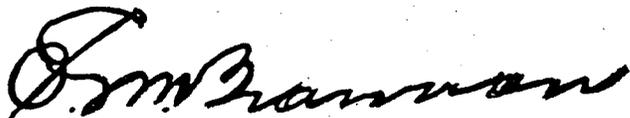
2. It is requested that you publish a general court-martial order in accordance with said holding and this indorsement, restoring all rights, privileges and property of which the accused has been deprived by virtue of the findings and the sentence so vacated. A draft of a general court-martial order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

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:

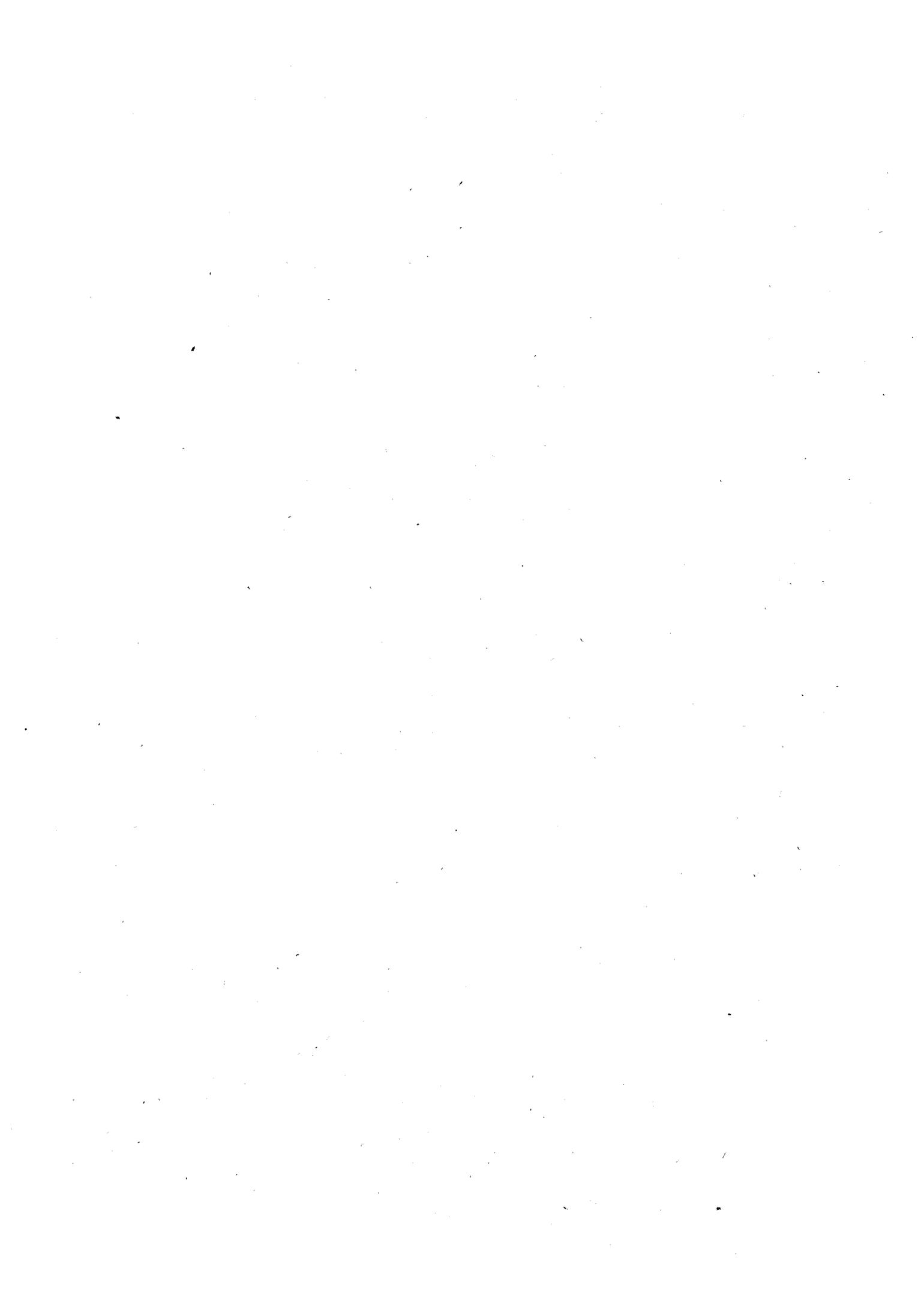
(CM 341786).

3 Incls

1. Record of trial
2. Opinion of the Board
of Review
3. Draft GCMO



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



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

(209)

JAGK - CM 341865

1 AUG 1950

UNITED STATES)

1ST INFANTRY DIVISION

v.)

Trial by G.C.M., convened at Bamberg,
Germany, 25-28 April 1950. Dismissal,
total forfeitures after promulgation,
and confinement for two (2) years.

First Lieutenant DONALD W.
DULLY (O-60384), Company G,)
26th Infantry Regiment.)

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that First Lieutenant Donald W. Dully, Company "G", 26th Infantry, did, at or near Bamberg, Germany from about 1 October 1949 to about 15 December 1949, with intent to defraud, falsely make and forge on about eighty-six (86) Soldier's Deposit Books containing the accounts of divers Enlisted men of Company "E", 26th Infantry Regiment, the signature of First Lieutenant Lewis C. Bower, Class B Agent Finance Officer, First Infantry Division, which said Soldier's Deposit Books were writings of a private nature, which might operate to the prejudice of others.

Specification 2: In that First Lieutenant Donald W. Dully, Company "G", 26th Infantry, did, at or near Bamberg, Germany from about 1 October 1949 to about 15 December 1949 feloniously steal money, to wit: United States Military Payment Certificates entrusted to said First Lieutenant Donald W Dully for deposit to Soldier's Deposit accounts, value of about two thousand, six hundred and fifty-five dollars (\$2655.00), the property of divers Enlisted men of Company E, 26th Infantry Regiment.

He pleaded not guilty to and was found guilty of the charge and specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances

to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

Between 1 October and 31 December 1949, accused was executive officer and Class A Finance Officer of Company E, 2nd Battalion, 26th Infantry Regiment, 1st Infantry Division, Bamberg, Germany (hereinafter called Company E). His duties as Class A Finance Officer included the collection and deposit of soldiers' deposits from enlisted men of his company to the 1st Infantry Division Finance Office at its branch office located at Erlangen, Germany (R 8, 12).

The customary method of handling soldiers' deposits in Company E was to collect them on pay day and for a few days thereafter, and Soldiers' Deposit Books (WD AGO Form No. 14-38) were prepared by entering the date of deposit, amount deposited, the signature of the officer making the deposit, and the words "Lt. Col. John M. Lydick, FD," typed or printed, on appropriate columns of the form. A Soldiers' Deposit Collection Voucher (WD AGO Form No. 14-15) was also prepared, in quadruplicate, which contained a list of the enlisted men's deposits corresponding to the entries on the Soldiers' Deposit Books, the total amount deposited, and the signature of the officer making the deposit on the last page of the form. The fifth copy of the Collection Voucher was retained in the Company orderly room and the Soldiers' Deposit Books, Collection Voucher in quadruplicate, and the money was taken by the depositing officer to the Erlangen Finance Office and given to the cashier. The cashier totaled the amounts shown on each of the Soldiers' Deposit Books and the amounts listed on the Collection Vouchers and counted the cash. If all totals agreed, the cashier put the money in his cash drawer and passed the Soldiers' Deposit Books and Collection Voucher to Lieutenant Colonel John M. Lydick, the Finance Officer, or his deputy, the only persons authorized to sign Soldiers' Deposit Books, who checked the tapes, recorded the amount on a daily record, signed the Soldiers' Deposit Books in the middle column above the typed or printed name of Lieutenant Colonel Lydick, and signed all copies of the Collection Voucher, thus acknowledging receipt of the funds listed thereon. All Soldiers' Deposit Books and a signed copy of the Voucher were then returned to the depositing officer (R 31-32, 39-40, 43, 47).

Eighty-six Soldiers' Deposit Books were admitted in evidence as Prosecution Exhibits 1 to 86, inclusive (R 9-10). Two Soldiers' Deposit

Collection Vouchers, in amounts of \$1215 and \$1540, respectively, were admitted in evidence as Prosecution Exhibits 87 and 88 (R 19, 22). It was stipulated that the signatures "Donald W. Dully" on each of the 86 Soldiers' Deposit Books and the two Soldiers' Deposit Collection Vouchers are the signatures of the accused (R 11, 20,22). Captain Harold B. Henderly testified that he was accused's commanding officer from 1 October to 31 December 1949; that the 86 Soldiers' Deposit Books (Pros Exs 1 to 86, incl) belonged to enlisted men under his command; and that they were in the exclusive possession of accused during that time (R 9).

Lieutenant Colonel John M. Lydick testified that he is Finance Officer, 1st Infantry Division; that he has held that position continuously for two years and nine months; and that his office operates several branch offices, one of which is located at Erlangen, Germany (R 46). About 4 January 1950, Lieutenant Richard E. Cross, who replaced accused as Company E executive officer and Class A finance officer, sometime between 1 and 4 January 1950, brought a large number of Soldiers' Deposit Books to the Erlangen branch of the 1st Infantry Division Finance Office for the purpose of making a soldiers' deposit. As one of the Soldiers' Deposit Books (Pros Ex 1) contained an undated entry which was not signed by the Finance Officer, Lieutenant Cross requested that it be signed (R 35-36). The records of the Finance Office did not disclose any such deposit. An examination of the other Soldiers' Deposit Books (Pros Exs 2 to 86, incl) revealed similar undated entries which, together with the undated entry in Prosecution Exhibit 1, were apparently made between 2 November 1949 and 4 January 1950, and were purportedly signed by First Lieutenant L. C. Bower for the Finance Officer. Lieutenant Bower had been assigned to Colonel Lydick's Erlangen office until 3 September 1949, and while thus employed was authorized to receipt for soldiers' deposits on Soldiers' Deposit Books for the Finance Officer. After that date, however, Lieutenant Bower had never worked in that office and did not thereafter sign Soldiers' Deposit Books. All of the entries in question were checked against the records of the Finance Office, and no record of their deposit could be found (R 52-53, 58). Colonel Lydick examined the above described purported signatures of Lieutenant Bower, with whose signature he was familiar, and determined that they were not the signatures of Lieutenant Bower (R 35-38,44). He made a similar comparison with the signatures of two cashiers, Corporals Chamness and Joy, who were on duty at the time the deposits were alleged to have been made, and determined that the handwriting of neither was similar to the signature of Lieutenant Bower on any of the Soldiers' Deposit Books (R 43-44,61, 362,363). He stated that it is "physically possible but very highly improbable" for a cashier to sign Soldiers' Deposit Books and embezzle funds because of the physical set-up of the Finance Office and because "There are too many people observing the cashier's cage at all times during duty hours" (R 42-43). On cross-examination, he stated that if a cashier of his office were to accept cash in the regular course of

business, and pocket it without making any record of the transaction, the records of the Finance Office would not disclose the embezzlement (R 51). Colonel Lydick stated that the total amount of the disputed entries was \$2565 (R 57) and \$2665 (R 39). He stated that Private First Class Miranda, a posting clerk in the Enlisted Pay Section of his office, committed suicide on 25 January 1950; that Miranda had no duties that took him into or near the cashier's cages (R 59, 364); that he made a thorough search of the records of his office and was unable to find either the retained copies of the two Collection Vouchers (Pros Exs 87 and 88) upon which the disputed entries on the Soldiers' Deposit Books (Pros Exs 1 to 86, incl) were listed or any record that the soldiers' deposits had been received (R 52-54, 235, 368). Lieutenant Colonel Lydick further stated that the Finance Office would pay an enlisted man, otherwise qualified, the amount shown as deposited by his service records and Soldiers' Deposit Book (R 56). He stated that the greatest care was exercised in his office to maintain all records required by Army directives (R 368-370).

First Lieutenant L. C. Bower testified that he was assigned to the branch office of the 1st Infantry Division Finance Office at Grafenwohr until 3 September 1949, and that he had seen accused there in July or August 1949. He denied that the disputed signatures of "L. C. Bower" on the Soldiers' Deposit Books were his (R 28-30, 33-34). On 16 January 1950, Lieutenant Bower, after being warned of his rights under Article of War 24, voluntarily furnished samples of his handwriting of the following: "L C Bower 1st Lt FD Asst," "Donald W. Dully, 1st Lt Inf," "Lt Col John M Lydick Major, FD," and made copies of furnished material for Criminal Investigation Division personnel (R 116, 130-131; Pros Ex 91).

On 13 January and 23 January 1950, accused "freely and voluntarily" and "with no hesitancy on his part" furnished four pages of the words "L. C. Bower 1st Lt F.D. Ass't." in his own handwriting and two pages of furnished material in his own handwriting to investigators of this case, which were admitted in evidence without objection (R 62-64, 66-67; Pros Exs 89, 90).

Corporal Billy J. Tidmore testified that sometime prior to 1 January 1950, as company clerk of Company E, he prepared Soldiers' Deposit Books and Soldiers' Deposit Collection Vouchers at the direction of accused and after that date, at the direction of Lieutenant Cross. He stated that Soldiers' Deposit Books were not returned to the enlisted men to whom they belonged but were kept by accused in a locked footlocker of which accused had the only key (R 147, 149-150).

Corporal Jehn H. Rash testified that he was personnel clerk of Company E from 1 October to 31 December 1949; that, on two different occasions, accused gave him two Soldiers' Deposit Collection Vouchers,

one dated 15 November 1949 in the sum of \$1215 and the other dated 2 December 1949 in the amount of \$1540, which he posted to the service records of enlisted men named therein; and that the company personnel officer initialed each service record entry thus posted (R 14, 21-23, 25-26). Although the two Collection Vouchers were not signed by the Finance Officer acknowledging receipt of the funds listed therein, Corporal Rash posted them to the service records of the enlisted men listed therein because he did not know at that time that Collection Vouchers should be signed by the Finance Officer prior to posting (R 21-23, 25-26).

Sergeant Edwin Albetski testified that he made a soldiers' deposit of \$20 in September 1949 and \$50 in November 1949, both of which are shown as entries on his Soldiers' Deposit Book and are signed by accused and the disputed signatures of Lieutenant Bower (R 144-145, Pros Ex 3).

First Lieutenant Julius F. Iokler testified that as a platoon leader of Company E he turned over \$380 in soldiers' deposits to accused on 30 November 1949, for which accused gave him a receipt, which receipt was admitted without objection as Prosecution Exhibit 93 (R 156).

Master Sergeant Bernard F. Santamoor, 1st Sergeant of Company E for over a year, testified that monthly soldiers' deposits for Company E average \$1200 to \$1500 (R 160).

Major Julius W. Toelken, called by the prosecution as a handwriting expert, testified that he was Commander of the 27th Military Police Criminal Investigation Detachment laboratory and examiner of questioned documents for all investigative agencies in the European Command. He had been in charge of the Massachusetts State Police laboratory for 17 years prior to entering the Army, examining or supervising the examination of all handwriting exhibits submitted to the laboratory from various Massachusetts state courts. During this time he also prepared and delivered lectures on this subject to students of Springfield College, Massachusetts Institute of Technology, and the "University extension department of the State of Massachusetts." He taught the subject of handwriting analysis at the Provost Marshal General's School for two and one-half years, and testified as a handwriting expert approximately 100 times before military courts. An objection by the defense that Major Toelken was not qualified to testify as a handwriting expert was overruled (R 160-165). Major Toelken testified that he examined Prosecution Exhibits 1 to 91 inclusive and 93 to determine whether or not the purported signatures of Lieutenant Bower checked in red on Prosecution Exhibits 2 to 86 inclusive were written by accused. He particularly studied the Soldiers' Deposit Books of Garcia, Malinowski, Regnier and Stankievitch (Pros Exs 21, 41, 51 and 64) as the disputed signatures on those Books represented basically the same details as in all other

disputed signatures, comparing each letter with the known handwriting specimens of accused (Pros Exs 1 to 86, incl, 89, 90, 93). He concluded that after making his study of all the exhibits, he "could come to but one conclusion," and that in his opinion the disputed signatures of Lieutenant Bower on the Soldiers' Deposit Books (Pros Exs 2 to 86, incl) were written by accused (R 166-168). Major Toelken was subjected to a vigorous cross-examination. He stated that the study of handwriting has a certain amount of scientific basis and that he agreed with Mr. Albert Osborne's published observations on the subject. He admitted that identifications could not be as easily established by handwriting specimens as from fingerprints or from ballistics tests (R 162-164). Major Toelken's opinion was positive and unequivocal, as is shown by the following testimony on redirect:

"Q Major, did you examine each and every one of Prosecution Exhibits 2 through 86 inclusive?

"A I did sir.

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"Q Now on each of the Exhibits 2 through 86 inclusive in the second column where it is headed 'receipt is acknowledged on the date and for the amount stated on the same line as signature below', on each of the points where you have indicated in red, on that line in red, a signature purporting to be L. C. Bower, do you have an opinion as to who wrote that L. C. Bower?

"A Yes sir.

"Q Will you give that opinion to the court?

"A It is my opinion that the hand that wrote the signatures Donald W. Dully in the right column entered the signature L. C. Bower in the second column in each instance where it has been checked. *** (R 172-173)

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"Q Do you have any knowledge of any of the suspected signatures about which you have any doubt in Prosecution Exhibits 2 to 86 inclusive?

"A I have no doubt based on my examination that would change my opinion that I have previously given in this case" (R 185).

Georg Nastvogel, a German national, testified, through a German interpreter, that he began the study of handwriting in 1933 when he was assigned as assistant investigator in the Criminal Investigation Department of the Criminal Police at Nurnberg, Germany; that since 1941 he has examined "handwriting and documents daily"; and that he testified in court as a handwriting expert at least 200 times including several appearances before United States courts in Germany. An objection by the defense that Mr. Nastvogel was not qualified to testify as a handwriting expert was overruled (R 197-202). He testified that he had examined Prosecution Exhibits 1 to 86, inclusive, and 89 to 91, inclusive, and that, as a result of that examination, in his opinion, accused had written the disputed signatures of Lieutenant Bower on Prosecution Exhibits 2-86, inclusive.

and that Lieutenant Bower had not written them (R 203-205). Mr. Nastvogel expressed his opinion in the following testimony:

"It is my firm opinion that the signature of the person on Prosecution Exhibits 89 and 90 [admitted handwriting specimens of accused wherein he copied the name of Lieutenant Bower and furnished material] is identical with the signature of the name Bower on Prosecution 2 through 86. The characteristics in these two cases are so great that no doubt can be left in my mind. It cannot be even be said that the person signing the name of Bower on Prosecution Exhibits 2 through 86 had even attempted to copy the signature of Bower. The characteristic forms which are on exhibits 2 through 86 are the same as those on exhibits 89 and 90" (R 204).

On cross-examination, Mr. Nastvogel stated that it is difficult at times to form an opinion as to the source of a forged signature because of the normal variations of signatures written by the same person; that when a forger imitates another's signature it is difficult to make a comparison between the forger's normal handwriting and his imitated handwriting and that certain letters like "S" and "C" furnish no basis for comparison because most people write them alike. However, although a comparison of a few characteristics of a person's handwriting may not identify the person writing them, the sum of many characteristics observed in a large number of handwriting specimens of a suspect, compared with the same characteristics in a large number of disputed signatures, can furnish a basis for an opinion. Although a study of one letter of the alphabet is not sufficient to form an opinion, a study of all the specimens of handwriting available in this case were sufficient to form an opinion as to the identity of the forger. (R 209-221, 224-225, 228-232.)

Mr. Livie Louis Vagnina, testifying as an expert on inks, stated that he is a graduate chemist of Fordham University, an accredited member, senior grade, of the American Chemical Society, a specialist in ink chemistry, and presently employed as chief forensic chemist for the 27th Criminal Investigation Detachment (R 186-187). He stated that he had microscopically examined each of the disputed signatures and the admitted signatures of accused on the same lines in Prosecution Exhibits 2 to 86, inclusive, and had chemically analyzed the ink of some of the signatures; that each exhibit was similar to the other in depth and strength of color, in "secondary color," in penetration through paper and in the "type of gloss," and that all specimens of ink tested belonged to the same class of inks known as "chromic ink" (R 187-190).

On 13 January 1950, after being advised of his rights under Article of War 24, accused made a voluntary pretrial statement to Warrant Officer Junior Grade Earl E. Ijas, 9th Military Police Criminal Investigation Detachment, Nurnberg, Germany, which statement was admitted in evidence

without objection (R 192, Pros Ex 96). In this statement, accused stated he was assigned to Company E, 26th Infantry Regiment, on 15 June 1948, and from the latter half of September 1948 was company executive officer and Class "A" Agent Finance Officer, which made him responsible for collecting, accounting for, and depositing soldiers' deposits which he always handled himself. Soldiers' deposits which he collected for the months of September and October 1949 were deposited in the Finance Office on 2 November 1949, a deposit of about \$1500 was deposited on or about 15 November 1949, and his last deposit for Company E was made on 7 December 1949. He stated that he did not recall that soldiers' deposit books had ever remained in the Finance Office between September and December 1949 for more than two hours. He stated that entries made on each Soldiers' Deposit Book bearing his signature were received and deposited by him and that his signatures on the Soldiers' Deposit Collection Vouchers in this case were genuine.

It was stipulated that the amount of soldiers' deposits stated in Specification 2 of the Charge "came into the hands of the accused by one means or another, either from various platoon leaders or from the men themselves" (R 194-195).

b. For the Defense

Captain Henderly, recalled as a defense witness, testified that sometime in December 1949 he observed accused and an enlisted man preparing Soldiers' Deposit Books for deposit and that thereafter he saw accused leave the office ostensibly to make the deposit at the Finance Office. A regimental contest awarded a day's holiday to the company with the highest percentage of participation in soldiers' deposits and this resulted in delaying the deposits being turned in to the Finance Office beyond the first day of the month. Accused retained the soldiers' deposit books in a footlocker of which accused had the only key pursuant to company policy (R 133-134, 139).

Colonel Lydiak, recalled as a defense witness, testified that there had been a few instances where unsigned copies of Soldiers' Deposit Collection Vouchers were returned to his office for signature. Where the records of his office showed that the deposits had been made, he signed the copy of the voucher. However, he stated that all copies of Vouchers brought into his office are signed "without exception" and that the copies returned for signature "had never been in [his] office" (R 237).

First Lieutenant Michael J. Dill testified that he is Commanding Officer, Company K, 26th Infantry Regiment; that on or about 4 April 1950, because of this case, he checked his file of Soldiers' Deposit Vouchers and found that three vouchers for the months of August,

September and October 1949 had not been signed by the Finance Officer; and that he took them to the Finance Officer who signed the vouchers. However, he stated that he was not with Company K when the Vouchers were originally submitted to the Finance Office (R 253-257).

Accused was advised of his rights as a witness and elected to take the stand as a sworn witness (R 262-263). He stated that he was born in Hamilton, Ohio, on 17 October 1921, graduated from high school and completed three years of college. He was married in May 1945, has three children, a boy aged four years and twins, a boy and a girl, aged nearly a year old. He entered the United States Navy in January 1942 and transferred to the Army on 25 May 1942, and was sent to Officers Candidate School at Fort Benning, Georgia, in October 1942, from which he graduated 11 January 1943. He was on inactive status between April and September 1946. He completed a competitive tour of duty for a commission in the Regular Army and was informed that he had "made" Regular Army in October or November 1949, but did not take his oath of office until 20 January 1950 because of a delay in completing his physical examination (R 264-265, 268-269).

He stated that he did not commit either of the offenses of which he is charged in this case; that he wrote his signature "Donald W. Dully" on the right hand column of each of the Soldiers' Deposit Books marked Prosecution Exhibits 1 to 86, inclusive, with his Parker 51 fountain pen, containing Parker 51 ink, which he has owned and used almost exclusively for two years; that he did not write Lieutenant Bower's signature on the aforementioned Books and does not know who did; that he made a pre-trial statement (Pros Ex 96) freely and willingly, and that he freely and willingly gave samples of his handwriting (Pros Exs 89, 90 and 93) whenever asked for and cooperated fully in the investigation of this case (R 266-268, 270). Relative to the soldiers' deposits in question, he testified in direct examination as follows:

"Q You admitted that this money came into your hands at various times and in divers manners?

"A Yes sir, I want that thoroughly understood that that money came into my hands.

"Q Was it always given to you by a platoon leader of a given platoon?

"A Not always, sir.

"Q Sometimes by the individual soldier?

"A Sometimes by the individual soldier.

"Q But you got it?

"A I got it.

"Q Did you steal it?

"A I did not.

"Q Do you know who did?

"A No sir, I don't have the slightest idea.

"Q Did you lose it?

"A I did not lose it" (R 270-271).

He did not turn in his soldiers' deposits for October 1949 until 15 November 1949 in order to collect more deposits to turn in in connection with a campaign then in progress. Corporal Tidmore prepared the Soldiers' Deposit Books and Soldiers' Deposit Collection Voucher which accused took to the Finance Office and handed to Corporal Chamness, the cashier on duty. He did not wait for their return, but went to the Post Exchange and returned in two hours, picked up his Soldiers' Deposit Books and Collection Vouchers, put them in a folder, and "dashed out." He put the Soldiers' Deposit Books away without checking them and did not have occasion to see them until he prepared his next deposit on Wednesday afternoon, 7 December 1949. On this occasion, Corporal Chapman prepared the Soldiers' Deposit Books and Collection Voucher and accused took them to the Finance Office and again turned them over to the cashier on duty. Again accused left the Finance Office and returned in about an hour, picked up the Soldiers' Deposit Books and Collection Voucher, but did not check them to determine if they were signed or even if all had been returned (R 272-279, 289, 306-307, 310, 318). On both occasions, as described above, accused stated he supervised the preparation of the Soldiers' Deposit Vouchers (Pros Exs 87 and 88) and did not date the entries on the Soldiers' Deposit Books (Pros Exs 1-86, incl) because the Finance Office customarily dated them or returned them for dating (R 294-296).

On about 25 March 1950, accused stated he received an anonymous typewritten letter through the German postal service which cast doubt on the accuracy and efficiency of the records of the Finance Office, which letter he turned over to his attorney, Mr. Gower. He made no effort to discover its source (R 286, 291-293).

Eleven officers, ranking from major to second lieutenant, including his chaplain and commanding officer at the time the offense is alleged to have been committed, testified that they had been assigned to the same organization with accused for varying periods from eight months to four years, have known him both socially and on duty, that his character is above reproach, his reputation for honesty is of the best, his performance of duty superior, that each would believe him under oath, and that from October to December 1949 there was nothing to indicate any sudden enrichment on the part of accused (R 132-133, 140-141, 238, 239, 240-241, 243-244, 245, 247-248, 249, 250-251, 253, 260, 262).

e. Rebuttal Evidence

Corporal John D. Chamness testified that he has been a cashier of the Erlangen Finance Office for ten months; that he was on duty as cashier at the Erlangen Finance Office on Tuesday, 15 November and Wednesday, 7 December 1949; and that he did not receive soldiers' deposits from accused in the sums of \$1540 and \$1215 on those dates; that when a day or two after pay day fell on Wednesday, the cashier's cage of the Finance Office would be open for "turn-backs of pay roll forms from Class A Agents only," but that "for other vouchers, Soldiers' Deposit Cards and other types of collections, the cashier's office is closed on Wednesday afternoon"; that he did not remember accused coming to that office on either date but that he might not remember such an incident if it occurred; that on 15 November 1949 Corporal Chamness' daily work sheet and balance sheet revealed that he collected a total of \$415 in Soldiers' Deposits and on 7 December 1949 they showed a total of \$70; that Corporal Joy was in the cashier's cage with Corporal Chamness but was not on duty; and that he did not write Lieutenant Bower's name on the Soldiers' Deposit Books in question (R 335-338; 346, 370, 372, 374, 377; Pros Exs 2 to 86, incl).

Corporal Bruce T. Joy, the other cashier referred to in the testimony of Lieutenant Colonel Lydiak and Corporal Chamness, testified to the same effect as Corporal Chamness (R 353-359).

Lieutenant Colonel Lydiak, recalled as a witness for the court, testified that the Erlangen Finance Office is located on the first floor of a building which also houses the German postoffice, thrift shop, guardroom, station complement unit, supply room, and educational center (R 385).

4. Discussion

Accused was charged with and found guilty of forging the signatures of First Lieutenant L. C. Bower on 86 Soldiers' Deposit Books of enlisted men of Company E, 26th Infantry Regiment, and feloniously stealing \$2655, entrusted to him for deposit to soldiers' deposit accounts of various enlisted men of Company E, 26th Infantry Regiment, all in violation of Article of War 83.

The evidence shows that from 1 October to 31 December 1949 accused was Class A Finance Officer of Company E, 26th Infantry Regiment, Bamberg, Germany, whose Company duties included the collection and deposit with the Finance Office of soldiers' deposits. It was stipulated that accused received the sum of \$2655 from various enlisted men of his Company as soldiers' deposits during the period alleged. Accused stated that he deposited the funds with the Finance Office in the form of two deposits, one on 15 November 1949 in the sum of \$1540 and another on 7 December

1949 in the sum of \$1215. The difference between the total of the two amounts deposited (\$2755) and the amount collected (\$2655) is unexplained. Two cashiers of the Finance Office, who were the only cashiers on duty on the dates in question, stated that the deposits had not been made. A thorough search of the Finance Office records revealed that no such deposits had been received. The deposits were contained in certain marked entries on 85 Soldiers' Deposit Books (Pros Exs 2 to 86, incl) showing the signed name of "L. C. Bower 1st Lt Asst" above the printed or typed name of "JOHN M. LYDICK LT COL FD," as receipting for the amounts of the deposits stated thereon, and one Soldiers' Deposit Book (Pros Ex 1) on which there was no signature. It was uncontroverted that Lieutenant Bower had not signed the abovementioned signatures purporting to be his and that he had not been in the Erlangen branch of the Finance Office after 3 September 1949. Two Soldiers' Deposit Collection Vouchers (Pros Exs 87 and 88) dated 15 November and 7 December 1949 listing the aforementioned deposits, prepared under accused's direction, and not signed by the Finance Officer as evidence of receipt of the funds listed therein, were erroneously posted to the service records of each enlisted man listed thereon at accused's request. Lieutenant Colonel Lydick, the Finance Officer, stated that his office would reimburse enlisted men, otherwise qualified, with the amount of their soldiers' deposits shown on their service records and Soldiers' Deposit Books. Major Julius W. Toelken and Mr. Georg Mastvogel, two handwriting experts, testified over defense objection as to their qualifications that they had examined Prosecution Exhibits 1 to 91, inclusive and 93, which were the 86 Soldiers' Deposit Books, and numerous handwriting specimens voluntarily provided by accused and Lieutenant Bower, and that in their opinion accused had written the signature of Lieutenant Bower on each of the disputed entries in the Soldiers' Deposit Books (Pros 2 to 86, incl). Mr. Livio Louis Vagnina, testifying as an expert on writing inks, without defense objection, stated that a comparison between accused's admitted signatures and the signatures of "L. C. Bower" on the disputed entries in the Soldiers' Deposit Books (Pros Exs 2 to 86, incl) by microscope and chemical analysis revealed that similarities of depth and strength of color, secondary color, penetration through paper and type of gloss and that all inks tested were of the same class.

Specification 2 of the Charge properly alleges the offense of larceny. Larceny is defined as "the unlawful appropriation of personal property which the thief knows to belong either generally or specially to another, with intent to deprive the owner permanently of his property therein. Unlawful appropriation may be by trespass or by conversion through breach of trust or bailment. In military law former distinctions between larceny and embezzlement do not exist" (MCM, 1949, par 180g).

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

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

The evidence clearly shows that accused, as Class A Agent officer, received soldiers' deposits from certain enlisted men of his company for deposit in the Finance Office and credit to their Soldiers' Deposit Accounts. When accused was relieved as Class A Agent officer the records of the Finance Office did not show the receipt by that office of any of the deposits in question. The evidence adduced at the trial confirms that showing and, in addition, shows that all of the 86 deposits which are the subject of the charges on which the accused was tried were paid to the accused, and that the only record purporting to show their payment to the Finance Office consisted of 86 Soldiers' Deposit Books, kept by the accused in his capacity as Class A Finance Officer, on each of which is the signature of the accused and what purports to be the signature of Lieutenant L. C. Bower, who had been previously authorized to receipt for such payments on behalf of the Finance Officer, but who had been transferred on 3 September 1949 and thereafter had no connection with the Finance Office concerned. The purported signatures of Lieutenant Bower are clearly shown by the evidence not in fact to have been his signatures. Further they were made between 2 November 1949 and 4 January 1950. That the purported signatures of Lieutenant Bower were forgeries is an inescapable inference from the facts. They appeared on documents kept by the accused in his trunk locker to which he was the only person who had access. These 86 forged Soldiers' Deposit Books which were found in the accused's possession and the accused's testimony constituted the only defense evidence purporting to substantiate that he had paid the money into the Finance Office. The accused testified that he had deposited all the money covering the 86 items of deposit with the Finance Office. There was thus presented a clear issue of fact, which was the function of the court to determine and which it resolved against the accused. Under these facts and circumstances the trial court, if it did not believe the assertions of the accused, was practically compelled to find the accused guilty. The Board of Review is of the opinion that the apparent conclusion of the court that the deposits were not made as contended by the accused was fully justified by the evidence.

The concealment by accused of such shortage by forgery, while not a necessary element to prove larceny, is additional justification for

the finding of guilty of larceny (CM 324666, Braun, 73 BR 289, 293).

The failure of accused to account for the money thus received by him constituted a breach of fiduciary obligations, a breach of trust, and a violation of Article of War 93 (CM 338350, Hoover, 3 BR-JC 39, 47).

The Manual for Courts-Martial, at paragraph 180i, defines forgery as follows:

"Forgery is the false or fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice."

The elements of proof of forgery are:

"(a) That a certain writing was falsely made or altered as alleged; (b) that the writing was of a nature which would, if genuine, apparently impose a legal liability on another, or change his legal liability to his prejudice; (c) that it was the accused who so falsely made or altered such paper; and (d) facts or circumstances indicating the intent of the accused thereby to defraud or prejudice a right of another person." (MCM, 1949, par 180i)

As to (a) above, this element is proved by the uncontradicted evidence that the signatures of Lieutenant Bower on the Soldiers' Deposit Books (Pros Exs 2 to 86, incl) were not genuine. The logical conclusion follows that whoever signed Lieutenant Bower's signature to the Soldiers' Deposit Books in question did so falsely.

As to (b) above, the following well-established legal principles are applicable:

"Some of the instruments that are subjects of forgery are *** receipts.

* * *
"To constitute a forgery the instrument must on its face appear to be enforceable at law, for example, a check or note; or one which might operate to the prejudice of another, for example, a receipt." (Underscoring supplied; MCM, 1949, par 180i.)

The signature of the Finance Officer to any entry on a Soldiers' Deposit Book is a receipt for the money shown thereon as deposited. The words "Receipt is acknowledged on the date and for the amount stated on

same line as signature below" are printed at the top of the column above the signatures of the Finance Officer. Pertinent regulations relative to soldiers' deposits indicate that signatures of Finance Officers to entries in Soldiers' Deposit Books represent receipts therefor (par 4, AR 35-2600, 10 Dec 1947; par 56b(3), Change 6, TM 14-502, 1 Jan 1948). The receipts in this case totaling \$2755, if genuine, would have imposed a legal liability upon Lieutenant Bower and Lieutenant Colonel Lydick and would have rendered them liable for the amount of the deposit and interest from the date of receipt thereof (par 56c, Change 6, TM 14-502, 1 Jan 1948; 15 Comp. Dec. 534).

As to (c) above, the proof thereon consists of the accused's judicial admission that he directed the preparation of the entries on the Soldiers' Deposit Books in question; Lieutenant Bower's denial that he signed the disputed signatures; the denial of two cashiers of the Finance Office on duty when accused stated he presented the Soldiers' Deposit Books to the Finance Office that they received them; the fact that the records of the Finance Office do not reveal any such deposits; the admission by accused that he had exclusive possession of Soldiers' Deposit Books and deposit funds of his organization during the time alleged; the failure of accused to show any receipt for the funds he alleged having turned in to the Finance Officer, and the testimony of two handwriting experts who, after comparing a large number of handwriting specimens admitted by accused to be his, with the disputed signatures, stated that in their individual opinions accused signed the disputed signatures.

The only thing tending to refute the prosecution's evidence that accused had not deposited the money and had forged Lieutenant Bower's signatures on the Soldiers' Deposit Cards was the testimony of the accused himself. As heretofore stated this was the issue of fact for the court to determine. The defense contended that the evidence for the prosecution is insufficient to establish the commission of the offense beyond a reasonable doubt because of the paucity of handwriting specimens upon which the testimony of the handwriting experts was based; that in view of the uncontroverted testimony of accused's cooperation with the investigation officials and his excellent reputation, a reasonable doubt should be created in a case of this type involving a crime malum per se, and accused should have been acquitted. Although the testimony as to forgery in this case was circumstantial, from the very nature of the crime of forgery, direct proof thereof is seldom available (State v. Regna, 108 N.J. Law Rep., 157 Atl Rep. 100). The proof as to the forgery, while circumstantial, is nevertheless convincing. The testimony of the handwriting experts was based upon a large quantity of admitted handwriting specimens and disputed signatures wherein a comparison showed a sufficient similarity of characteristics to express opinions that accused was the author of the disputed signatures. It is well settled that admitted handwriting specimens of an accused may be used by witnesses and by the court as a standard of comparison with disputed signatures to establish whether or not accused

signed the disputed signatures (MCM, 1949, par 129b; CM 336607, Hosick, 3 BR-JC 151, 156; CM 324725, Blakeley, 73 BR 307, 324; CM 320478, Vance, 71 BR 415, 430). Where proven or admitted signatures and handwriting specimens of accused and disputed signatures are in evidence, the court alone has the right to make its own comparison of the former with the latter and to conclude as a fact that accused signed each of the disputed signatures (In re Goldberg, 91 F (2d) 996, 997, citing Moore v. United States, 91 U.S. 270; CM 325112, Halbert, 74 89, 92).

It is inferred by the defense that the Finance Office cashiers, Corporals Chamness and Joy, or Private First Class Miranda, Finance Office posting clerk, who committed suicide on 25 January 1950, may have either individually or jointly committed the forgeries and larceny alleged. However, there is no testimony upon which this conclusion may be based. The testimony is to the contrary in that the deceased had no access to the money or to the cages where the cashiers worked. By its findings, the court determined that accused forged Lieutenant Bower's signature. We find no cogent reason to disturb its findings.

As to (d) above, the facts and circumstances of this case indicate accused's intent to defraud Lieutenant Bower and each of the 86 enlisted men named on the Soldiers' Deposit Books and such acts would prejudice their rights. The circumstances that accused, an officer with eight years of military experience, in exclusive possession of Soldiers' Deposit Books which he claimed to have taken to the Finance Office for the purpose of making soldiers' deposits in the total amount of \$2755, made neither a request for a receipt nor checked the Soldiers' Deposit Books and Collection Vouchers to determine whether they were properly receipted (which they were not) together with all the other facts in this case, can lead to but one conclusion, that accused did not deposit the money entrusted to him for that purpose but converted it to his own use with intent to defraud those persons hereinabove mentioned (CM 340473, Morton, supra).

Both specifications state that the victims of the forgery and larceny were "divers enlisted men of Company 'E', 26th Infantry Regiment" and the question is whether or not the specifications, otherwise proper in form, allege offenses where the names of the persons whose accounts were the subject of forgery and whose money was the subject of larceny are not specifically listed. The accused is entitled to be informed of all elements of the offense to enable him to plead double jeopardy if tried again (CM 324736, Moore, 73 BR 341, 345, citing Cochran v. United States, 157 U.S. 290). In the instant case, the specifications specifically

and sufficiently informed the accused of the offenses of which he was charged.

"*No finding or sentence should be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect or that his substantial rights were in fact otherwise injuriously affected thereby" (MCM, 1949, par 87b).

That accused was aware of the names of the persons who entrusted their soldiers' deposits to him was clearly established by accused's judicial admission at the trial that he wanted it "thoroughly understood" that he had received the money from the enlisted men themselves or from platoon leaders to whom the enlisted men had given the money to transmit to accused. The accused made no objection to the specifications as drawn and the Board of Review concludes that no error resulted from the method of pleading the specifications.

It is the opinion of the Board of Review that the record of trial warrants the findings of guilty of both specifications and the charge.

5. At a hearing held on 21 July 1949 before the Board of Review, Mr. Michael F. Dennis, Counselor at Law, 50 Court Street, Brooklyn, New York, appeared on behalf of accused and presented a written Brief and verbal argument, which have received careful consideration.

6. Records of the Department of the Army show that accused is 28 years of age, is married, and has three children. He completed 2-1/2 years of college in 1942. He entered the United States Army as an enlisted man on 25 May 1942. He successfully completed Officers Candidate School at The Infantry School, Fort Benning, Georgia, was commissioned a second lieutenant on 11 January 1945, and was promoted to first lieutenant on 2 April 1945. He was released from active duty effective 20 April 1946 and returned to active duty on 20 September 1946. He was appointed to the Regular Army on 3 October 1949, subject to physical examination, and took his oath of office therefor on 20 February 1950.

His efficiency ratings from 1 July 1944 to 30 June 1947, except for the periods of 1 January 1945 to 30 June 1945, 1 January 1946 to 27 November 1946 and 28 November 1946 to 10 January 1947, for which no efficiency reports are shown, average 4.7. His overall efficiency ratings are: 30 October 1947 to 5 February 1948, 119; 21 July 1948 to 31 August 1948, 056; 16 July 1949 to 21 December 1949, 099; 22 December 1949 to 28 February 1950, 067.

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 thereof. Dismissal is authorized upon a conviction of a violation of Article of War 93.

Lewis D. Thrall, J.A.G.C.

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

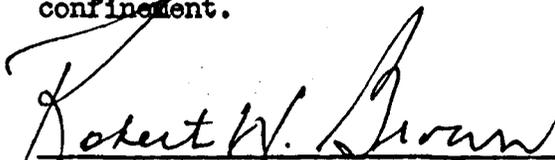
Samuel S. Wrey, J.A.G.C.

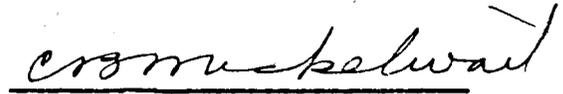
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant Donald W. Dully,
O-60384, Company G, 26th Infantry Regiment, upon the concurrence
of The Judge Advocate General the sentence is confirmed and will
be carried into execution. The United States Disciplinary
Barracks or one of its branches is designated as the place of
confinement.

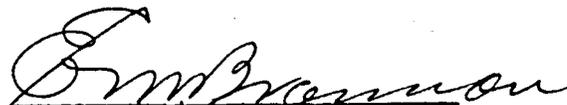

Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

UG 231

I concur in the foregoing action.


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

13 September 1950

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

JAGK-CM 341921

11 JUL 1950

UNITED STATES)

NURNBERG MILITARY POST

v.)

Trial by G.C.M., convened at
 Nurnberg, Germany, 26 April,
 1 and 3 May 1950. Dismissal.

First Lieutenant PALMER G.
 ARNDT (O-1559536), 7847th
 Ammunition Depot Detachment,
 APO 139, U.S. Army.)

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 Charge and Specifications:

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

Specification 1: In that 1st Lieutenant Palmer G Arndt, 7847th Ammunition Depot Detachment, being indebted to 1st Lieutenant David W. Tucker, in the sum of \$2000.00 (two thousand dollars) for the sale of a 1947 Willys Overland Station Wagon which amount became due on or about 10 May 1948, did at Bamberg, Germany, from 10 May 1948 to 13 February 1950 dishonorably fail and neglect to pay said debt.

Specification 2: In that 1st Lieutenant Palmer G Arndt, 7847th Ammunition Depot Detachment, did, at Bamberg, Germany, on or about 7 February 1950, with intent to deceive Lt Colonel Edward Miller, officially state to the said Lt Colonel Edward Miller, that he was not indebted to 1st Lieutenant David W. Tucker and that he had paid his debt in full, which statement was known by the said 1st Lieutenant Palmer G Arndt to be untrue.

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

3. Evidence for the Prosecution.

In April 1948 First Lieutenant David W. Tucker owned a 1947 Willys-Overland station wagon which he desired to sell. Just prior to 10 April 1948 Lieutenant Tucker sold the station wagon to the accused, First Lieutenant Palmer G. Arndt, for the agreed price of \$2000.00. Lieutenant Tucker executed a bill of sale and transferred title of the station wagon to the accused. In this transaction Lieutenant Tucker received a promissory note, dated 10 April 1948, from the accused whereby the accused promised to pay to Lieutenant Tucker the sum of \$2000.00 " * * * thirty days (30) from date of this note * * * ." All of the papers concerning this transaction were executed in the Provost Marshal's Office in Bamberg, Germany. At the time Lieutenant Tucker and the accused agreed upon the sale of the station wagon the accused stated that he did not have sufficient money to pay the purchase price in full but that he did have approximately \$1600 "of which the most part was in bonds, one of them being a \$600 leave bond." At this time bonds could not be cashed in that theater and it was necessary to send them to the United States in order to cash them. He exhibited the bonds to Lieutenant Tucker.

The note executed by the accused was identified by Lieutenant Tucker and received in evidence, without objection, as Prosecution Exhibit No. 1 (R 9-11, 29, 30).

Lieutenant Tucker testified that the accused did not pay the note when it became due and that he never made payments on the note at any time.

About two weeks after the note became due Lieutenant Tucker contacted the accused, at which time the accused stated that he was having trouble getting the bonds cashed. They then agreed that the accused would deposit \$1600 in Lieutenant Tucker's Savings Account in the First National Bank of Green Forest, Arkansas, and pay the balance due "at \$50 to \$100 a month." This arrangement was made because Lieutenant Tucker was then on temporary duty at the "Herfa mine." Lieutenant Tucker talked to the accused several times in the following months and each time the accused stated that he was depositing monthly payments in Tucker's bank account. In March of 1949 he asked the accused about the status of the debt and the accused stated that he still owed about \$500. The accused also stated that the deposits had been made by money order. About the 1st of June 1949 Lieutenant Tucker contacted the accused by telephone and asked him for a statement of the

amounts he had deposited in the bank and the dates of the deposits. The accused stated that in 1948 he had deposited \$600 on 6 April, \$50 on 5 May, \$50 on 4 June, \$400 on 7 July, \$50 on 5 August, \$50 on 6 September, \$50 on 5 October, \$50 on 5 November, \$50 on 7 December, and in 1949 he deposited \$50 on 6 February. These sums total \$1400 (R 11, 12, 100, Pros Exs 2A, 2B).

A short time after receiving the above information Lieutenant Tucker contacted the accused and "I/told him I had information that he had made no deposits to that account, and he at that time owned up to the fact that he had not made any deposits." Lieutenant Tucker told the accused that he would have to report his failure to pay the obligation to Colonel Miller, who was the commanding officer of the detachment, at which time the accused "begged for additional time." He saw the accused about the latter part of June 1949, at which time the accused stated that he did not have any money but that he was still going to pay the debt. Lieutenant Tucker then went to Colonel Miller's home and reported the facts concerning the accused's obligation. About eight or ten days thereafter he went to Colonel Miller's headquarters and found that Colonel Miller was in Heidelberg and that Captain Johnson was in command during Colonel Miller's absence. He "talked it over with Captain Johnson. * * * Later on that afternoon Lieutenant Arndt came over to the headquarters and I was called out of the area and Arndt stated at that time that Col. Miller had called him in and that the conversation had got pretty hot and he was going to have to pay."

Just before the 1st of December 1949 Lieutenant Tucker made a special trip to Bamberg to see the accused. The accused stated that he did not have the money to pay the debt, but that he was going to pay it. They agreed to meet in Heidelberg, Germany, on 5 December 1949, however, the accused did not appear at the time and place specified. In January 1950 Lieutenant Tucker turned the note over to Mr. Lorber, a civilian lawyer in Heidelberg, for collection (R 11-14, 29, 30).

On cross-examination Lieutenant Tucker denied that the accused made payments of any amounts on the note at any time and particularly during April and May 1948. He did not recall that the accused had ever slapped him. He also stated that the only threats he had ever made against the accused concerned his preferring court-martial charges against him because of his failure to pay this debt (R 15-19).

On 3 February 1950 Mr. Phillip Lorber, a civilian attorney of Heidelberg, Germany, called Lieutenant Arndt at Bamberg, Germany, by telephone in reference to the note held by Lieutenant Tucker. Mr. Lorber testified that the following conversation occurred:

"I told Lt. Arndt that I was calling on behalf of Lt. Tucker, with reference to a \$2,000 debt which he owed Lt. Tucker. I told him that Lt. Tucker was in some difficulties at the time and wanted his money, and also told him that, according to Lt. Tucker's instructions to me, he wanted his money in the next ten days. Lt. Arndt said that he didn't think ten days was a sufficient amount of time to get the money, but he would do his best, and asked me to call him on Monday. If my memory serves me correctly, this was the 3rd of February, which was a Friday. He told me to call him at his home and gave me the telephone number.

"Q. Did you call Lt. Arndt on Monday?

"A. I did.

"Q. Was that 6 February 1950?

"A. That is correct. I called his home and was advised that Lt. Arndt was in Grafenwohr." (R 27-28)

The next day Mr. Lorber called Colonel Miller and told him about the conversation with the accused. The following day he again called Colonel Miller and asked him the result of his (Colonel Miller's) conversation with the accused. Mr. Lorber then called the accused and the following conversation occurred:

"* * * I again called Lt. Arndt and, I believe, it was the following day, the voice identified itself to me as Lt. Arndt, and I told Lt. Arndt I had spoken to Col. Miller and I told Lt. Arndt that I understood that he now claims he paid the thing, and, in effect, I told him, 'That's not what you had told me when I spoke to you.' Lt. Arndt said, 'You spoke to Col. Miller?' I said, 'Yes.' And he asked me, 'Did he tell you what my position was?' I said, 'Yes.' He said, 'That is the position I take.' And as a result of that conversation, I spoke no further to Lt. Arndt." (R 28)

Lieutenant Colonel Edward G. Miller was the executive officer of the Bamberg Ammunition Depot, until January 1949 when he became its commanding officer. The accused was an officer assigned to one of the companies stationed at the Depot. During August 1949 the accused became the adjutant and personnel officer of the Depot. Sometime between the months of February and April 1949 Lieutenant Tucker spoke to him about the sale of a station wagon to the accused. Following this conversation, Colonel Miller stated:

"I told Lt. Arndt in general, to the best of my recollection, that Lt. Tucker had told me that he sold his Willys station wagon to Lt. Arndt at some previous time—I believe nearly a year or possibly slightly more previously—and that no payment had been received by Lt. Tucker for the said automobile, and that the amount of the sale involved \$2,000, none of which had been paid. And Lt. Tucker, I asked him why he had not approached Lt. Arndt previously on it and he indicated that he had, but to no avail. So that is what I spoke to Lt. Arndt about and asked him if that was true, that he owed for this automobile, and he indicated to me at that time that he had satisfied the claim and there was no valid claim existing, and gave me to understand that he had no obligation to Lt. Tucker for the sale. I told him there was a complete divergence of statements between the statement of Lt. Tucker and the one he had just given me and that obviously someone must be completely wrong and I don't understand how there could be such a misunderstanding over the sale of the car. So I told him to get in touch with Lt. Tucker, who was at that time stationed with one of the units under my command there, and to straighten the matter out. I asked him a few days later if he had accomplished that and he assured me that he had, to the best of my recollection." (R 22-23)

In February 1950 Lieutenant Colonel Miller received a telephone call from Mr. Lorber. After receiving this call he -

"A. * * * asked Lt. Arndt to come into my office and told him that I had just had a telephone call from Mr. Lorber, who was representing Lt. Tucker, and that Mr. Lorber stated that there was still an unpaid balance of \$2,000 on an automobile, and if that wasn't paid immediately that he would enter suit in civil court, and that Lt. Tucker, would prefer charges against Lt. Arndt. And I told him that Mr. Lorber was going to call me back the following day as to what decision Lt. Arndt had arrived at in connection with the matter.

"Q. And what reply did Lt. Arndt make? Substantially.

"A. Lt. Arndt substantially told me that he had no obligation, no outstanding obligation to Lt. Tucker and that Mr. Lorber could go ahead and take whatever action he saw fit." (R 23)

4. For the Defense.

The accused was warned of his rights as a witness and elected to testify in his own behalf. He admitted that he purchased the Willys station wagon from Lieutenant Tucker in April 1948 at the price of \$2,000 and that as part of this transaction he executed the \$2,000 note,

Prosecution Exhibit No. 1. Although the note was not due until 10 May 1948, about 9 p.m. on 17 April 1948, Lieutenant Tucker, who had been drinking, came to his home. They were having a birthday party and Lieutenant Tucker had not been invited to the party. That evening:

"* * * About eleven o'clock I was out in the kitchen and with me were Captain Seale and Captain Frost and Mrs. Frost. Lt. Tucker came out in the kitchen and he said, 'Your time is running out on paying me for the automobile,' and I said, 'No, the time isn't running out--you will get your money on time.' And he said, 'Well, I don't like to go along with this. I know I accepted a thirty-day note, but I want my money just as fast as I can get it.' I said, 'Tucker, don't you think this is the wrong time to be doing business, at this party? I don't particularly want to do any business with you or anybody else tonight.' He said, 'No?'— I believe his words were 'Goddammit' or 'By God, I want my money.' So Captain Seale talked to Lt. Tucker for a few minutes and told him he thought it was out of order, he didn't think it was the thing to do. But Lt. Tucker refused to be quiet—in fact, he got extremely belligerent. At that time I went to my jacket which was hanging out in the hall and I took \$100 out of my jacket billfold and gave it to Lt. Tucker, and Captain Seale and Captain Frost both witnessed that payment, and Lt. Tucker put the \$100 in his pocket and everything was quiet.

"About an hour later Lt. Tucker by this time was quite drunk—he started raising the devil again and started screaming that all he had been paid was \$100 and he wished he could have some security; so by that time I was quite upset, quite angry, and so Captain Seale tried his best to quiet Lt. Tucker, took him outside and talked to him, brought him back in, and Lt. Tucker refused to be quiet. At that time my wife came out in the kitchen. She was very, very upset. The rest of the guests at the party were, of course, quite curious and quite interested in what was going on, and she said, 'Can't you do something to get him quiet?' so I said, 'Well, I don't know what to do.' So I had a \$600 bond and he asked what type of bond was that. It was the leave bond that I received from the army when the excess and accumulated leave was paid off. The bond was for \$600 and I knew the bond couldn't be used as security, and so forth, but I was at the end of my rope, I wanted something to quiet the man with, so I told my wife to go upstairs and get this bond, and at that time Captain Frost intervened and he said, 'There will be no such thing as that. You know the bond can't be used for security.'

And I said, 'Well, I've got to do something to get him quiet. He is ruining my wife's party.' So Captain Seale said, 'Well, maybe this will work.' So he said, 'Tucker, if Lt. Arndt gives me that bond to hold, will that satisfy you tonight?' and Lt. Tucker said, 'Yes, it would.' So my wife was completely upset; she didn't want to get the bond. I finally persuaded her and she went upstairs. We had a little strong box we kept our important papers in. She got the bond and brought it back down, under much protest, and I gave the bond to Captain Seale, who took it and put it in an envelope and marked it with his name and mine, and put it in his pocket. And immediately after that Lt. Tucker went back in the other room. There was no more said that night." (R 34, 35)

On Sunday morning, about 25 April 1948, Lieutenant Tucker again came to his home and said "I want some more money." He told Lieutenant Tucker, "I don't appreciate your pushing me like this. I have thirty days to pay the note." He then obtained \$50 from his wife and paid it to Lieutenant Tucker. On the next Sunday, Lieutenant Tucker "showed up at my house again * * * at that time I gave him a second \$50." Mrs. Arndt was present when this \$50 was paid to Lieutenant Tucker.

A short time thereafter, at a party held in the Officers Lounge at Bamberg, Germany, for an officer who was returning to the United States, accused paid Lieutenant Tucker \$100. At this time it was the custom to have a stag night at the "Schutzen Haus, at the officers club, at Bamberg, Sub-post," at which time roulette, pool, blackjack and other cards were played. Either two or three weeks after the party at the Officers Lounge he attended a stag party and during a poker game Lieutenant Tucker asked him for some money. He gave Lieutenant Tucker \$100, making a total of \$400 which he had paid on the \$2,000 note. On Sunday, 23 May 1948, he was at the office advising a soldier named Harris about a divorce when the accused came to the office.

"At that time he was very, very belligerent and he said the time of the note had run out and was I going to give him the money for the car. I said, 'Yes, I am going to give you the money for the car. I wanted to wait and see you.' He said, 'You could have gotten in touch with me,' but I said, 'Not with you up at the Herfa Mine.' He said, 'I am here now. How about my money?' I said 'all right.' I went over to my safe, which I had behind my desk, and gave Tucker \$1600."

Harris was in the office at the time he paid this money. He asked Tucker for the note and Tucker replied that the note was "in his foot locker or in his papers at Herfa" and that he "would send it to me in the very next mail when he got back there." He had no reason to

distrust Lieutenant Tucker. He could offer no explanation as to why he did not get a receipt for the money except that he had the title to the car and he thought he had sufficient papers concerning the transaction. He saw Lieutenant Tucker on several occasions after the money was paid and on one occasion Tucker came to his home in a drunken condition. Lieutenant Tucker called him a "sonofabitch" at which time he picked Lieutenant Tucker up and dragged him out of the house and cuffed him around with his open hands. At this time Lieutenant "Tucker vowed vengeance against me * * * and said if he ever had the slightest opportunity he was going to get me in all the trouble he could possibly get me in and reminded me at that time that he still had the note, he hadn't sent it to me, and I didn't have to look for it." He heard nothing more about the transaction until July 1949 when Colonel Miller called him in and said that Lieutenant Tucker had complained that he (Lieutenant Arndt) had not paid for the automobile. He told Colonel Miller the story and Colonel Miller said that he would see Lieutenant Tucker. The next time he heard anything about the transaction was in February of 1950 when Mr. Lorber called from Heidelberg and said that he had been retained by Lieutenant Tucker to collect the \$2,000 note, and asked him if he was going to pay it. He replied, "If Lt. Tucker says I owe him money there is a misunderstanding. I don't have \$2,000 to my name and it isn't likely I will have. I have talked this over with my commanding officer and you can call him, if you like." Two days later Colonel Miller called him into the office and said that Mr. Lorber had called about the debt to Lieutenant Tucker. He told Colonel Miller, "I have talked to you about this last July, when you called me in and I know nothing other than what I told you now. It is news to me." The next day Colonel Miller said that Mr. Lorber had informed him that if he (accused) did not pay the money immediately they were going to prefer charges. He replied, "I certainly don't have the money to pay it again. If they want to prefer charges, we will just have to let them" (R 34-42).

On cross-examination he stated that before leaving the United States he had sold an automobile for \$800, which money he carried with him to Germany. His wife gave him \$500 from her account and he cashed enough Savings Bonds to make up the amount due Lieutenant Tucker. He did not ask Mr. Lorber for additional time in which to pay the \$2000 which Lieutenant Tucker claimed was due him. On each of the two occasions when he talked to Colonel Miller about the claim of Lieutenant Tucker, he "denied the debt" (R 43, 44).

Mrs. Lorna Mae Arndt, wife of the accused, testified that on three occasions in 1948 she witnessed the payment of money by her husband to Lieutenant Tucker. The first payment of \$100 was at a party. The Sunday following the party \$50 was paid and the next Sunday an additional \$50 was paid to Lieutenant Tucker by her husband (R 50, 51).

Corporal Willard P. Harris, 571st Ordnance Ammunition Company, was released from the stockade after serving a sentence for absence without leave, and assigned to that organization on 10 May 1948. He saw the accused about two days after being assigned to the company. Corporal White informed him that the accused was the personnel adjutant for his organization. He requested permission to talk to the accused about a divorce proceeding in which he (Harris) was involved. On Sunday morning, 23 May 1948, he talked to the accused about the divorce papers. While they were talking Lieutenant Tucker came in and

"* * * said, 'Arndt, what about my money for the automobile?' and Lt. Arndt spoke, 'Good evening,' and he asked him what about his money for the automobile and Lt. Arndt went on to explain to him that he had had a little bad luck and he didn't have the money at the present time that that's why he hadn't seen him. So I took my papers from the desk and went to the far end of the room and sat there for a while and through the course of the conversation I saw Lt. Arndt give Lt. Tucker a stack of bills about so big (indicating), and Lt. Tucker counted the bills through his hands, like that (demonstrating) and put it into his pocket, and then he said, 'The fight is on,' and walked out of the office. I walked back to Lt. Arndt with my papers and he continued to explain to me about my papers.

"Q. Could you tell what denomination the bills were in?

"A. At that time there were two denominations of bills-- \$5 and \$10 bills--in '48, and I couldn't exactly say whether they were 5's or 10's, but I doknow it was a very large sum of money." (R 52, 54)

On cross-examination and examination by the court he testified that the stack of currency given Lieutenant Tucker by the accused was between four and five inches thick. He was under the impression that the accused obtained the money from a drawer in his desk. The office contained a large iron safe and he (Harris) was sitting next to the safe at the time the money was paid. The money was not taken from this safe. Lieutenant Tucker counted the money and it took him approximately three minutes to count it. He did not hear the accused ask Lieutenant Tucker for a receipt for the money although he was within ten feet of the accused during this transaction (R 55-69).

The defense introduced the deposition of Captain Winston R. Frost wherein he testified that on 20 April 1948 he was at Lieutenant Arndt's home attending a party. Early in the evening Lieutenant Tucker came in and transacted some business, concerning money and bonds, with the accused. He further testified: "I do not know exactly how many or what amount of money was represented by the bonds, but I believe that the actual amount of money involved was one hundred (\$100.00) dollars.

* * * Lt. Arndt asked his wife to go upstairs and get the bonds. His wife protested and suggested that he wait until the next day. Lt. Arndt insisted that she get them and I advised Lt. Arndt to make sure he knew what he was doing as it is always a bad policy to mix business with entertainment especially when there was drinking involved. Neither Lt. Arndt nor Lt. Tucker were intoxicated nor under the influence of liquor, but both had a couple of high balls." He had no reason to doubt the veracity of accused (Defense Exhibit No. A).

Major Joseph F. Greene, Captain James C. Purvis and Lieutenant Colonel Edward G. Miller each testified that they had worked with the accused and associated with him during off duty hours. In their opinion his efficiency rating is superior and his character excellent. Each would believe him under oath (R 64-69).

5. Rebuttal Evidence.

Lieutenant Tucker was recalled as a witness and denied receiving any of the payments which the accused testified he made on the note. He admitted being in the accused's office on a Sunday about the 23rd of May 1948, but denied that on this occasion the accused paid him \$1600. On this occasion he had gone to accused's quarters with a Mr. Seibold, a German civilian. He discussed payment of the debt with the accused and it was on this occasion when it was agreed that the accused would make deposits in his (Lieutenant Tucker's) home bank. The only other person present was the "CQ" who was in an outer office. Corporal Harris was brought into the court room and Lieutenant Tucker stated that he did not believe Corporal Harris was the person in the office on that occasion. He never vowed that he would avenge himself on the accused although he did threaten to prefer charges against him for failing to pay the debt (R 70-73).

Captain William E. Winterstein, 50th Ordnance Ammunition Company, had been stationed at the Bamberg Ammunition Depot since 11 June 1948. At the time he arrived in Bamberg, the Blue Spade Club, also known as the "Schutzen Haus" was the only officers club in existence. This club is now known as the 26th Infantry Officers Club. Shortly after he arrived Colonel Waters, the commanding officer, established an officers' lounge. This lounge was opened in either July or August 1948. He was appointed to the Board of Governors of the Bamberg Officers Club in January 1949 and the first stag party was held on a Friday in the early part of February 1949 (R 75-78).

Lieutenant Tucker testified that the officers' lounge was established in the quarters formerly occupied by Colonel Masters (R 79-80).

An extract copy of the morning report of the 7847 Ammunition Depot Detachment was introduced into evidence without objection by the defense. This morning report shows that Lieutenant Colonel George C. Masters was transferred to the Student Detachment Industrial College of the Armed Forces at Fort Lesley J. McNair, Washington, D. C. on 13 June 1948 (R 81).

Hans Seibold, a German national employed as a supervisor in the Bamberg Ammunition Depot, testified that during most of 1948 Lieutenant Tucker worked at the Herfa salt mine which is between 220 and 250 kilometers from Bamberg. This distance can be traveled by automobile in about six hours. He further testified that in the latter part of May 1948 he accompanied Lieutenant Tucker to the home of the accused. This was about noon on a Sunday. Lieutenant Tucker got out of the car and inquired for the accused. They stayed at the accused's home between one and two hours. Lieutenant Tucker and the accused had some whiskey and "talked." When they left Lieutenant Tucker "drove the car in the wrong direction to Coberg." They stayed at Hersfeld, Germany that night (R 83-86).

Reinhard Thiel, a German national, had been employed by the Bamberg Officers Club since 26 December 1945. The Officers Club did not hold stag parties between January and October 1948. Official card parties were not held before October 1948. Gambling was prohibited by orders. He has no knowledge of any card games between officers at the club prior to the time of the authorization of card games. All cards, poker chips and dice were in his possession. The bar at Schutzen Haus has been in existence since the Americans arrived in Bamberg (R 95-99).

The defense requested permission to reopen its case and place the accused on the witness stand for further examination. This request was granted and the accused testified:

"Q. Will you explain the relation between certain officers' clubs on or about 11 July 1948?

"A. Yes, the Lounge at the Bamberg Ammunition Depot was in Building 8501. Colonel Masters quarters were in Building 8502, two different quarters. In 8501, the upstairs has four apartments occupied by officers and DA civilians, so there was one apartment downstairs, the left hand apartment downstairs, which was the Officers' Lounge. Sometime in the early part of June 1948, Colonel Masters was sent home, and at that time the Lounge moved from Building 8501 to 8502. The Lounge occupied two separate buildings."

On cross-examination he stated that when Colonel Masters was the commanding officer poker parties were held in 8501. These parties were kept very quiet because Colonel Masters frowned on gambling and drinking. Captain Ramey and Captain Seale had built a bar out of plywood and bricks. This place was known as the Lounge at that time. When he arrived in Bamberg, stag nights were being held in the Bamberg Officers Club. After a postal officer was accused of embezzling a large sum of money the interest in the stag parties gradually died out. Stag parties were later revived sometime in 1949. Under examination by the court he reiterated the circumstances of his paying the \$1600 to Lieutenant Tucker on 23 May 1948 and stated that he obtained the money from his field safe which was behind his desk. This money was scrip in ten dollar denominations. It was in one bundle with a rubber band around it (R 87-92).

6. Discussion.

The accused was found guilty of a dishonorable failure and neglect to pay a debt of \$2000 to First Lieutenant David W. Tucker and of making a false official statement with intent to deceive Lieutenant Colonel Edward Miller, by stating that he was not indebted to First Lieutenant David W. Tucker and that he had paid his debt in full, which statement was known to the accused to be untrue, all in violation of Article of War 95. Each offense charged has long been recognized as an offense in violation of Article of War 95 (par 182, MCM 1949; CM 274930, Curley, 47 BR 375, 382; CM 337961, Sykora, 4 BRJC 187, 190).

Paragraph 183b, Manual for Courts-Martial U. S. Army, 1949, provides, in part:

"If an officer or soldier by his conduct in incurring private indebtedness or by his attitude toward it or his creditor thereafter reflects discredit upon the service to which he belongs, he should be brought to trial for his misconduct. He should not be brought to trial unless in the opinion of the military authorities the facts and law are undisputed and there appears to be no legal or equitable counterclaim or set-off that may be urged by the officer or soldier. The military authorities will not attempt to discipline officers and soldiers for failure to pay disputed private indebtedness or claims, that is, when there appears to be a genuine dispute as to the facts or the law. An officer may be tried for this offense under either Article 95 or Article 96, as the circumstances may warrant."

In the instant case the evidence presents a controverted question of fact as to whether the \$2000 note executed by the accused was in fact paid by him long prior to the time the charges were preferred. In the past military authorities have referred charges to a court-martial for trial where controverted questions of fact involving the legality of a debt were presented and such cases have been reviewed in accordance with the applicable law by the Boards of Review (CM 203609, Upton, 7 BR 241, 260). The quoted section of the Manual for Courts-Martial is therefore directive in nature and does not prohibit the military authorities from referring charges wherein the facts and law are in dispute to a court-martial for trial.

The charges were properly before the court and the issues presented by the evidence were required to be determined in the first instance by the members of the court-martial hearing the case. It is their function, under their oath, to well and truly try and determine, according to the evidence, the issues joined; it is their sworn duty to administer justice, without partiality, favor or affection, according to the provisions of the rules and articles for the government of the armies of the United States. In carrying out their functions the members of the courts must necessarily weigh conflicting evidence and pass upon the credibilities of witnesses and determine controverted questions of fact (CM 325200, Hightower, 74 BR 103, 120).

The prosecution's evidence establishes, and the accused admits, that on 10 April 1948 the accused purchased a 1947 Willys Overland station wagon from First Lieutenant David W. Tucker and in consideration therefor gave to Lieutenant Tucker his promissory note in the sum of \$2000 payable thirty days after that date. The prosecution's evidence is to the effect that thereafter the accused failed to pay said note when it became due although he possessed savings bonds and leave bonds in sufficient amounts to pay approximately \$1600 of the amount due. He made numerous promises to pay this obligation and also promised to deposit the money in Lieutenant Tucker's bank in Green Forest, Arkansas, and he wholly failed to comply with any of the promises to pay the note. This situation continued from the time the note became due on 10 May 1948 until about 3 February 1950 when Mr. Lorber, a civilian attorney, called the accused on behalf of Lieutenant Tucker and demanded payment of the note within ten days. The accused stated that he did not think ten days was sufficient time for him to make payment, but that he would do his best and asked Mr. Lorber to call him the following Monday. Lieutenant Tucker reported the nonpayment of the note to Lieutenant Colonel Miller, the accused's commanding officer, and when Lieutenant Colonel Miller asked the accused about it the accused claimed that he was not indebted to Lieutenant Tucker because he had paid this note in full. If the evidence on behalf of the prosecution is believed it

amply establishes that the accused dishonorably failed and neglected to pay the note as alleged in Specification 1 (CM 320308, Harnack, 69 BR 323, 329; CM 329496, Deligero, 78 BR 43, 49; CM 320578, Himes, 70 BR 31, 37; CM 340589, Bell, 1950). The evidence would also establish that the statements of the accused to Lieutenant Colonel Miller that he was not indebted to Lieutenant Tucker and that the obligation had been fully paid and satisfied was false and the accused knew it was false as charged in Specification 2. This statement being made to his commanding officer in connection with an official complaint made to that superior officer it was an official statement from which an intent to deceive may be inferred (CM 319514, Robbins, 68 BR 337, 352; CM 320669, Berendsen, 70 BR 111; CM 280335, Alexander, 53 BR 177, 180; CM 340733, Heindorf, 1950; CM 341216, Cherwak, 1950).

On the other hand the evidence adduced by the defense is to the effect that payments were made on the note before it became due and that the \$2000 note was fully paid in May of 1948 within a couple of weeks after it became due. If the defense evidence is believed the accused would not be guilty of dishonorably failing and neglecting to pay the debt and the statement of the accused to Lieutenant Colonel Miller concerning the payment of the obligation would not be false.

The evidence concerning payment of the note is in sharp dispute. The court saw the witnesses and heard their testimony. The court by its findings of guilty resolved the controverted questions of fact presented by the evidence against the accused. By virtue of Article of War 50g The Judge Advocate General and all appellate agencies in his office have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.

The Board of Review has carefully considered the evidence, bearing in mind its right to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, and finds no cogent reason to disagree with the court-martial in its findings of guilty.

7. Department of the Army records show the accused to be 32 years of age and married. He graduated from high school and was employed by a powdered milk company for two years prior to his enlistment in the Regular Army on 8 December 1939. On 8 December 1944 he was discharged as a staff sergeant to enable him to accept a commission as a second lieutenant, AUS. He attended Officers Candidate School at Aberdeen Proving Ground, Maryland, and was commissioned a second lieutenant, AUS, 9 December 1944. On 2 July 1946 he was promoted to first lieutenant.

He served overseas in England and North Africa for 19 months. He has been awarded the Army Commendation Ribbon. His efficiency ratings for the period 1 January 1945 to 14 April 1947 are generally superior. His overall efficiency ratings are: 1 July 1947 to 20 September 1947, 073; 20 September 1947 to 19 January 1948, 058; 19 January 1948 to 31 August 1948, 082; 1 September 1948 to 28 February 1949, 077; 1 March 1949 to 27 July 1949, 086; 1 September 1949 to 28 February 1950, 102.

8. 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 thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95.

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

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

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



(244)

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

1 AUG 1950

JAGU CM 341921

SUBJECT: Record of Trial by General Court-Martial in the Case
of First Lieutenant Palmer G. Arndt, O-1559536

TO: Commanding General
Nurnberg Military Post
APO 696, c/o Postmaster
New York, New York

1. In the case of First Lieutenant Palmer G. Arndt, O-1559536, 82d Ordnance Battalion, formerly of 7847th Ammunition Depot Detachment, APO 139, attention is invited to the inclosed opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, the opinion of the Judicial Council that the record of trial is legally insufficient and the action of the Judicial Council, with my concurrence. Under Articles of War 48 and 49 the action of the Judicial Council and my concurrence vacate the findings of guilty and the sentence.

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

(CM 341921)

4 Incls

- 1 Record of trial and accompanying papers
- 2 Opinion of B/R
- 3 Opinion of Judicial Council
- 4 Action of Judicial Council w/conc TJAG

E. M. Brannon

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

MAUC 11

1 AUG 1950

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

(245)

JAGU CM 341921

AUG 5 1950

UNITED STATES)

v.)

First Lieutenant PALMER G.
ARNDT, O-1559536, 82d Ordnance
Battalion, formerly of 7847th
Ammunition Depot Detachment,
APO 139)

NURNBERG MILITARY POST

Trial by G.C.M., convened
at Nurnberg, Germany, 26
April, 1 and 3 May 1950.
Dismissal.

- - - - -
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 by general court-martial in the case of the officer named above and the opinion of the Board of Review have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to and was found guilty of dishonorably failing and neglecting to pay a debt of \$2,000.00 to First Lieutenant David W. Tucker for the sale of a station wagon, at Bamberg, Germany, from 10 May 1948 to 13 February 1950, in violation of Article of War 95 (Charge I, Specification 1); and making a false official statement to Lieutenant Colonel Edward Miller, with intent to deceive him, that he was not indebted to Lieutenant Tucker and that he had paid his debt in full, at Bamberg, on or about 7 February 1950, also in violation of Article of War 95 (Charge I, Specification 2). 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. With respect to Specification 1 of Charge I, there is no dispute that First Lieutenant David W. Tucker sold a station wagon to the accused in April 1948 for an agreed price of \$2,000.00, or that the accused on 10 April 1948 gave Tucker his note for that amount, payable in thirty days. Whether the accused paid the whole or any part

of the debt, however, is in sharp dispute. Tucker denied that the accused ever made any payments on the note and testified that the accused made statements, which he later retracted, concerning deposits totaling \$1,400.00 in Tucker's account in Arkansas, and begged for additional time to pay as late as June 1949. According to Lieutenant Colonel Edward G. Miller, Commanding Officer of the accused's depot, the accused informed him early in 1949 and again in February 1950 that he had no outstanding obligation to Tucker. Mr. M. Philip Lorber, Tucker's attorney, testified that in February 1950 he made a demand on the accused for the payment of the note within ten days and that the accused replied that he did not think ten days was sufficient time, but would do his best. Lorber also testified that when he advised the accused he had spoken to Colonel Miller, the accused indicated to Lorber that he had paid the debt.

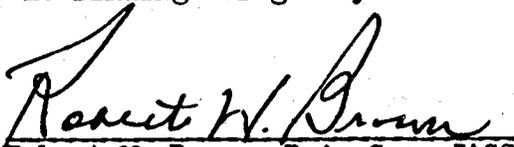
The defense evidence is irreconcilable with Tucker's testimony. The accused testified substantially as follows: On 17 April 1948 Tucker came uninvited to his home, and in the presence of Captain Harmon H. Seale and Captain and Mrs. Winston R. Frost, truculently demanded his money even though the note was not due until 10 May 1948. The accused then, in the presence of his wife and guests, paid Tucker \$100.00 in cash and gave Captain Seale a \$600.00 leave bond to hold as security for Tucker's benefit. In April 1948 the accused in his wife's presence made two further payments of \$50.00 each to Tucker, and shortly thereafter made two other payments of \$100.00 each. Later on in May 1948, in the presence of Corporal Willard P. Harris, he paid Tucker the balance due of \$1,600.00. Tucker stated he would return the note by the next mail. The accused did not require or receive a receipt because he had the title to the car. Some days later Tucker, in a drunken condition, came to the accused's home and insulted the accused, who dragged him out of the house and cuffed him, whereupon Tucker said he would get the accused in trouble and would not surrender the note. The accused denied that he had impliedly acknowledged liability on the note in a conversation with Lorber.

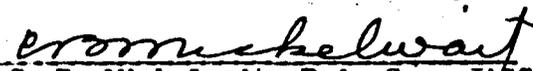
The accused's wife corroborated his payments of \$100.00, \$50.00 and \$50.00 in April 1948, and Harris testified that in May 1948 he saw the accused give Tucker a stack of \$5.00 and \$10.00 bills, whereupon Tucker said, "The fight is on." Tucker denied this testimony. Captain Frost, by deposition, testified to a transaction in April 1948 concerning Tucker's sale of a station wagon to the accused, which transaction involved \$100.00 in cash and also some bonds.

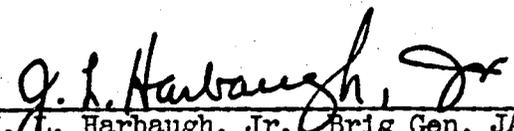
No valid reason appears to doubt the veracity of Captain Frost's testimony, which casts serious doubt upon Tucker's credibility inasmuch as he maintained that no payments were made. The accused's claim of the payment of the debt is also corroborated in substantial measure by his wife and Harris. There is also evidence of the accused's excellent character (see CM 336675, Friedland, 3 BR-JC 185, 195-196). If Tucker's testimony is believed, the accused, his wife, Captain Frost and Harris all must have falsified their testimony. The Judicial Council is unable to accept such a conclusion as reasonable, particularly in view of Tucker's obvious interest in the case as the accuser. Under the

circumstances, the Judicial Council is not satisfied beyond a reasonable doubt that the accused in fact failed to pay his debt to Lieutenant Tucker with reasonable promptness. It follows that the conviction under Specification 1 is not supported by the record (See CM 340886; Dominguez, BR-JC, Aug 1950). The same doubt exists as to the falsity of the accused's statement to Colonel Miller that he was not indebted to Lieutenant Tucker and had paid the debt in full, the subject of the charge in Specification 2. Hence the proof likewise fails to support this conviction.

4. For the foregoing reasons, the Judicial Council is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

CM 341921

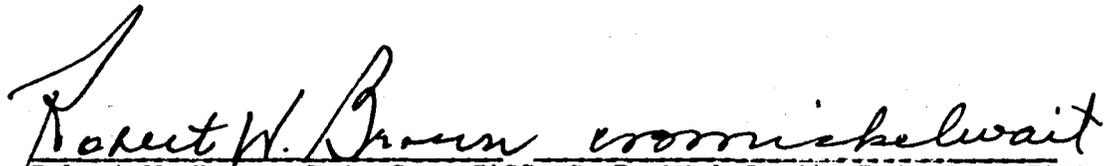
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DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

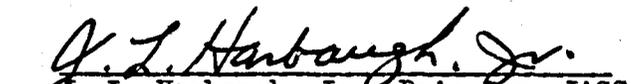
THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant Palmer G.
Arndt, O-1559536, 82d Ordnance Battalion, formerly of 7847th
Ammunition Depot Detachment, APO 139, upon the concurrence of
The Judge Advocate General, the findings of guilty and the
sentence are disapproved.


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

AUG 9 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

11 August 1950

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

(249)

JAGH CM 341945

AUG 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 Drake, Tokyo, Japan, 7, 10
Major GREGORY F. MEAGHER	)	April 1950. Dismissal, total
(O-290213), Headquarters	)	forfeitures after promulgation,
1st Cavalry Division	)	and confinement for one (1) year.
(Infantry).)	

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

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

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

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

Specification 1: In that Major Gregory F. Meagher, Headquarters, 1st Cavalry Division (Infantry), did, at Camp Drake, Tokyo, Japan, on or about 16 February 1950, feloniously steal:

- 1,000,000 Units Penicillin
- 1,000 tablets Saccharin
- 3,800 Japanese Yen
- 4 Brooches mounted with pearls
- 7 Rings mounted with pearls
- 1 Watch chronometer (marked on back: "everright back, Star")
- 1 Watch, gold star, (marked on back "stainless steel back")
- 1 Crawford watch
- 1 Rhicar watch
- 1 Meda wrist watch, ladies model
- 1 Bulova wrist watch, ladies model
- 1 Titus wrist watch
- 1 Medena wrist watch
- 1 Bulova wrist watch
- 1 Omega wrist watch
- 2 Roamer wrist watches

- 1 Clifford wrist watch
- 1 Waltham pocket watch
- 2 Fifty-cent pieces, (U.S. Money)

of a total value of more than fifty (\$50.00) dollars, the property of the United States.

Specification 2: In that Major Gregory F. Meagher, Headquarters, 1st Cavalry Division (Infantry), did, at Camp Drake, Tokyo, Japan, during the period 10 August 1949 to 16 February 1950 feloniously steal sixty thousand (¥60,000) Japanese Yen, of a value of more than fifty (\$50.00) dollars, the property of the United States.

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

Specification 1: In that Major Gregory F. Meagher, Headquarters, 1st Cavalry Division (Infantry), did, at Camp Drake, Tokyo, Japan, on or about 16 February 1950, willfully and unlawfully destroy official records of the United States, to wit:

Letter Headquarters 2nd Cavalry Brigade, APO 201 Unit 2 Subject: Contraband Property; dated 15 September 1948, To: Deputy Contraband Property Administrator, 1st Cavalry Division, APO 201, (ATTN: Maj. Phelps), signed by 1st Lt Wilson G. Smith, Cavalry, Asst Provost Marshal, and Letter Headquarters 1st Cavalry Division, APO 201, Subject: Receipt for Contraband Property, dated 28 June 1949, To: Provost Marshal Tokyo Metropolitan Area Hq 1st Cavalry Division APO 201 Unit 2, signed by Major Gregory F. Meagher, CMP, Provost Marshal.

Specification 2: In that Major Gregory F. Meagher, Headquarters, 1st Cavalry Division (Infantry), did, at Tokyo, Japan, on or about 30 November 1949, wrongfully acquire three thousand (¥3,000) Japanese Yen by sale of cigarettes to Indigenous Personnel of Japan in violation of paragraph 16a, Circular 23, General Headquarters, Supreme Commander for the Allied Powers, dated 13 September 1949.

Specification 3: In that Major Gregory F. Meagher, Headquarters, 1st Cavalry Division (Infantry), did, at Tokyo, Japan, on or about 10 December 1949 wrongfully acquire three thousand (¥3,000) Japanese Yen by sale of cigarettes to Indigenous Personnel of Japan in violation of paragraph 16a, Circular 23, General Headquarters, Supreme Commander for the Allied Powers, dated 13 September 1949.

Specification 4: In that Major Gregory F. Meagher, Headquarters, 1st Cavalry Division (Infantry), did, at Tokyo, Japan, on or about 30 November 1949 wrongfully solicit Corporal Robert E. Carson, 545th Military Police Company, to commit a criminal offense in his behalf, to wit: the acquisition of Japanese Yen by sale of cigarettes in violation of paragraph 16a, Circular 23, General Headquarters, Supreme Commander for the Allied Powers, dated 13 September 1949.

Specification 5: In that Major Gregory F. Meagher, Headquarters, 1st Cavalry Division (Infantry), did, at Tokyo, Japan, on or about 10 December 1949, wrongfully solicit Corporal Robert E. Carson, 545th Military Police Company, to commit a criminal offense in his behalf, to wit: the acquisition of Japanese Yen by sale of cigarettes, 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 all the Charges and Specifications. He was found guilty of Specification 1, Charge I, except the words and figures "1 Medena wrist watch," guilty of Specification 2, Charge I, and guilty of Charge I; of Specifications 1, 4 and 5, Charge II, guilty; of Specification 2, Charge II, guilty, except the words and figures "three thousand (¥3,000) Japanese yen," substituting therefor the words and figures "two thousand (¥2,000) Japanese yen," of the excepted words Not Guilty, of the substituted words Guilty, of Specification 3, Charge II, guilty, except the words and figures "three thousand (¥3,000) Japanese yen," substituting therefor the words and figures "two thousand (¥2,000) Japanese yen," of the excepted words Not Guilty, of the substituted words Guilty; of Charge II, 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 one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

On 13 July 1949 the accused, Major Gregory F. Meagher, was appointed Deputy Contraband Property Administrator of the First Cavalry Division, Camp Drake, Tokyo, Japan, replacing Major Max W. Phelps, in which capacity he served until 11 March 1950 (R 12). His duties as such were to take possession of and administer articles of contraband seized by the military authorities in accordance with the provisions of Circular No. 23, General

Headquarters, Supreme Commander for the Allied Powers, APO 500, dated 7 July 1948, of which the court took judicial notice (R 11), and a copy of which is appended to the record. Paragraph 1b of this publication provides that title to such articles of contraband shall vest in the Contraband Property Administrator.

On 28 June 1949, while the accused was being "broken into the job," four wrist watches were turned over to him as contraband, and he gave his receipt in exchange (R 14,150; Pros Ex 2). Sometime during the month of August 1949 the accused was also assigned as Provost Marshal of the First Cavalry Division (R 10), at which time he received from Major Phelps, his predecessor as Provost Marshal, certain articles described as the first 17 items listed on a memorandum directed to the Deputy Contraband Property Administrator, dated 15 September 1948. These articles, together with the four watches listed in the above-mentioned receipt, are enumerated in Specification 1, Charge I (R 13,14,34; Pros Ex 1). The items enumerated under Specification 1, Charge I, were of an aggregate value in excess of \$50.00 (R 165). The mentioned receipt and memorandum constituted the only records of this property and were kept in the safe in the office of the accused (R 13,14,16,18; Pros Exs 1,2).

In conversations prior to 16 February 1950 the accused had stated in the presence of the Provost Sergeant, Master Sergeant John M. Hunter, that "we would sooner or later have a 'grab bag'" and "we would divide the miscellaneous items which were the contents of his safe" (R 16,54).

On the afternoon of 16 February 1950 the accused called Sergeant Hunter into his office (R 17). He had displayed on his desk the articles listed in Specification 1, Charge I (R 18). He inquired of Sergeant Hunter whether the property was listed on an inventory and disposition report, and upon being informed that it was not, expressed the opinion that he (the accused) was not "accountable" for it (R 18). At that time either the accused or Sergeant Hunter suggested that they divide the property. The accused thereupon made the division and gave Sergeant Hunter a portion of the articles (R 18; p.2, Pros Ex 26). Sergeant Hunter then placed his share of the property in a wooden box and carried it to his office (R 19). He later turned the contents of this box over to Lieutenant Colonel John J. Beiser, First Cavalry Division G2, who in turn placed it in the hands of Lieutenant Colonel Wesley U. Moran, the Assistant Inspector General of the division (R 21,104,130). An investigation was then conducted by Colonel Moran of the activities of the accused (R 94).

On 17 February 1950, the accused was asked by the investigating officers to account for the items listed in Prosecution Exhibits 1 and 2. He, however, produced only a portion of those items. These were in

the middle drawer of his desk (R 95). The accused was asked by Colonel Moran at this time, whether he understood his rights under Article of War 24, and replied that he did (R 99).

Having failed to locate much of the subject property, the investigators obtained authorization from the Assistant Division Commander, General Hodes, to search the quarters of the accused (R 96). There they inquired of the accused whether any of the property was located therein. He at first answered in the negative but upon being informed that his denial would precipitate a thorough search, he disclosed the location of a Waltham watch and two pearl brooches, stating that he had brought the watch home to use for a day or two, and the brooches for the purpose of having them reproduced for his wife (R 100). A receipt for these items, addressed to Sergeant Hunter was found in the safe of the Provost Marshal on 6 April 1950 (R 48). Sergeant Hunter, however, had not seen the receipt before that time. The paper on which it was written was not similar to that used in the Provost Marshal's office, and it was not found by the investigators, nor offered by the accused during the investigation of 17 February 1950 (R 46,47,105,106).

On the morning of 18 February 1950 the accused produced money in the amount of 3,800 yen, Japanese currency, which he had failed to produce on the previous day (R 101,103). This, however, was not the same currency which he had received from Major Phelps (R 38).

When the contents of the safe in the office of the Provost Marshal were turned over to the accused, there was included the sum of 60,000 yen (R 39). During his service as Deputy Contraband Administrator the accused had "used" some of this money (R 41). He had also permitted Sergeant Hunter to use some of it but this had been repaid (R 40,41). At the time of the investigation on 17 February 1950, no yen was produced by the accused, although the investigation at that time involved only the sum of 3,800 yen listed on Prosecution Exhibit 1 (R 96). At about 0815 hours on 18 February 1950 the accused approached Captain Philip Plant, and requested a loan of \$165.00, saying "I need it; I am in a lot of trouble." Having secured the loan, the accused asked Captain Plant to use the money to purchase 60,000 yen for him, which Captain Plant did (R 157). At a continuation of the investigation, on the same morning (18 February 1950) the accused produced 60,000 yen and stated that it had been in the safe on the previous day, but that he could not find it (R 101,102). The yen produced by the accused at that time, however, was not the same currency that had previously been in the safe. No yen was turned over to the accused in his official capacity after 16 February 1950 (R 41,42). The sum of 60,000 yen represents a value in excess of \$169.00 (R 157,165).

On the evening of 16 February 1950, the date on which the division of contraband property by the accused occurred, Sergeant Hunter reported what had transpired to Sergeant Johnny P. Turner, a member of the Corps

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of Military Police, who then went with him to the office of the accused, which was unoccupied, the accused having left for the day. There they found in the wastepaper basket, in a torn condition, the memorandum and the receipt referring to the items listed in Specification 1, Charge I (R 36,73-75).

In the latter part of the month of November 1949 the accused approached his driver, Corporal Robert E. Carson, and inquired whether he could dispose of cigarettes in exchange for yen. Carson replied that he would try. Pursuant to this conversation Carson disposed of cigarettes for the accused on two occasions by selling them to Japanese nationals at 1000 yen per carton. These cigarettes had been purchased from the Post Exchange. The first occasion was in the latter part of November, and the second in the early part of December. At least two cartons of cigarettes were involved in each transaction. The money was turned over to the accused (R 86,88, 89; p.6, Pros Ex 26). Paragraph 16a, Circular 23, General Headquarters, Supreme Commander for the Allied Powers, 13 September 1949, prohibits the acquisition of yen by sale, barter, or exchange of goods "with indigenous personnel, or with other Allied or United States personnel."

After being informed of his rights under Article of War 24 by Captain Irven S. Brown, of the 51st CID (R 149), and having previously admitted that he understood those rights, the accused, on 20 February 1950, made a statement substantially admitting all of the offenses charged with the exception of the destruction of official records. This statement was read and signed by him on the following day (R 98,119,149,156; Pros Ex 26).

b. For the defense.

The accused, at his own request, took the stand for the limited purpose of testifying concerning the voluntary nature of his statement (R 147). At the time this statement was taken he was confused, due to domestic difficulties which had arisen as a result of the investigation (R 148). He had no counsel, did not know whether to make a statement, and "would like to ask somebody," and "would like to have some counsel, or get some counsel from the JA Section, or someone who could advise me, and they said 'we cannot advise you'" (R 148). He was influenced in making his statement by Captain Brown's (one of the investigators) suggestions that "in the confused mental condition you are in now if you can think about just one thing at a time you would feel much better," and that "it would make you feel much better if you would get it off your mind and you could concentrate on holding your family together" (R 148). Being unable to obtain further advice, and as a result of these suggestions, he made a statement (R 149). He had been questioned "about 8 times" before the date on which he made his statement (R 149). The accused admitted that no physical force was used, nor was any threatened. He was not confined, deprived of any privilege or necessity, nor promised any immunity, clemency, reward,

or benefit, except that "by telling the truth it would * * * be in my favor, the fact I was telling the truth, and somebody would recognize that" (R 99,150). He was not told, however, what would happen if he made a truthful statement (R 151). Although he had been in the Corps of Military Police "as a Corps" since "a year ago last September" (approximately one year and seven months) he had never had occasion to use Article of War 24 "except the time it applied to myself." He understood, however, at the time he made his statement, that he could not be compelled to do so (R 151,152).

The accused, after being warned of his rights as a witness elected to remain silent (R 166,167).

4. Discussion.

The accused is charged, in each of the two Specifications under Charge I, with stealing certain articles, the property of the United States, of a value in excess of \$50.00.

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

The evidence in support of Specification 1, Charge I, affirmatively shows a conversion by the accused of the articles enumerated in that specification through breach of trust, with intent to deprive the owner permanently of its property therein. Circular 23, General Headquarters, Supreme Commander for the Allied Powers, 7 July 1948, provides in paragraph 1b that title to articles seized as contraband vests in the Contraband Property Administrator for the benefit of the Allied Powers. The United States being one of those Allied Powers, therefore, has a special property in the articles which supports the allegation of ownership (CM 335738, Carpenter, 2 BR-JC 245,261).

As to the 60,000 yen alleged in Specification 2, Charge I, to have been feloniously stolen by the accused, it was shown that the money came lawfully into his possession, that he had from time to time used portions of it, and that at the time of the investigation on 17 February 1950, he neither produced nor accounted for any amount of yen. Such a failure to account constituted a breach of his fiduciary obligation, a breach of trust, and was prima facie proof of embezzlement, and properly charged as stealing in violation of Article of War 93 (CM 336350, Hoover, 3 BR-JC 39,47). The fact that on the following day he replaced the money is no defense (CM 323764, Mangum, 72 BR 397,403).

Aside from certain admissions contained in the pretrial statement of the accused, the evidence in support of Specification 1, Charge II, is circumstantial. Before a finding of guilty may be based upon such evidence alone, it is required that the evidence be of a nature excluding any reasonable hypothesis except that of guilt (CM 336675, Friedland, 3 BR-JC 185, 194). Here it was shown that two documents, a property receipt signed by the accused and a memorandum directed to the Deputy Contraband Property Administrator, which were the only records of the articles enumerated in Specification 1, Charge I, were in the possession of the accused, and that after the commission of the offense alleged in that specification those same documents were found, in a torn condition, in his wastepaper basket. These facts permit no other reasonable conclusion than that the documents were destroyed by the accused in order to conceal his crime.

Uncontradicted evidence conclusively proves that the accused, on two occasions, gave his driver, Corporal Carson, at least two cartons of cigarettes, requesting that the latter exchange them for yen, that the cigarettes were sold by Carson to Japanese nationals for 1,000 yen per carton, and the proceeds turned over to the accused. This was in violation of paragraph 16a, Circular 23, General Headquarters, Supreme Commander for the Allied Powers, dated 13 September 1949. The accused thus, in soliciting Carson to commit a crime, also made himself an accessory before the fact, and chargeable as a principal (CM 313453, Hughes, 63 BR 81,87).

The defense contended that the pretrial statement of the accused, amounting to a confession of all but one of the offenses charged, was improperly admitted because it was involuntarily given. The accused, was, however, warned of his rights under Article of War 24, and knew that he could not be compelled to make a statement. Furthermore, in view of his past experience in the Corps of Military Police it appears likely that he was familiar with Article of War 24 independently of this warning. No promise of reward or benefit was made to him. Neither an admonition to tell the truth nor a representation to the accused that if he makes a statement he will "feel much better" renders a statement involuntary (CM 325492, Mosely, 74 BR 263,269; CM 330208, Inman and Wangelin, 78 BR 295, 308). It is the opinion of the Board of Review that the pretrial statement of the accused was voluntary and, therefore, admissible.

The reviewing authority designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement. Paragraph 87b, Manual for Courts-Martial, 1949, provides on page 97:

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

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

5. Consideration has been given to representations by the accused and for and on his behalf by his counsel, Mr. Daniel L. O'Donnell, to letters addressed to members of Congress and referred for consideration, and to letters addressed to The Judge Advocate General.

6. The records of the Department of the Army show that the accused is 44 years of age and married. He was graduated from Boston English High School in 1926, and from New Bedford Textile Institute in 1929. He thereafter attended Massachusetts Institute of Technology and Boston University for one year each. In civilian life he did general work in knitting and textile mills, and worked as a textile engineer and as chief investigator for the Massachusetts Milk Control Board. He was also employed in merchandising and advertising for a short time. He was appointed Second Lieutenant in the Army of the United States on 20 October 1931, and served for one year with the Civilian Conservation Corps. He was reappointed Second Lieutenant on 2 September 1936, and was promoted to First Lieutenant on 13 November 1936, to Captain on 18 November 1941, and to Major on 18 May 1944. He served overseas in Wales from 16 December 1944 to 20 July 1945, and is entitled to wear the European, African, Middle Eastern Theater Ribbon, the American Theater Ribbon, and the American Defense Medal. His efficiency ratings prior to the offense charged have been seven of excellent, two of superior, three of very satisfactory, and numerical ratings of 119 and 63.

7. The court was legally constituted, and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal, total forfeitures after promulgation, and confinement at hard labor for one year is authorized upon conviction of an officer of violations of Articles of War 93 and 96.

C. P. Hill, J.A.G.C.
C. J. Hauch, Jr., J.A.G.C.
C. C. B. B. B. J.A.G.C.

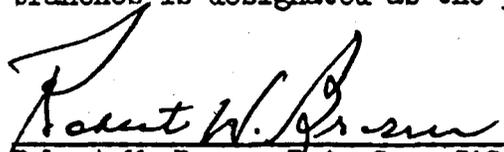
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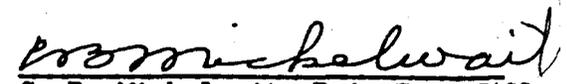
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

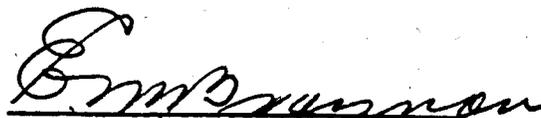
In the foregoing case of Major Gregory F. Meagher,
O-290213, Headquarters 1st Cavalry Division (Infantry),
upon the concurrence of The Judge Advocate General the
sentence is confirmed and will be carried into execution.
The United States Disciplinary Barracks or one of its
branches is designated as the place of confinement.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

I concur in the foregoing action.


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

21 September 1950

(GCMO 70, Oct 13, 1950).

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

SP CM 2064

MAY 8 1950

U N I T E D S T A T E S	)	YOKOHAMA COMMAND
)	
v.	)	Trial by Sp.C.M., convened at
	)	APO 503, 30 March 1950. Bad con-
Private JOHN EDMUND BABINEAU	)	duct discharge (suspended), for-
(RA 14271151), Detachment A,	)	feiture of \$50.00 pay per month
8031st Regional Post Engineer	)	for six (6) months, and confine-
Service Unit, APO 503.	)	ment for six (6) months. Stockade.

HOLDING 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, and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

2. The specification alleges that the accused was absent without proper leave from his organization from about 12 January 1950 to about 19 March 1950. The only evidence tending to prove the offense as alleged consists of extract copies of morning reports purporting to establish the initial absence and the return to military control, respectively. The only question requiring consideration is whether these extracts have any value as evidence to support the finding of guilty and the sentence. They read as follows:

"Babineau John E Dy to AWOL 0615	RA14271151	Pvt
/s/ Joseph A Fontana 1st Lt		/t/ JOSEPH A FONTANA CE"
		(Pros Ex 1)
"Babineau John E AWOL to conf hands P M Metropolitan Tokyo APO 500 1510	RA14271151	Pvt
/s/ Dan S. Leasure CAPT		/t/ DAN S LEASURE CE"
		(Pros Ex 2)

The authenticating certificates on the extract copies are dated 12 January 1950 and 19 March 1950 which are the dates, respectively, that the accused was alleged to have absented himself without leave and returned to duty.

3. The extract copies of the morning reports are defective in that, although they show the accused from duty to absent without leave and from absent without leave to confinement, they fail to show the dates upon which the changes of status occurred (CM 325518, Alberto and Sielky, 74 BR 281,283). The missing information is not supplied by the dates on the certificates for the reason that "a mere authenticating certificate 'is obviously not in itself a public document of record and thus the facts stated in such certificate have only the force and effect for which they were intended, that is, authentication.' In other words, the authenticating certificate of the official custodian is competent to show that the extracted matter is a true and complete copy of matters recorded in the original documents and no more" (CM 328542, Jeffries, 77 BR 123,127, citing CM 318685, Sustaite, 67 BR 389). The Alberto case, supra, quotes with approval the following language of the Board of Review in CM 9204, Simmers, ETO 9 June 1945:

"While it might be possible in this case to say that the officer who prepared the document simply misinterpreted the forms and that the date 3 October 1944 refers to the date when accused initially absented himself rather than to the date of certification; so to interpret the document would involve recourse to mere conjecture, violate accepted principles of construction and open the door to possibilities of grave error. It is concluded that the extract copy of the morning report here introduced has no probative value as showing the date of accused's initial absence." (CM 325518, Alberto and Sielky, 74 BR 283).

Since no other evidence was adduced as to the alleged absence without leave of the accused, there is no proof that he committed the offense of which he was found guilty.

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

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

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

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

MAY 15 1950

JAGH SP CM 2064

1st Ind

JAGO, Department of the Army, Washington 25, D.C. *5/15*TO: Commanding Officer, Yokohama Command, APO 503, c/o Postmaster,
San Francisco, California

1. In the case of Private John Edmund Babineau (RA 14271151), Detachment A, 8031st Regional Post Engineer Service Unit, 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 a rehearing. Should you determine so to do, a statement to that effect should be added to the special court-martial order, when issued.

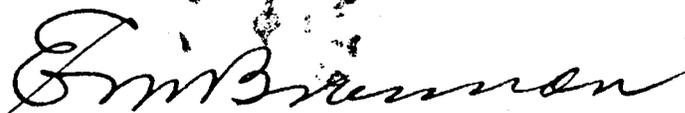
3. When copies of the published order in the case are forwarded to this office, together with the record of trial, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference, please place the file number of the record in brackets at the end of the published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

(SP CM 2064).

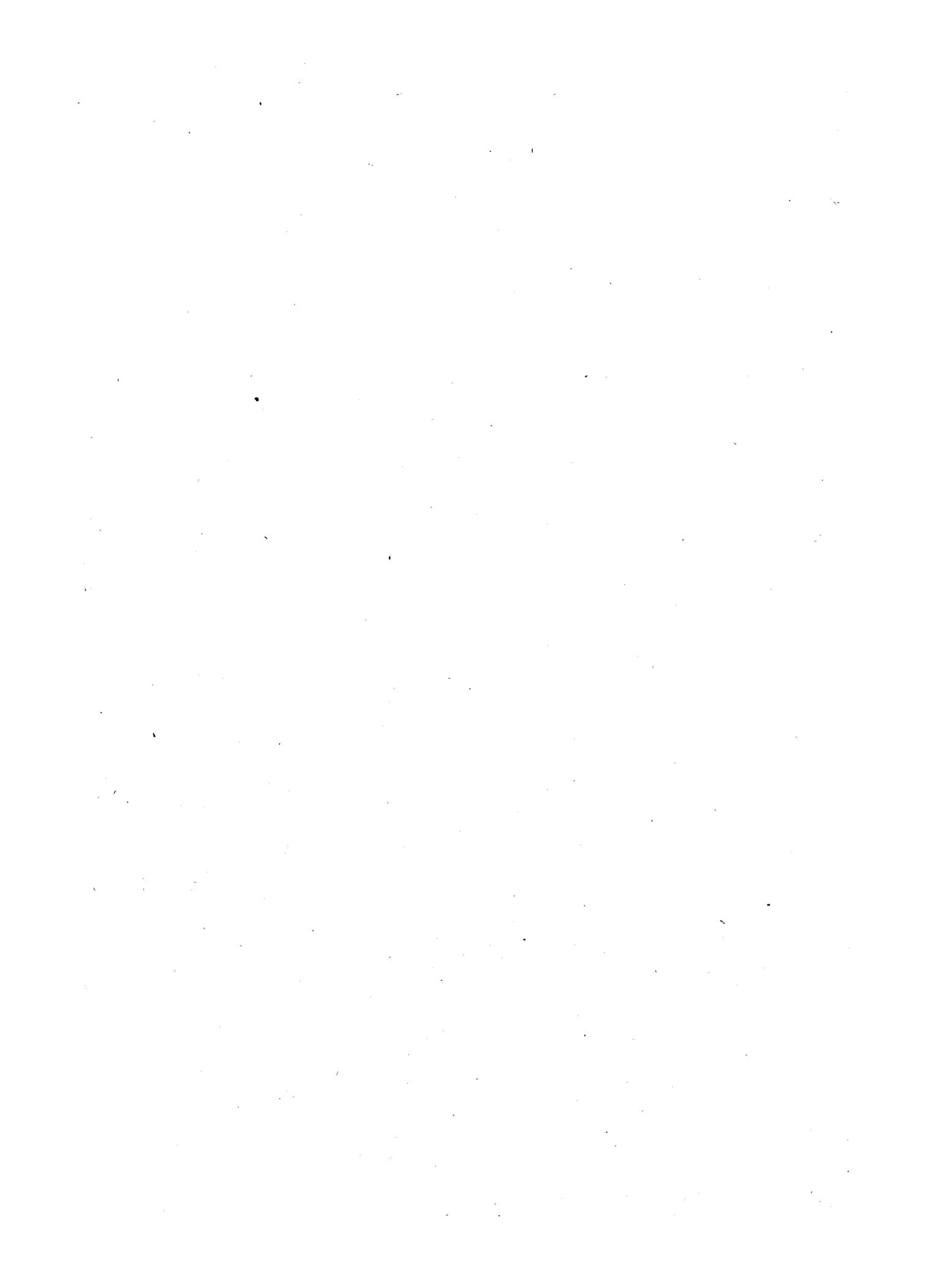
2 Incls

1 Record of trial

2 Draft SPCMO



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



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

JAGN-SpCM 2132

29 MAY 1950

UNITED STATES)

25TH INFANTRY DIVISION

v.)

Trial by Sp.C.M., convened at Camp
Otsu, Honshu, Japan, 10 March 1950.

Private ROBERT E. CONLEY
 (RA 16249799), Private
 First Class HERBERT W.
 SWOOPE (RA 13213556) and
 Private GEORGE J. LUSCOMBE
 (RA 16308663), all of
 Medical Company, 35th
 Infantry Regiment, APO 25,
 Unit 3.

CONLEY: Bad conduct discharge, for-
 feiture of \$50 pay per month for six
 (6) months and confinement for six
 (6) months. Eighth Army Stockade.
 SWOOPE: Forfeiture of \$30 pay per
 month for six (6) months and confine-
 ment for six (6) months. Division
 Stockade. LUSCOMBE: Forfeiture of
 \$50 pay per month for six (6) months
 and confinement for six (6) months.
 Division Stockade.

HOLDING by the BOARD OF REVIEW
 YOUNG, LUDINGTON and GRABB

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 above named and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50e.

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

CHARGE: Violation of 96th Article of War.

Specification: In that Private First Class Herbert W Swoope, Medical Company, 35th Infantry Regiment, Private Robert E Conley, Medical Company, 35th Infantry Regiment, and Private George J Luscombe, Medical Company, 35th Infantry Regiment, acting jointly and in pursuance of a common intent, did, at Kitahama, Imazu, Takashima-gun, Honshu, Japan, on or about 3 January 1950, with intent to deprive the owner temporarily of his property and without the consent of the owner take and use a certain boat, value of about \$111.00, property of Fukutaro Suzuki.

The accused pleaded not guilty to and were found guilty of the Charge and its Specification. Evidence of one previous conviction by summary court-martial, dated 11 February 1949 was introduced as to accused Conley. Accused Conley was sentenced to be discharged from the service with a bad conduct discharge, to forfeit \$50.00 of his 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, 25th Infantry Division, approved the sentence, designated the Eighth Army Stockade as the place of confinement and forwarded the record of trial for action under Article of War 50g.

3. The record of trial is not legally sufficient to support the findings of guilty of the Specification and the Charge. The only question requiring consideration is whether the specification states a criminal offense.

4. The specification alleges and, by its finding of guilty, the court found that the accused did "take and use" a certain boat "with the intent to deprive the owner temporarily of his property and without consent of the owner" in violation of Article of War 96. There is no allegation that the taking and using was, in itself, wrongful, unlawful or without proper authority.

In CM 316886, Chaffin (66 BR 97, 100) the Board of Review said:

"Where an act or acts alleged in the specification, as finally approved by the reviewing authority, is not per se an offense, words (of criminality) must be used and remain in the specification to make the act or acts alleged an offense. Ordinarily, such words as 'wrongfully', 'unlawfully' or 'without authority' are therefor employed."

and in the case of CM 319573, O'Brien (68 BR 382), the Board of Review said:

"It is a fundamental principle of law that the Government's pleading in a criminal case, be it an indictment, complaint or a specification in court-martial proceedings, must charge a violation of law. If it does not do so a finding of guilty under such a defective pleading will be of no legal effect whatsoever no matter what crime or crimes the evidence may show accused has committed."

Again, in the case of CM 325541, Morgan (75 BR 416), the Board of Review stated in part:

"* * * it is not sufficient that a criminal pleading may or may not state an offense, according to whatever interpretation the beholder may choose to place upon it. It must, in order legally to support a conviction of crime, unfailingly and unequivocally set forth an offense, without regard to whatever proof may appear in the record, and cannot, in any manner, be open to an interpretation that it may decri acts which are not subject to a criminal penalty." (emphasis supplied)

Upon mature consideration of the specification it will be seen that these accused could have lawfully taken and used the described boat without consent of the owner and with the intent to deprive said owner thereof temporarily of his property. A lawful taking and using under such conditions could occur under any number of circumstances, such as, these accused could have been ordered to confiscate the boat, or take it temporarily for the use of military authorities or had found it abandoned. It is obvious that the specification as drawn merely states, at the most, a simple, civil trespass.

Paragraph 29a, page 22, Manual for Courts-Martial, 1949, states specifically:

"If the alleged acts of the accused are not in themselves criminal or contrary to the custom of the service but are made an offense by statute (including Articles 95 and 96) or regulations, words importing criminality such as 'wrongfully', 'unlawfully', 'without authority', 'dishonorably' or 'feloniously', depending upon the nature of the particular offense involved, should be used to describe the accused's acts. To a reasonable extent matters of aggravation may be recited." (emphasis supplied)

In construing paragraph 29a, Manual for Courts-Martial, 1949, supra, the Board of Review has specifically held in a long line of decisions:

"The Specification on which the accused was arraigned and tried does not set forth any offense, nor a violation of any law, or Articles of War, nor does it allege in any manner that the dive was unlawful, wrongful, improper, or unauthorized. It may have been proper and necessary." (CM 221993, Baker, 13 BR 259, 260)

"* * * where an act charged is not per se an offense, words such as 'wrongful', 'unlawful' or the like must be used in the Specification to make it an offense (CM 113535 and 130811, Dig. Ops. JAG 1912-40, sec. 451 (8); CM 218409, 1 Bull. JAG 18; CM 226512, 2 Bull. JAG 17)." (CM 254704, Thompson, 35 BR 329, 339)

And in CM 325107, Shatzer, 74 BR 83, 85, the Board of Review in citing the Thompson case, supra, with approval stated:

"Manifestly, the specification contains no other words importing wrongdoing. Lacking the requisite language to charge an act 'per se' an offense, and similarly lacking an allegation that the conduct was wrongful or unlawful, no offense was charged and the proof may not supply the legal deficiency."

The acts of the accused as alleged in the specification, i.e. "take and use" do not, per se, constitute a criminal offense, as do the acts of "steal", "rob" or "forge". The phrases "with the intent to deprive the owner temporarily of his property and without consent of the owner", are merely "matters of aggravation" and as such do not constitute the offense. It is clear that since the acts "take and use" do not import any criminality, then such acts to constitute a criminal offense must be alleged as having been done wrongfully or unlawfully or without proper authority. It is therefore apparent that the specification as drawn in these case does not "exclude every reasonable hypothesis of innocence * * * which may be regarded as the settled law of this office as it is the settled law of the land" (CM 187548, Burke, 1 BR 55, 56; Harris vs. U.S., 104 Fed (2d) 41; Pullan vs. U.S., 164 Fed (2d) 756).

In the recent case of SpCM 765, Mason, the Board of Review said:

"It is well settled that every specification, in order to support a finding of guilty of a crime, must set forth an offense and that where the act or acts alleged in the specification do not describe an offense, per se, words of criminality must be used such as 'wrongfully', 'unlawfully' or 'without authority.' * * * In the instant case, the alleged possession and use of the pass are not accompanied by words descriptive of criminality nor by words from which criminality may be 'reasonably implied' (see par 87b, p 92, MCM, 1949). There is no allegation that the possession or use was wrongful, unlawful or unauthorized, or that there was any intent to defraud or deceive. The imagination need not be greatly taxed in order to discover situations in which the acts alleged would not be criminal."

The Board is compelled to conclude that in the absence of words importing an act of criminality, as in the case here, the finding of guilty as to the Specification of the Charge may not be sustained irrespective of the proof offered (VI Bull. JAG 177; CM 318596, Volante, 67 HR 363, 364).

5. For the foregoing reasons, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of the Specification and of the Charge and the sentence as to accused Robert E. Conley.

Chas. C. Young, J.A.G.C.
W. H. [unclear], J.A.G.C.
W. H. [unclear], J.A.G.C.

(268)

JAGG SP CM 2132

1st Ind

JAGO, SS USA, Washington 25, D. C.

15 June 1950

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

In the foregoing case of Private Robert E. Conley, RA 16249799, Private First Class Herbert W. Swoope, RA 13213556, and Private George J. Luscombe, RA 16308663, all of Medical Company, 35th Infantry Regiment, APO 25, Unit 3, The Judge Advocate General has withheld his concurrence in the holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence as to the accused Robert E. Conley. 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.



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.

JAGU Sp CM 2132

26 July 1950

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

25th INFANTRY DIVISION

v.)

) Trial by Sp. C. M., convened at
) Camp Otsu, Honshu, Japan, 10
) March 1950. Bad conduct discharge,
) forfeiture of \$50.00 pay per month
) for six months and confinement for
) six months. Eighth Army Stockade

) Private ROBERT E. CONLEY,
) RA 16249799, Medical Company,
) 35th Infantry Regiment, APO
) 25, Unit 3

- - - - -
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 soldier named above have been transmitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

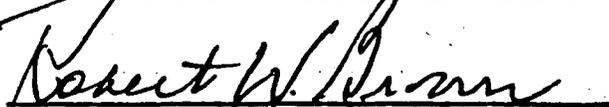
2. Upon trial by special court-martial the accused pleaded not guilty to and was found guilty, jointly with Private First Class Herbert W. Swoope and Private George J. Luscombe, both of the accused's organization, of taking and using a certain boat of the value of about \$111.00, property of Fukutaro Suzuki, with intent to deprive the owner temporarily of his property and without his consent, at Kitahama, Imazu, Takashima-gun, Honshu, Japan, on or about 3 January 1950, in violation of Article of War 96. Evidence of one previous conviction by special court-martial was introduced. He was sentenced to be discharged the service with a bad conduct discharge, to forfeit \$50.00 of his pay per month for six months and to be confined at hard labor for six months. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47d. The officer exercising general court-martial jurisdiction approved the sentence, designated the Eighth Army Stockade as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50e.

The Board of Review has held the record of trial legally insufficient to support the findings of guilty and the sentence. The Judge Advocate General has withheld his concurrence in the holding by the Board of Review and transmitted the same with the record of trial to the Judicial Council for appropriate action.

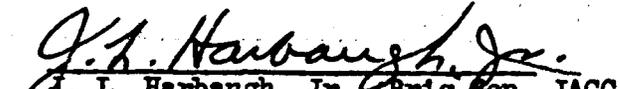
3. The Judicial Council is of the opinion that the evidence establishes all of the allegations of the specification. The only question, as in the case of Sp CM 2293, Connolly, decided this day by the Judicial Council, is whether the omission of the words "wrongfully," "unlawfully," or "without authority" from the specification is fatal to its sufficiency to allege an offense.

4. It was determined in the Connolly case that the omission of such words was not fatal to the validity of the specification, which involved taking and using a Government vehicle. The only material difference between that case and this is that the instant specification involves a private owner. The essential distinctive element of the offense of wrongful appropriation of the property of another is the want of consent of the owner (See CM 318430, Turgeon et al, 67 BR 295, referring to D. C. Code (Sec 22-2204), which denounces taking and using an automobile or motor vehicle without the owner's consent). The element of want of consent of the owner is expressly alleged in the specification under consideration. Proof of the facts alleged would establish the offense prima facie (See MCM 1949, par 180g, pages 240-241). As pointed out in the opinion in the Connolly case, the specification need not negate every conceivable theory which might invalidate it. The instances in which the taking and using alleged would be justified are rare enough to make it fair to require the accused to prove them without requiring the pleader expressly to negate them. As in the Connolly case the accused was adequately apprised of the offense against which he was required to defend. The Judicial Council is therefore of the opinion that the specification adequately alleges the offense of wrongful appropriation of the property of another, in violation of Article of War 96.

5. 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. In view of all the circumstances of the case, however, including the accused's youth (twenty years of age) and the relatively minor nature of his offense, the Judicial Council suggests that consideration be given to the suspension of the execution of that portion of the sentence adjudging bad conduct discharge until the accused's release from 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

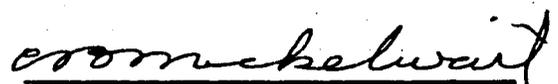
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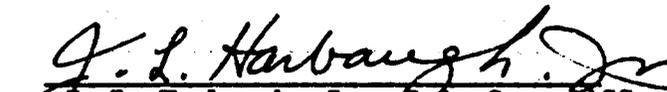
THE JUDICIAL COUNCIL

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

In the foregoing case of Private Robert E. Conley,
RA 16249799, Medical Company, 35th Infantry Regiment, APO
25, Unit 3, upon the concurrence of The Judge Advocate General
the sentence is confirmed and will be carried into execution.
An appropriate guardhouse is designated as the place of
confinement.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

26 July 1950

I concur in the foregoing action.


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

4 August 1950

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

JAGN-SpCM 2203

8 JUN 1950

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

ZONE COMMAND AUSTRIA

v.)

Recruits ALLYN D. HERRIED)
(RA 16284422) and ROBERT H.)
WOLFF (RA 12302659), both)
of A Company, 4th Reconnaissance)
Battalion, APO 174.)

Trial by Sp.C.M., convened at Camp
McCauley, Linz, Austria, 25 April
1950. BOTH: Bad conduct discharge
forfeiture of \$50 pay per month for
six (6) months and confinement for
six (6) months. Disciplinary
Barracks.

HOLDING BY THE BOARD OF REVIEW
YOUNG, LUDINGTON and GRABB
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 above named and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50g.

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Recruit Robert H. Wolff, A Company 4th Reconnaissance Battalion, and Recruit Allyn D Herried A Company 4th Reconnaissance Battalion, acting jointly, and in pursuance of a common intent, did, at Leonding, Austria, on or about 13 April 1950, with intent to deprive the owner temporarily of his property take and use a certain motor vehicle, one quarter (1/4) ton truck, license #C-2819, value of over \$50.00, property of Private Harold E Backer, 544 Quartermaster Company U S Army.

The accused pleaded not guilty to and were found guilty of the Charge and its Specification. Evidence of four previous convictions by summary and special courts-martial were introduced as to accused Herried and six

previous convictions by summary courts-martial were introduced as to accused Wolff. Both accused were sentenced to be discharged from the service with a bad conduct discharge, to forfeit \$50.00 per month for six months and to be confined at hard labor for a period of six months. The convening authority approved the sentences and forwarded the record of trial for action under Article of War 47d. The officer exercising general court-martial jurisdiction, the Commanding General, Zone Command Austria, approved both sentences and forwarded the record of trial for action under Article of War 50e.

3. The record of trial is not legally sufficient to support the findings of guilty of the Specification and the Charge. The only question requiring consideration is whether the specification states a criminal offense.

4. The specification alleges, and by its finding of guilty, the court found that the accused did "take and use" a certain motor vehicle "with intent to deprive the owner temporarily of his property" in violation of Article of War 96. There is no allegation that the acts of the accused were done wrongfully, unlawfully or without proper authority. In the case of CM 319573, O'Erien (68 BR 382) the Board of Review said:

"It is a fundamental principle of law that the Government's pleading in a criminal case, be it an indictment, complaint or a specification in court-martial proceedings, must charge a violation of law. If it does not do so a finding of guilty under such a defective pleading will be of no legal effect whatsoever no matter what crime or crimes the evidence may show accused has committed."

Paragraph 29a, page 22, Manual for Courts-Martial, 1949, succinctly states:

"If the alleged acts of the accused are not in themselves criminal or contrary to the custom of the service but are made an offense by statute (including Articles 95 and 96) or regulations, words importing criminality such as 'wrongfully', 'unlawfully', 'without authority', 'dishonorably' or 'feloniously', depending upon the nature of the particular offense involved, should be used to describe the accused's acts. To a reasonable extent matters of aggravation may be recited." (emphasis supplied)

In construing paragraph 29a, Manual for Courts-Martial, 1949, supra, the Board of Review has specifically held in a long line of decisions:

"The Specification on which the accused was arraigned and tried does not set forth any offense, nor a violation of any law, or Article of War, nor does it allege in any manner that the dive was unlawful, wrongful, improper, or unauthorized. It may have been proper and necessary." (CM 221993, Baker, 13 BR 259, 260)

"* * * where an act charged is not per se an offense, words such as 'wrongful', 'unlawful' or the like must be used in the Specification to make it an offense (CM 113535 and 130811, Dig. Ops. JAG 1912-40, sec. 451 (8); CM 213409, 1 Bull. JAG 18; CM 226512, 2 Bull. JAG 17)." (CM 254704, Thompson, 35 ER 329339)

And in CM 325107, Shatzer, 74 ER 83, 85, the Board of Review in citing the Thompson case, supra, with approval stated:

"Manifestly, the specification contains no other words importing wrongdoing. Lacking the requisite language to charge an act 'per se' an offense, and similarly lacking an allegation that the conduct was wrongful or unlawful, no offense was charged and the proof may not supply the legal deficiency."

Upon mature consideration of the specification it will be seen that these accused could have lawfully taken and used the described motor vehicle with the intent to deprive the owner temporarily of the use of his property. A lawful taking and using could occur if the accused had been ordered to replevin the vehicle, impound it for some traffic violation or confiscate it. It is obvious that the specification as drawn merely states a simple, civil trespass.

The acts of the accused as set out in the specification, i.e. "take and use" do not, per se, constitute a criminal offense, as do the acts of "steal", "rob" or "forge". The phrase "with the intent to deprive the owner temporarily of his property" does not lend criminality to the words "take and use". It is clear that since the acts of the accused as expressed by the words "take and use" do not import any criminality, then such acts must be described as having been done "wrongfully", "unlawfully" or "without proper authority" in order to allege a criminal offense. It is therefore apparent that the specification as drawn in this case does not "exclude every reasonable hypothesis of innocence * * * which may be regarded as the settled law of this office as it is the settled law of the land" (CM 187548, Burke, 1 ER 55, 56; Harris vs. U.S., 104 Fed(2d) 41; Pullan vs. U.S., 164 Fed(2d) 756).

In the recent case of SpCM 765, Mason, the Board of Review said:

"It is well settled that every specification, in order to support a finding of guilty of a crime, must set forth an offense and that where the act or acts alleged in the specification do not describe an offense, per se, words of

criminality must be used such as 'wrongfully', 'unlawfully' or 'without authority' * * * In the instant case, the alleged possession and use of the pass are not accompanied by words descriptive of criminality nor by words from which criminality may be 'reasonably implied' (see par 87b, p 92, MCM, 1949). There is no allegation that the possession or use was wrongful, unlawful or unauthorized, or that there was any intent to defraud or deceive. The imagination need not be greatly taxed in order to discover situations in which the acts alleged would not be criminal."

The Board is compelled to conclude that in the absence of words importing an act of criminality, as in the case here, the finding of guilty as to the Specification of the Charge may not be sustained, irrespective of the proof offered (VI Bull. JAG 177; CM 318596, Volante, 67 ER 363, 364).

5. For the foregoing reasons, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of the Specification and of the Charge and the sentence as to both accused.

Chas. E. Jensen, J.A.G.C.
W. H. L. L. L., J.A.G.C.
P. G. G. G., J.A.G.C.

(277)

JAGG SP CM 2203

1st Ind

JAGO, SS USA, Washington 25, D. C.

15 June 1950

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

In the foregoing case of Recruits Allyn D. Herried, RA 16284422, and Robert H. Wolfe, RA 12302659, both of A Company, 4th Reconnaissance Battalion, APO 174, The Judge Advocate General has withheld his concurrence in the holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence as to both accused. 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.



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

1 Incl
Record of Trial



(278)

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

26 JUL 1950

JAGU Sp CM 2203

UNITED STATES)

ZONE COMMAND AUSTRIA

v.)

Recruits ALLYN D. HERRIED,
RA 16284422, and ROBERT H.
WOLFF, RA 12302659, both
of A Company, 4th Reconnaissance
Battalion, APO 174)

Trial by Sp. C. M., convened
at Camp McCauley, Linz, Austria,
25 April 1950. BOTH: Bad
conduct discharge, forfeiture
of \$50 pay per month for six
months and confinement for
six months. 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 joint trial by special court-martial the accused pleaded not guilty to and were found guilty of jointly taking and using a one-quarter ton truck of the value of over \$50.00, property of Private Harold E. Backer, with intent to deprive the owner temporarily of his property, at Leonding, Austria, on or about 13 April 1950, in violation of Article of War 96. Evidence of four previous convictions, two by special court-martial and two by summary court-martial, was introduced as to the accused Herried, and evidence of six previous convictions by summary court-martial was introduced as to the accused Wolff. Each accused was sentenced to be discharged from the service with a bad conduct discharge, to forfeit \$50.00 pay per month for six months and to be confined at hard labor for six months. The convening authority approved the sentences and forwarded the record of trial for action under Article of War 47d. The officer exercising general court-martial jurisdiction approved the sentences, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50e.

The Board of Review has held the record of trial legally insufficient to support the findings of guilty and the sentence as to each accused. The Judge Advocate General has withheld his concurrence in the holding

by the Board of Review and transmitted the same with the record of trial to the Judicial Council for appropriate action.

3. The Judicial Council is of the opinion that the evidence establishes all the allegations of the specification. The only question is whether the specification states an offense.

4. The specification alleges the taking and using of the vehicle with intent to deprive the owner temporarily of its use. No allegation appears that the taking and using were done without the owner's consent or "wrongfully," "unlawfully," or "without authority." The omission of an allegation negating the owner's consent distinguishes the specification from those in Sp CM 2293, Connolly, and Sp CM 2132, Conley, both decided this day by the Judicial Council. It was determined in those cases that allegations both of the intent alleged herein and of want of consent of the owner sufficiently characterized the taking and using as wrongful and adequately apprised the accused of the offense charged. As pointed out in the opinion in the Conley case, the essential distinctive element of the offense sought to be alleged is the want of consent of the owner (CM 318430, Turgeon et al, 67 BR 295). Failure to negate such consent, therefore, is fatal to the sufficiency of the specification.

Nor is such deficiency supplied by the allegation of an intent to deprive the owner temporarily of his property. The word "deprive" is thus defined: "To take. The term * * * denotes a taking altogether, a seizure, a direct appropriation, dispossession of the owner. * * * It connotes want of consent" (Black's Law Dictionary (3d Ed), p 561). An allegation of intent to take property without the owner's consent, however, is not tantamount to an allegation of actual want of consent of the owner, nor may such want of consent necessarily be inferred merely from the allegation of improper intent. For all the specification alleges, the owner might fully have consented to the taking and using, irrespective of the state of mind of the taker and user. The Judicial Council is therefore of the opinion that the specification fails to allege an offense (MCM 1949, par 29a, p 22; see CM 325541, Morgan, 75 BR 409, 415-416, and cases cited).

5. For the reasons stated, the Judicial Council is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence as to each accused.

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

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

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

(280)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

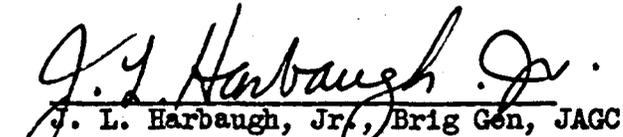
THE JUDICIAL COUNCIL

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

In the foregoing case of Recruits Allyn D. Herried,
RA 16284422, and Robert H. Wolff, RA 12302659, both of
A Company, 4th Reconnaissance Battalion, upon the
concurrence of The Judge Advocate General, the findings
of guilty and the sentence as to each accused are
disapproved.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

26 July 1950

I concur in the foregoing action.


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

3 August 1950

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

(281)

JAGQ - SPCM 2236

MAY 29 1950

UNITED STATES)

1ST INFANTRY DIVISION

v.)

Private MACK SMITH (RA
37066953), Battery A,
48th Antiaircraft Ar-
tillery Automatic
Weapons Battalion.)

Trial by SPCM, convened at
Grafenwohr, Germany, 29 April
1950. To be reduced to lowest
enlisted grade, bad conduct
discharge, forfeiture \$60 per
month for six (6) months and
confinement for six (6)
months. 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 soldier named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50e.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Mack Smith, Battery A, 48th Antiaircraft Artillery Automatic Weapons Battalion, did, at Gerszewski Barracks, Knielingen, Germany, on or about 2 April 1950, feloniously steal a wallet value about \$2.60 the property of Pfc Gerald E. Ambeau.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction was introduced. He was sentenced to be reduced to the lowest enlisted grade, to be discharged from the service with a bad conduct discharge, to forfeit sixty dollars pay per month for six months and to be confined at hard labor at such place as proper authority may direct for six months. The convening authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 47d. The reviewing authority approved only so much of the finding of guilty of the specification with respect to value as found "some value", approved the sentence, 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 50e.

3. The only question requiring consideration is the effect of the accuser's acting as defense counsel.

4. The record of trial shows that the charge was preferred by First Lieutenant W. E. Hewes and acknowledged 20 April 1950 (R 7). The charge sheet shows that the charge was served on the accused on 20 April 1950. First Lieutenant William E. Hewes was detailed 6 March 1950 as assistant defense counsel of the court which tried the accused on the charge (R 1) and was the only member of the defense staff regularly detailed to the court who was present at the trial (R 2). The record further shows that, upon being "asked by the trial judge advocate by whom he desired to be defended. The accused stated that he desired to be defended by the regularly appointed assistant defense counsel" and the defense counsel stated that the accused waived the presence of the regularly appointed defense counsel (R 2-3). The trial judge advocate subsequently announced "that the charges were preferred by 1st Lt WILLIAM E. HEWES" (R 4).

5. It thus appears that First Lieutenant William E. Hewes was both accuser (MCM, 1949, par 60) and regularly appointed assistant defense counsel. As the only member of the defense staff present at the trial of accused, in the absence of the regularly appointed defense counsel, he actively participated in accused's defense.

The question involved in this case has previously been decided by the Board of Review in CM 324883, Ewing, 73 BR 383, 385-386. It was stated in that case:

"The matter was considered at length in CM 284066, Mejia, 55 BR 241, 4 Bull JAG 334. In that case the accuser was also the regularly appointed and acting defense counsel. At the commencement of the trial proceedings the attention of the accused was specifically invited to this fact and he replied: 'I still wish Captain Geist to be defense counsel.' The Board of Review considered accused's statement of desire in this respect improvident and held that:

'* * * it is the present purpose of military law to provide an accused not merely with defense counsel but with defense counsel not "disqualified or unable" for any reason "to perform his duties." * * * the law forbids an accuser to purport to defend the man he has accused. For an accuser to serve in such inconsistent capacities is unfair to himself, unfair to the court, and a mockery of the requirement that he must serve the accused with "undivided fidelity" and by all "honorable and legitimate means known to

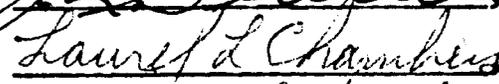
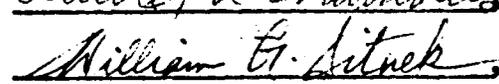
law." Observance of these simple principles compel the conclusion that the record of trial is legally insufficient to sustain the findings of guilty and the sentence.'

* * * * *

"It is to be noted that such a situation was viewed by the Board of Review in * * * the Mejie case as fatal error regardless of the fact that accused was at least partially advised of the situation, and in the Mesquite and Henry cases /CM 316898, Mesquite, 66 BR 107, 5 Bull JAG 332; CM 319176, Henry, 68 BR 181, 6 Bull JAG 58/ as fatal error in the absence of some showing that accused had been advised of the situation, or that he expressed a clear desire to be defended by the officer in question as opposed to a formalized acceptance of such officer when designated as defense counsel by the appointing authority. In this case it does not affirmatively appear from the record of trial * * * that prior to being asked his choice of counsel his attention was invited to the fact that Captain Watson was his accuser. Neither does it appear that accused, in expressing his desires as to defense counsel, did more than accept the regularly appointed assistant defense counsel officially offered to him. We are of the opinion that such a state of facts comes clearly within the rule of law stated in the Mejie case and followed in the Mesquite and Henry cases, and that it constitutes fatal error."

6. Applying the principles above set forth, the Board concludes that it is fatal error for the accuser to act as defense counsel in the absence of an affirmative showing that the accused had been advised of the exact nature of the situation and particularly desired to be defended by the accuser, as opposed to a formalized acceptance of such officer when designated as assistant defense counsel by the appointing authority. Accordingly, it is not considered necessary to resolve the conflicting statements in the record as to whether Lieutenant Hewes was investigating officer (See AW 11, CM 335048, Nelson, 2 BR-JC 7, 10, 8 Bull JAG 4).

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

 JAGC
 JAGC
 JAGC

(284)

JAGQ - SPCM 2236

1st Ind

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

TO: Commanding General, 1st Infantry Division, APO 1,
c/o Postmaster, New York, New York

1. In the case of Private Mack Smith (RA 37066953), Battery A, 48th Antiaircraft Artillery Automatic Weapons Battalion, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under Article of War 50e(3), this holding and my concurrence vacate the findings of guilty and the sentence. A re-hearing 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 2236).


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.

(285)

Board of Review

SP CM 2293

JUN 8 1950

UNITED STATES)

1ST INFANTRY DIVISION

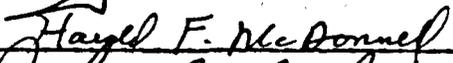
v.

Private EDMUND W. CONNOLLY
(RA 11182676), Head-
quarters Battery,
5th Field Artillery
Battalion.

Trial by SPCM, convened at
Hessental, Germany, 18 April 1950.
Bad Conduct Discharge (suspended),
forfeiture of fifty dollars (\$50.00)
pay per month for six (6) months, and
confinement for six (6) months.
Branch United States Disciplinary
Barracks.

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

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


_____, J.A.G.C.

_____, J.A.G.C.

_____, J.A.G.C.

JAGG SP CM 2293

1st Ind

JAGO, SS USA, Washington 25, D.C.

15 June 1950

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

In the foregoing case of Private Edmund W. Connolly, RA 11182676,
Headquarters Battery, 5th Field Artillery Battalion, The Judge Advocate
General has withheld his concurrence in the holding by the Board of Review

(286)

that the record of trial is legally sufficient to support the findings of guilty and the sentence. Pursuant to Article of War 50e(2) the holding and record of trial are transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.

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.

JAGU Sp CM 2293

26 July 1950

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

1ST INFANTRY DIVISION

v.)

) Trial by Sp. C. M., convened
) at Hesselental, Germany, 18 April
) 1950. Bad conduct discharge
) (suspended), forfeiture of
) \$50.00 pay per month for six
) months and confinement for six
) months. Disciplinary Barracks.

) Private EDMUND W. CONNOLLY,
) RA 11182676, Headquarters
) Battery, 5th Field Artillery
) Battalion

- - - - -
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 taking and using a certain motor vehicle of the value of over \$50.00, property of the United States Government, with intent to deprive the Government temporarily of its property and without the consent of the owner, at Dolan Barracks, Hesselental, Germany, on or about 5 April 1950, in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit \$50.00 pay per month for six months and to be confined at hard labor for six months. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47d. The officer exercising general court-martial jurisdiction approved the sentence and ordered it duly executed, but suspended the execution of that portion thereof adjudging bad conduct discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement. The proceedings were published in Special Orders No 137, Headquarters 1st Infantry Division, 23 May 1950. The Board of Review has held the record of trial legally sufficient to support the findings of guilty and the sentence. The Judge Advocate General has withheld his concurrence in the holding by the Board of Review and transmitted the same with the record of trial to the Judicial Council for appropriate action.

3. The Judicial Council is of the opinion that the evidence establishes all of the allegations of the specification. The only question is whether the specification alleges an offense.

4. The specification follows the form prescribed in Appendix 4, page 333, Manual for Courts-Martial, 1949 (Form 189), as amended by Joint Army and Air Force Bulletin No. 3, 4 February 1949, Section II, except that it does not contain the words "wrongfully," "unlawfully," or "without authority". The question is whether the omission of such words from the specification is fatal to its sufficiency to state an offense.

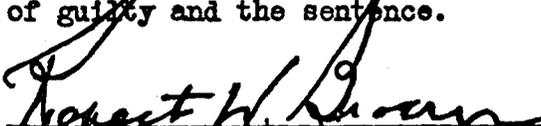
The specification should include a statement in simple and concise language of the facts constituting the offense, which facts will include all its elements. If the alleged acts are not in themselves criminal or contrary to the custom of the service but are made an offense by statute, including Article of War 96, words importing criminality such as "wrongfully," "unlawfully," "without authority," etc., depending upon the nature of the offense, should be used to describe the accused's acts (MCM 1949, par 29a, p 22).

Article of War 37 provides inter alia that the proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case for any error as to any matter of pleading unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error has injuriously affected the substantial rights of the accused, provided that the act upon which the accused has been tried constitutes an offense denounced and made punishable by an article of war. The purpose of Article of War 37 is "that substantial justice may be done" (MCM 1949, par 87b, p 91). No finding or sentence should be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect or that his substantial rights were in fact otherwise injuriously affected thereby (Ibid, p 92).

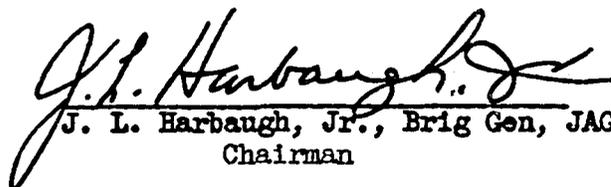
The rules prescribed in the Manual for the drafting of specifications (par 29a, supra) must be read in the light of Article of War 37 and the construction thereof in paragraph 87b of the Manual, supra. The test of the sufficiency of the specification, broadly, is whether it states an offense within the foregoing rules, makes the offense charged clear to the common understanding, and sufficiently apprises the accused of what he must be prepared to meet. The sufficiency of the specification should be determined upon reading it as a whole by practical, as distinguished from technical, considerations (CM 339548, Green, BR-JC, March 1950, and authorities there cited).

The instant specification charges that the accused, with intent to deprive the Government temporarily of its property, and without the consent of the owner, took and used a Government vehicle. Applying the accepted rules of construction, it is apparent that the allegation of want of consent of the Governmental owner is the substantial equivalent of a general allegation of want of authority. The specification, like the civil indictment, need not negate every conceivable theory which might combat the validity of the pleading (See *Pyle v. Johnson* (CCA 9, 1943) 137 F. 2d 869, cert. den. 320 U.S. 793). The accused was adequately apprised of the offense against which he was required to defend (Cf CM 339584, Green, supra). The Judicial Council is therefore of the opinion that the specification adequately alleges the offense of wrongful appropriation of the property of another, in violation of Article of War 96.

5. 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

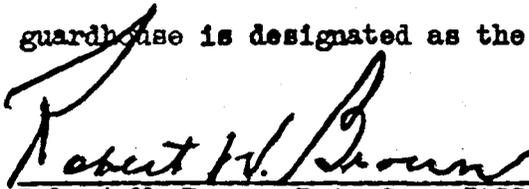
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DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Private Edmund W. Connolly,
RA 1182676, Headquarters Battery, 5th Field Artillery Battalion,
upon the concurrence of The Judge Advocate General the sentence
is confirmed and will be carried into execution. An appropriate
guardhouse is designated as the place of confinement.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

26 July 1950

I concur in the foregoing action.


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

4 August 1950

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

(291)

Board of Review

SpCM 2300

8 JUN 1950

UNITED STATES)

v.)

Private MIKE VINCENT
KRIVACEK (RA 68L2370),
Battery A, 96th Antiair-
craft Artillery Gun
Battalion, Fort Bliss,
Texas.

ANTIAIRCRAFT ARTILLERY AND
GUIDED MISSILE CENTER

Trial by SpCM, convened at Fort Bliss,
Texas, 17 April 1950. Bad conduct
discharge and forfeiture of \$63.32 per
month for six (6) months.

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

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

Charles C. Young, J.A.G.C.
W. Ludington, J.A.G.C.
R. Grabb, J.A.G.C.

JAGG SP CM 2300

1st Ind

JAGO, SS, USA, WASHINGTON 25, D. C.

15 June 1950

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

In the foregoing case of Private Mike Vincent Krivacek, RA 68L2370,
Battery A, 96th Antiaircraft Artillery Gun Battalion, Fort Bliss, Texas,
the Board of Review has held the record of trial to be legally sufficient
to support the findings of guilty and the sentence but deems modification

(292)

of the sentence necessary to the ends of justice. Pursuant to Article of War 50e(2) the holding and record of trial are accordingly transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.



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

2 Incls
1 Record of trial
2 Memo 8 Jun 50 fr
Bd 3

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

JAGU Sp CM 2300

26 July 1950

U N I T E D S T A T E S	)	ANTI-AIRCRAFT ARTILLERY AND GUIDED
	)	MISSILE CENTER
v.)	
Private MIKE VINCENT KRIVACEK,	)	Trial by Sp.C.M., convened at Fort
RA 6812370, Battery A, 96th	)	Bliss, Texas, 17 April 1950. Bad
Antiaircraft Artillery Gun	)	conduct discharge and forfeiture
Battalion, Fort Bliss, Texas	)	of \$63.32 per month for six months.

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

1. Pursuant to Article of War 50e(2) the record of trial and the holding by the Board of Review in the case of the soldier named above, together with a separate memorandum of such Board recommending reduction of the sentence, have been transmitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by special court-martial the accused pleaded not guilty to and was found guilty of two specifications of absence without proper leave, both at Fort Bliss, Texas, the first from about 14 to 28 February 1950 and the second from about 18 to 22 March 1950, in violation of Article of War 61, and breach of arrest at Fort Bliss, Texas, on or about 18 March 1950, in violation of Article of War 69. Evidence of five previous convictions, four by summary court-martial and one by special court-martial, was introduced. He was sentenced to be discharged from the service with a bad conduct discharge and to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47d. The officer exercising general court-martial jurisdiction approved only so much of the sentence as provides for a bad conduct discharge and forfeiture of \$63.32 pay per month for six months and withheld the order directing execution of the sentence pursuant to Article of War 50e.

The Board of Review has held the record of trial legally sufficient to support the findings of guilty and the sentence, but in its memorandum dated 8 June 1950 recommends modification of the sentence in the interests of justice because the instant offenses and those resulting in the previous convictions considered by the court in reaching its sentence to bad conduct discharge were purely military in character and did not

involve moral turpitude; the accused has completed more than twenty years of honorable service and is eligible for retirement; and a qualified psychiatrist has stated that if the bad conduct discharge is executed, the accused will become a public charge.

3. The Judicial Council concurs in the holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the offenses with which the accused was charged and the sentence. The Council is of the further opinion, however, that in view of all the circumstances of this case a reduction in the sentence is necessary to the ends of justice.

Except for the last year or so it appears that the accused has served honorably and creditably since June 1929. He has received six certificates of honorable discharge (R 24; Def Ex A). His personnel records show that he performed peacetime service in the Philippines, Alaska and the Canal Zone. During World War II he performed combat service as an Antiaircraft Artillery Automatic Weapons Crewman and was stationed in New Caledonia, New Zealand, New Guinea, Morotai and Leyte in the Asiatic-Pacific Theater. The five previous convictions which formed the legal basis for the accused's sentence to bad conduct discharge and six months' forfeitures consisted of absences without leave for periods of two, three, five and six days, respectively, breaches of restriction coincident with the inceptions of two of the unauthorized absences, and one breach of arrest. The offenses of which he stands convicted as a result of the instant trial are absences without leave of four and fourteen days, respectively, and breach of arrest coincident with the inception of one of the unauthorized absences.

According to the accused's unsworn statement at the trial, although eligible for retirement by reason of length of service, his application for retirement was not honored because he did not have in his possession at the time all of his certificates of discharge (R 17).

4. It appears from the foregoing that confirmation of the sentence will deprive this soldier of retirement based upon over twenty years of honorable service because of relatively minor military derelictions all occurring roughly within the last year of that service. Such a deprivation, in the opinion of the Judicial Council is not in accord with the interests of justice in this case. Although the accused merits some punishment for his misconduct, the Judicial Council is of the view that the sentence as approved by the general court-martial reviewing authority is unduly severe and that the accused should be given an opportunity to retire from the service under honorable conditions. Accordingly, in the opinion of the Judicial Council, only so much of the sentence

as provides for forfeiture of \$63.32 pay per month for three months should be confirmed.

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

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

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

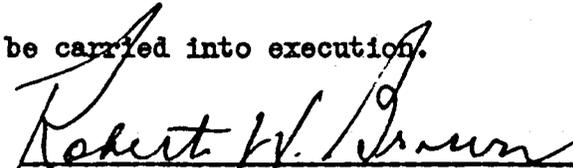
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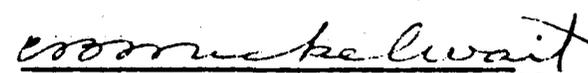
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Private Mike Vincent Krivacek,
RA 6812370, Battery A, 96th Antiaircraft Artillery Gun Battalion,
Fort Bliss, Texas, upon the concurrence of The Judge Advocate
General only so much of the sentence as provides for forfeiture
of \$63.32 pay per month for three months 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

26 July 1950

I concur in the foregoing action.


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

1 August 1950

Incl 4

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

(297)

JUN 13 1956

JAGQ - SPCM 2306

UNITED STATES)

1ST INFANTRY DIVISION

v.)

Recruit MARTIN J. STEVENS)
(RA 11177264), Head-)
quarters Company, 16th)
Infantry Regiment.)

Trial by SPCM, convened at
Furth, Germany, 18 April 1950.
Bad conduct discharge, for-
feiture \$50 per month for six
(6) months and confinement for
six (6) months. 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 soldier named above and submits this, its holding, to The Judge Advocate General, under the provisions of Article of War 50g.

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

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

Specification: In that Recruit Martin J Stevens Headquarters Company 16th Infantry Regiment APO 696 US Army, having been restricted to the limits of Monteith Barracks Furth, Germany APO 696 US Army, did at Monteith Barracks Furth, Germany APO 696 US Army, on or about 1300 hours 11 March 1950, break said restriction by going to Furth, Germany.

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

Specification 1: In that Recruit Martin J Stevens Headquarters Company 16th Infantry Regiment APO 696 US Army, did, without proper leave, absent himself from his organization at Monteith Barracks Furth, Germany APO 696 US Army from about 1300 hours 11 March 1950, to about 0200 hours 15 March 1950.

Specification 2: In that Recruit Martin J Stevens Headquarters Company 16th Infantry Regiment APO 696 US Army did, without proper leave, with intent to avoid service during field

exercises with his company, absent himself from his station at Monteith Barracks Furth, Germany APO 696 US Army, on or about 1430 hours 15 March 1950, and did remain absent without leave until 2230 hours 23 March 1950.

CHARGE III: Violation of the 69th Article of War.

Specification: In that Recruit Martin J Stevens Headquarters Company 16th Infantry Regiment APO 696 US Army, having been duly placed in arrest, on or about 0200 hours 15 March 1950, did, at Monteith Barracks Furth, Germany APO 696 US Army on or about 1430 hours 15 March 1950, break his said arrest before he was set at liberty by proper authority.

CHARGE IV: Violation of the 65th Article of War.

Specification: In that Recruit Martin J Stevens Headquarters Company 16th Infantry Regiment APO 696 US Army, having received a lawful order from Corporal Glenn L Wilson Headquarters Company 16th Infantry Regiment APO 696 US Army, a noncommissioned officer who was then in the execution of his office, to report to Regimental hard labor detail, did, at Monteith Barracks Furth, Germany APO 696 US Army, on or about 11 March 1950, willfully disobey the same.

The accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. Evidence of four previous convictions was introduced. He was sentenced to be discharged the service with a bad conduct discharge, to forfeit \$68.00 pay per month for six months and to be confined at hard labor for six months. The convening authority approved only so much of the sentence as provides for bad conduct discharge, forfeiture of \$50.00 pay per month for six months and confinement at hard labor for six months, and forwarded the record of trial for action under Article of War 47(d). The general court-martial reviewing authority approved only so much of finding of guilty of Specification 2, Charge II, as involves a finding that the accused absented himself without leave at the time and place alleged and remained so absent until 23 March 1950, approved the sentence as modified by the convening authority, 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 50a.

3. The only questions presented and which will be discussed are the legality of the findings of guilty of Charge IV and its Specification and the legality of the sentence. The review of the evidence, therefore, will be limited to that pertaining to Charge IV and its Specification.

4. Evidence. The evidence for the prosecution and the defense is without conflict. As a result of sentence of a special court-martial adjudged 13 January 1950 and promulgated 30 January 1950 by the Commanding Officer, 16th Infantry Regiment, the accused was ordered to be confined at hard labor for four months and to forfeit \$63.00 per month for a like period (Pros Ex 2). Thereafter, on some unspecified date on or before 11 March 1950, written orders issued by Headquarters, 16th Infantry Regiment, suspended "the unexecuted portion of the sentence of the accused pertaining to confinement" (R 6, 11). The accused was accordingly released from confinement and returned to his organization for duty at about 1200 hours on 11 March 1950. The morning report of his organization for 11 March 1950 shows him present in a duty status on that date (Pros Ex 1). Before the accused arrived at company headquarters, First Lieutenant Sam Guzzardo, Executive Officer of the accused's company, gave instructions to the first sergeant of the company and to Corporal Glenn L. Wilson, then the Charge of Quarters of the company, to have the accused report at 1300 hours, 11 March to the regimental hard labor detail to perform hard labor as "the unexecuted portion of the sentence of the accused pertaining to confinement was suspended" (R 11, 13). Corporal Wilson thereupon ordered the accused to report for hard labor at 1300 hours on 11 March 1950 to the sergeant in charge of the hard labor detail (R 7, 8). The accused asked to see an officer first but one could not be found (R 9) and the accused left the area and did not report to the sergeant in charge of the hard labor detail (R 10, 19).

5. Where a court-martial sentence includes "confinement at hard labor", a suspension of the execution of that portion of the sentence relating to confinement "suspends not only the sentence to confinement but also that portion thereof relating to hard labor" (JAGJ 1948/1284, 2 Feb 1948).

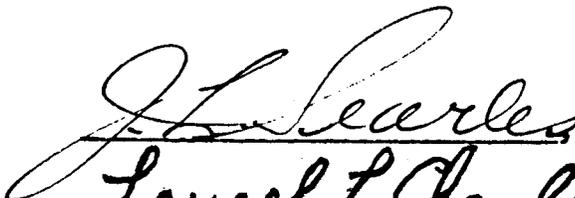
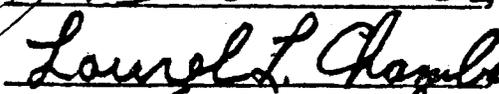
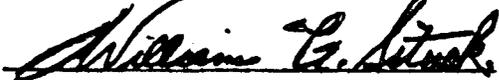
The evidence shows that the order to perform hard labor was in fact punitive, it being based upon the proposition that where the sentence as ordered executed, requires the accused "to be confined at hard labor", the suspension of the execution of that portion of the sentence relating to "confinement" does not suspend that portion which provides for "hard labor". It is noted that the order suspending the execution of that portion of the sentence relating to "confinement" does not expressly order the accused to perform hard labor without

confinement. It is manifest from the foregoing that the order requiring the accused to report to the regimental hard labor detail had its inception in the erroneous interpretation of the legal effect of the order suspending the execution of that portion of the sentence relating to "confinement" and was, therefore, illegal. Since the order to perform hard labor was illegal, the refusal to obey the order was not an offense under Article of War 65.

"A person cannot be convicted under this article if the order was illegal". (MCM, 1949, pars 152b and 153a).

6. With respect to the offenses of which the accused was found guilty under Charges I, II (as modified by the general court-martial reviewing authority) and III, the record establishes that the absence without leave alleged in Specification 1 of Charge II was concurrent with and had its inception in the breach of restriction alleged in the Specification of Charge I and that the unauthorized absence alleged in Specification 2 of Charge II was similarly concurrent with and had its inception in the breach of arrest alleged in the Specification of Charge III. In each instance the two offenses were but different aspects of the same act and accordingly punishment could be imposed only for the most serious aspect of each act (CM 330185, Embs, 78 BR 285, 287-288), namely: the breach of restriction and the breach of arrest. The maximum punishment for these offenses is confinement at hard labor for four months and, in view of the action of the convening authority, forfeiture of \$50.00 of his pay per month for four months (MCM 1949, par 117c).

7. For the foregoing reasons, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Specifications of Charges I and III, the Specification of Charge II, as modified by the general court-martial reviewing authority, and the findings of guilty of Charges I, II and III, legally insufficient to support the findings of guilty of Charge IV and the Specification thereof, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for four months and forfeiture of \$50 per month for four months.


J. L. Seales, JAGC

Laurel L. Chambers, JAGC

William G. Sitnik, JAGC

17 JUL 1951

JAGQ SPCM 2306

1st Ind

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

TO: Commanding General, 1st Infantry Division
APO 1, c/o Postmaster, New York, New York

1. In the case of Recruit Martin J. Stevens (RA 11177264), Headquarters Company, 16th 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 Specifications of Charges I and III, the Specification of Charge II, as modified by the general court-martial reviewing authority, and the findings of guilty of Charges I, II and III, legally insufficient to support the findings of guilty of Charge IV and the Specification thereof, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for four months and forfeiture of \$50 per month for four months. Under Article of War 50e this holding and my concurrence vacate the findings of guilty of Charge IV and its Specification, and so much of the sentence as is in excess of confinement at hard labor for four months and forfeiture of fifty dollars pay per month for four 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:

(SPCM 2306).



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

1 Incl
R/T

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

SP
JAGZ - CM 2398

JUL 28 1950

U N I T E D S T A T E S	)	82D AIRBORNE DIVISION
)	
v.	)	Trial by Sp CM, convened at Fort Bragg,
	)	North Carolina, 18 May 1950. Bad conduct
Private BEN WILSON, JR.	)	discharge, forfeiture of \$50 pay per month
(RA 15266590), Company L,	)	for six (6) months and confinement for
505th Airborne Infantry	)	six (6) months. Post Guardhouse.
Regiment.)	

HOLDING by the BOARD OF REVIEW
WHIPPLE, MICKEL 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. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Private Ben Wilson Jr, Company "L", 505th Airborne Infantry Regiment did, without proper leave, absent himself from his organization at Fort Bragg, North Carolina from about 0600 hours 22 December 1949 to about 0430 hours 11 January 1950.

Specification 2: In that Private Ben Wilson, Jr, Company "L", 505th Airborne Infantry Regiment did, without proper leave, absent himself from his organization at Fort Bragg, North Carolina from about 1030 hours 18 January 1950 to about 2005 hours 18 April 1950.

The accused pleaded not guilty to, and was found guilty of, the Charge and its Specifications. He was sentenced to be discharged the service with a bad conduct discharge, to forfeit fifty dollars pay per month for six months and to be confined at hard labor for six months. 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 and forwarded the record of trial for action under Article of War 50e. The Post

Guardhouse, Fort Bragg, North Carolina, was designated as the place of confinement.

3. Evidence

a. For the Prosecution

The initial absence without leave was established by an extract copy of the morning report of Company "L", 505th Airborne Infantry Regiment, showing the accused from duty to AWOL at "0600 hrs 22 Dec 49."

The prosecution then offered in evidence an extract copy of the morning report of 2306th ASU, Ft. Hayes, Ohio, "to be attached to the record and marked Prosecution Exhibit '2' with entry 18 April 1950 only" [underscoring supplied]. The entire extract which is attached to the record of trial reads as follows:

"2306th ASU

"11 Jan 50

Wilson Ben Jr (atchd) RA 15266590 Pfc
Atchd fr AWOL 505th Abn Inf Regt Ft
Bragg NC Del to MP 0430 Conf 0800

"23 Jan 50

Wilson Ben Jr (atchd) RA 15266590 Pfc
Fr Conf to AWOL 1030 18 Jan 50

"18 Apr 50

Wilson Ben Jr (atchd) RA 15266590 Pfc
Fr AWOL to Conf 2005"

The entry "pertaining to 18 April 1950 only" was received in evidence. The entries for 11 January 1950 and 23 January 1950 were neither offered nor received in evidence. (R 9)

b. For the Defense

The accused, after proper explanation of his rights, elected to testify under oath. In his testimony the accused admitted his absence without leave from 22 December 1949 to 18 April 1950. He made no mention of his return to military control at any intermediate date. The balance of his testimony was confined to relating a history of domestic difficulties as the underlying cause of his unauthorized absence.

4. The evidence is legally sufficient to support the findings of guilty of Specification 1 and the Charge. The question for consideration

is whether the evidence is legally sufficient to support the finding of guilty of Specification 2 of the Charge.

The condition of absence without leave, having once begun, is presumed to have continued, in the absence of evidence to the contrary, until the return of the accused to military control (MCM, 1949, par 146; CM 314935, Gift, 64 BR 285, 288). In so far as Specification 1 of the Charge alleges a return to military control on 11 January 1950, that date is the date of constructive return to military control for the purpose of a prosecution for absence without leave. No evidence was offered to establish the commencement of the absence without leave alleged in Specification 2. By excluding those extracts of the morning reports which purported to show a return to military control on 11 January 1950 and a second unauthorized absence on 18 January 1950 there was no evidence to support Specification 2 of the Charge. In the absence of any competent evidence to establish the commencement of the absence alleged in Specification 2 of the Charge the findings of guilty of this Specification cannot be sustained.

5. For the reasons stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 2 of the Charge, legally sufficient to support the findings of guilty of Specification 1 and the Charge and only so much of the sentence as provides for confinement at hard labor for two months and forfeiture of \$50.00 per month for a like period.

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

On Leave, J. A. G. C.

Robert C. Byrne, J. A. G. C.

11 AUG 1951

JAGZ SP CM 2398

1st Ind.

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

TO: Commanding General, 82d Airborne Division, Fort Bragg, North Carolina

1. In the case of Private Ben Wilson, Jr., (RA 15266590), Company L, 505th Airborne Infantry Regiment, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 2, legally sufficient to support the findings of guilty of Specification 1 and the Charge, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for two months and forfeiture of \$50 per month for two months. Under Article of War 50 this holding and my concurrence vacate the finding of guilty of Specification 2 of the Charge and so much of the sentence as is in excess of confinement at hard labor for two months and forfeiture of \$50 per month for two months. Under Article of War 50 you now have authority to order the execution of the sentence, as modified, in accordance with the holding. You are authorized, alternatively, to direct a rehearing. In the event that you desire a rehearing, the findings and the sentence should be disapproved in entirety, and, simultaneously, a rehearing directed as to the charge and the specifications thereunder.

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

(SP CM 2398).

2 Incls

1. Record of trial
2. Opinion of Board
of Review



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

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

JUL 27 1950

JAGI SP CM 2432

UNITED STATES)

2D INFANTRY DIVISION

v.)

Trial by SP CM., convened at
Fort Lewis, Washington,

Private NOEL FERWERDA)
(RA 37475193), Headquarters)
and Service Company,)
5th Engineer Combat Battalion,)
Fort Lewis, Washington.)

29 May 1950. Bad Conduct)
Discharge, forfeiture of)
fifty-eight dollars and thirty-)
three cents (\$58.33) pay 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 50g.

2. Before a special court-martial convened by The Commanding Officer, 36th Engineer Combat Group, Fort Lewis, Washington, on 29 May 1950, the accused was arraigned and pleaded not guilty to a specification alleging that he did at Fort Lewis, Washington, on or about 21 September 1949, desert the service of the United States, and did remain absent in desertion until he was apprehended at Tomar, Washington, on or about 4 May 1950, in violation of Article of War 58. He was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit \$58.33 pay per month for six (6) months, and to be confined at hard labor at such place as proper authority might direct for six (6) months. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47d. The reviewing authority, The Commanding General, 2d Infantry Division, Fort Lewis, Washington, approved the sentence, designated the Post Stockade, Fort Lewis, Washington, or elsewhere as the Secretary of the Army might direct, but not in a penitentiary, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50g.

JAGI SP CM 2432

3. The only question which need be considered is whether the court had authority to try the accused because of the fact that the assistant trial judge advocate and the assistant defense counsel were warrant officers.

4. By paragraph 1, Special Orders Number 95, dated 18 May 1950, the Commanding Officer of the 36th Engineer Combat Group, Fort Lewis, Washington, appointed a special court-martial to meet at the call of the president thereof. Warrant Officer (JG) Clarence C. Fortin was designated assistant trial judge advocate and Warrant Officer (JG) James E. Stevens was designated assistant defense counsel. The accused was brought to trial before the court so appointed and Warrant Officer (JG) Fortin was sworn as assistant trial judge advocate (R. 4), Warrant Officer (JG) Stevens, the appointed assistant defense counsel, being absent (R. 2). The accused stated that he desired to be defended by the regularly appointed defense counsel then present in court (R. 3). The appointed trial judge advocate and defense counsel were both commissioned officers.

This question is but an extension of the problem considered in the recent court-martial case of SP CM 1770, Ness, 27 April 1950, 6 BR-JC 345, 346 wherein the question was considered whether the regularly appointed defense counsel for general and special courts-martial are required to be commissioned officers. The following is quoted from the opinion of the Board of Review:

"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 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:

JAGI SP CM 2432

'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).

JAGI SP CM 2432

"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 rights 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."

Article of War 116 relating to the powers of assistant trial judge advocate and assistant defense counsel provides:

"An assistant trial judge advocate of a general or special court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge advocate of the court. An assistant defense counsel shall be competent likewise to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused."

JAGI SP CM 2432

Since under the Ness case, supra, regularly appointed counsel must be commissioned officers in order to comply with the mandatory provisions of Article of War 11, and as the duty of trial judge advocate or defense counsel may devolve upon assistant counsel as provided in Article of War 116, the assistant counsel must likewise be commissioned officers. Because of the failure to comply with the mandatory provisions of Article of War 11, the court which tried the accused was without jurisdiction and all acts in connection therewith are void.

This view confirms previous decisions of The Judge Advocate General to the effect that warrant officers under present custom, usage, and policy may not be appointed assistant trial judge advocates (SPJGA 1943/7729, dated 5 June 1943). The Board has not overlooked the fact that Article of War 11 does not require the appointment of assistant counsel. Suffice to say that the overriding importance of the assistant counsel's position in the event the duties of the trial judge or defense counsel may devolve upon him is enough to require that if an assistant is appointed, he must be a commissioned officer.

In AFCJA/20 ACM S-684, Kolbert, 21 June 1950, the Board of Review, Department of the Air Force, considered a question similar to the one at hand, relied upon the Ness opinion, supra, and reached the same decision as this Board.

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

Robert E. Joseph, J. A. G. C.

On Leave, J. A. G. C.

John F. Taylor, J. A. G. C.

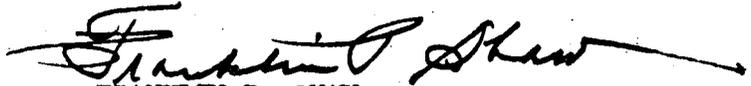
(312)

JAGE SP CM 2432 1st Ind

JAGO, SS USA, Washington 25, D. C. 16 AUG 1950

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

In the foregoing case of Private Noel Ferwerda, RA 37475193, Headquarters and Service Company, 5th Engineer Combat Battalion, The Judge Advocate General has withheld his concurrence in the holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Pursuant to Article of War 50e(4) the holding and record of trial are accordingly transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.



FRANKLIN P. SHAW

Major General, USA

The Assistant Judge Advocate General

1 Incl

Record of trial

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

(313)

SEP 29 1950

JAGU Sp CM 2432

UNITED STATES)

2D INFANTRY DIVISION

v.)

Trial by Sp CM, convened at
Fort Lewis, Washington, 29
May 1950. Bad conduct discharge,
forfeiture of \$58.33 pay per
month for six months and
confinement for six months.
Post Stockade.

Private NOEL FERWERDA, RA)
37475193, Headquarters and)
Service Company, 5th Engineer)
Combat Battalion, Fort Lewis,)
Washington)

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

1. Pursuant to Article of War 50a(4) 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 desertion at Fort Lewis, Washington, from on or about 21 September 1949 until his apprehension at Tomar, Washington, on or about 4 May 1950, in violation of Article of War 58. No evidence of previous convictions was introduced. He was sentenced to be discharged the service with a bad conduct discharge, to forfeit \$58.33 pay per month for six months, and to be confined at hard labor for six months. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47d. The officer exercising general court-martial jurisdiction approved the sentence, designated the Post Stockade, Fort Lewis, Washington, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50e. The Board of Review has held the record of trial legally insufficient to support the findings of guilty and the sentence. The Judge Advocate General has withheld his concurrence in the Board's holding.
3. The only question the Judicial Council deems necessary to consider is whether the fact that the appointed assistant trial judge advocate and the appointed assistant defense counsel were warrant officers invalidates the proceedings.

4. The record of trial shows that the appointed trial judge advocate, First Lieutenant Maurice D. Guffey, and the appointed assistant trial judge advocate, Warrant Officer (Junior Grade) Clarence C. Fortin, were present (R 2) and sworn (R 4). The record does not disclose the extent of Fortin's participation in the conduct of the trial. The appointed defense counsel, Captain John Kahaniak, was present (R 2) and signed the record of trial (R 13). The appointed assistant defense counsel, Warrant Officer (Junior Grade) James E. Stevens, was absent "V.O.C.A." (R 2). The accused stated that he desired to be defended by the regularly appointed defense counsel (R 3).

5. The Judicial Council concurs with the Board of Review in its opinion that the Articles of War contemplate that only commissioned officers shall be eligible for appointment as trial judge advocate, assistant trial judge advocate, defense counsel, and assistant defense counsel for general and special courts-martial (AW 1, 11, 116). Congressional committee hearings with respect to the 1916, 1920 and 1948 revisions of the Articles of War confirm this conclusion (See Hearings before House Committee on Military Affairs on H.R. 23628, 62d Cong., 2d Sess., pages 28, 98 (1912); Hearings before Senate Subcommittee on Military Affairs on S. 3191, 64th Cong., 1st Sess., pages 40, 94 (1916); Hearings before House Subcommittee on Military Affairs on Revision of Articles of War, 64th Cong., 1st Sess., pages 18-19, 33 (1916); Subcommittee Hearings before House Committee on Armed Services on H.R. 2575, 80th Cong., 1st Sess., pages 2018, 2024, 2135 (1947)). The conclusion is further confirmed by opinions of The Judge Advocate General subsequent to the 1920 revision that only commissioned officers were legally qualified for appointment as counsel for the prosecution or defense or as their assistants (e.g. SPJGA 1943/7729, 5 June 1943, to the effect that under then existing laws, regulations and War Department policy, a warrant officer could not legally be assigned to duty as assistant trial judge advocate).

It follows that the appointment of Warrant Officers Fortin and Stevens as assistant trial judge advocate and assistant defense counsel, respectively, herein was error, and that the purported appointments were ineffective to empower those individuals to act in the indicated capacities in any way. The vital question remains, however, as to the nature and effect of such errors.

The Board of Review held that these errors were jurisdictional and therefore fatal to the validity of the record of trial, citing Sp CM 1770, Ness, April 1950 and AFGJA/20 ACM S-684, Kolbert, 29 June 1950. In the Ness case the appointed defense counsel was a chief warrant officer, by whom the accused stated in open court he wished to be defended. No assistant defense counsel was appointed. The Board of Review held with the concurrence of The Judge Advocate General that the attempt to appoint as defense counsel a warrant officer who did not meet the requirements of Article of War 11 was

tantamount to appointing a court-martial that was without defense counsel. The Board concluded that such a "defect in the organization of the court-martial" could not effectively be waived by the accused, and that failure to comply with the mandatory requirement of Article of War 11 was jurisdictional and therefore fatal error. In the Kolbert case the defense counsel was a commissioned officer, but the appointed assistant defense counsel, who was present at the trial, was a warrant officer. The Board of Review, Department of the Air Force, expressed concurrence with the holding in the Ness case and stated:

"While the appointment of an assistant defense counsel is not required under Article of War 11, if an assistant defense counsel is appointed he must be a commissioned officer * * *, as the duty of defense counsel may devolve upon him * * *."

Article of War 11 provides that for each general or special court-martial the convening authority 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. It is to be noted that there is no mandatory requirement that the convening authority shall appoint an assistant trial judge advocate or assistant defense counsel for any general or special court-martial. The appointment of assistant trial judge advocates and assistant defense counsel for a court-martial is and always has been a matter within the sound discretion of the convening authority. Whether he shall appoint none or ten assistants on each side is determined by practical considerations, such as the difficulty and number of cases to be referred to the court-martial for trial, and the need for the instruction of junior officers in the trial of cases. Inasmuch as there is no mandatory requirement for the appointment of any assistant trial judge advocate or assistant defense counsel for a court-martial, the Judicial Council concludes that any error resulting from the appointment of ineligible persons to these positions is not an error affecting the jurisdiction of the court but is an error of procedure for consideration under Article of War 37. This conclusion is consistent with that reached by the United States Supreme Court in Swain v. United States, 165 U. S. 553, 561, wherein the court held that it was a procedural error only for the court-martial to permit a person to act as judge advocate who had not been appointed by competent authority and who was not sworn. Furthermore, the above conclusion is not inconsistent with the holding in the Ness case, supra, which is based upon the view that the provision of Article of War 11 relating to the appointment of a defense counsel is mandatory. Here we are not concerned with the appointment of a defense counsel but on the contrary with the provision of Article of War 11 relating to the appointment of assistant trial judge advocates and assistant defense counsel.

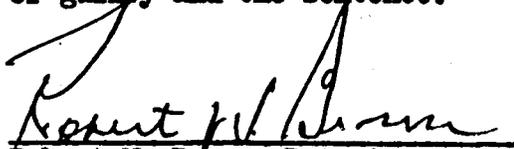
We are not unmindful of the fact that the Air Force Board of Review in the Kolbert case, supra, has apparently arrived at a contrary conclusion.

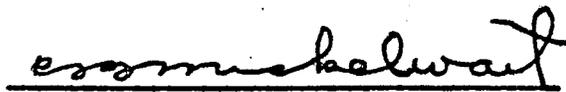
In our view it is unsound to hold the error jurisdictional on the mere possibility that the duties of the defense counsel may devolve upon an ineligible assistant defense counsel.

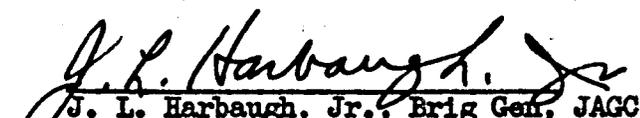
It is now necessary to determine whether or not the appointment of Warrant Officer Fortin as assistant trial judge advocate and Warrant Officer Stevens as assistant defense counsel for the court-martial which tried the accused injuriously affected any of his substantial rights. Stevens, the assistant defense counsel, was absent from the trial by verbal orders of the convening authority, and the accused stated in open court that he desired to be defended by the regularly appointed defense counsel, a commissioned officer, then present in court. The Judicial Council is of the opinion that, under the circumstances, the mere appointment of Warrant Officer Stevens as assistant defense counsel did not injuriously affect any of the accused's substantial rights.

It has been held that active participation on behalf of the prosecution by unauthorized personnel in court-martial trials is an invasion of the right of the accused to be protected during his trial from the intrusion of such personnel, and constitutes fatal error (CM 200734, Burns, 5 BR 1; CM 248390, Arkward, 31 BR 241; CM 248464, Adams, 31 BR 289; CM 316102, Kayser, 65 BR 249; CM 318089, Knothe, 67 BR 129; CM 324853, Pollard, 73 BR 379; CM 338217, Taylor, 4 BR-JC 235). The trial judge advocate, First Lieutenant Maurice D. Guffey, and the assistant trial judge advocate, Warrant Officer Fortin, were both present at the trial and were sworn in the capacities indicated. The record of trial does not disclose the extent that Fortin participated in the trial. For all the record shows, he may have conducted substantially the entire proceedings for the prosecution, or he may have been merely present. In any event, the record of trial does not negate Fortin's participation in the prosecution and is therefore inconclusive as to the extent and nature of such participation. Such being the case, the Judicial Council cannot presume that his participation was not prejudicial to the substantial rights of the accused. Accordingly the findings of guilty and sentence must be disapproved (see CM 330028, Stokes, 78 BR 237, 240; CM 334097, Anderson, 4 BR-JC 361, 373).

6. For the reasons stated, the Judicial Council is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC

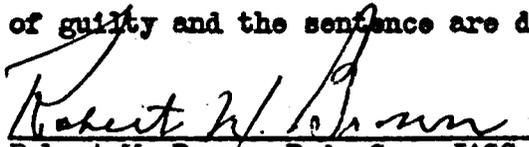

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

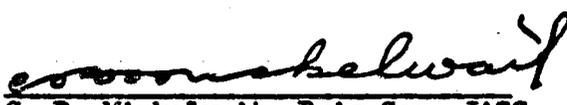
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

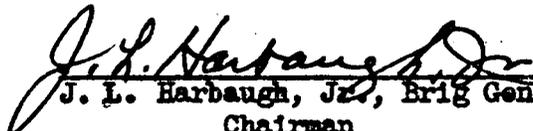
THE JUDICIAL COUNCIL

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

In the foregoing case of Private Noel Ferwerda, RA
37475193, Headquarters and Service Company, 5th Engineer
Combat Battalion, Fort Lewis, Washington, upon the
concurrence of The Judge Advocate General, the findings
of guilty and the sentence are disapproved.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

SEP 20 1950

I concur in the foregoing action.


E. M. BRANNON
Major General
The Judge Advocate General

21 September 1950

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

JAGV Sp CM 2461

19 1950

UNITED STATES	)	CAMP GORDON, GEORGIA
)	
v.	)	Trial by Sp CM, convened at
Recruit ERNEST P. LINSOTT	)	Camp Gordon, Georgia, 2 June 1950.
III, (RA 11187647), Student	)	Bad conduct discharge (suspended),
Company Number 4, Signal	)	forfeiture of \$50 pay per month
Training Regiment, Camp	)	for six (6) months and confinement
Gordon, Georgia	)	for six (6) months. Post 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 Specification:

CHARGE: Violation of the 64th Article of War.

Specification: 1. In that Recruit Ernest P. Linscott III, assigned Student Company Number 4, Signal Training Regiment, Camp Gordon, Georgia, having received a lawful order from First Lieutenant George Serbousek, his superior officer, to not leave the Camp Gordon Reservation under any circumstances, did at Camp Gordon, Georgia, on or about 21 May 1950, willfully disobey the same.

CHARGE II: Violation of the 96th Article of War (Nolle Prosequi).

He pleaded guilty to the Charge and Specification but, at the conclusion of the prosecution's case and after having elected to remain silent, the accused changed his plea to not guilty of the Charge and Specification, which change in plea was accepted by the court. He was found guilty of the Charge and Specification and sentenced to be discharged from the service with a bad conduct discharge, to forfeit fifty dollars pay per

JAGV Sp CM 2461

month for six months, and to be confined at hard labor for six months (Four previous convictions considered). 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, Camp Gordon, Georgia, approved the sentence and ordered it executed but suspended the execution of that portion thereof adjudging bad conduct discharge until the soldier's release from confinement, and designated the Post Stockade, Camp Gordon, Georgia, as the place of confinement. The result of trial was promulgated in Special Court-Martial Orders Number 28, Headquarters Camp Gordon, Georgia, dated 23 June 1950.

3. The evidence in the case may be briefly summarized as follows:

On 20 May 1950, the accused was released from confinement and brought before his Company Commander at approximately 1030 hours; his Company Commander talked to him, told him to get his bed and get set up, and the first sergeant assigned the accused to a barracks. This officer further testified:

***I told Recruit Linscott that I had put papers in for a 368 Board and that I had the papers in the safe and that I was not restricting him but I ordered him not to leave the Camp Gordon reservation under any circumstances." (R 8, 9)
(Underscoring supplied).

This order was never rescinded and the instructions were given as an order. The accused was absent at reveille on the morning of 22 May (R 8-11). On 26 May 1950 the accused was picked up by military guards at the Post Stockade, Fort Bragg, North Carolina and returned by them to Camp Gordon, Georgia (R 14).

4. From the foregoing, it is apparent that on 20 May 1950, the accused was told by his Company Commander that he was not being restricted but was being ordered not to leave the Camp Gordon Military Reservation; that on 22 May 1950, the accused was not present for reveille, and that on 26 May 1950, the accused was at Fort Bragg, North Carolina apparently in confinement. In the absence of a showing to the contrary, it must be presumed that the accused's presence at Fort Bragg was unauthorized. His presence there, under these circumstances, is also conclusive of the fact that at some time between 20 and 26 May 1950, the accused, without authority, left the Camp Gordon Military Reservation contrary to the instructions given him by his Company Commander. Whether the accused was within the confines of the Camp Gordon Military Reservation on 22 May 1950, cannot be ascertained from the evidence in the record of trial, nor can the exact time of his departure from Camp Gordon. He was presumably present at Camp Gordon until at least 22 May 1950.

As is stated in paragraph 152b, page 206, Manual for Courts-Martial, 1949, under a discussion of the offense of willfully disobeying a superior

JAGV Sp CM 2461

officer in violation of Article of War 64:

"The willful disobedience contemplated is such as shows an intentional defiance of authority, as when a soldier is given an order by an officer to do or cease doing a particular thing at once and refuses or deliberately omits to do what is ordered."

The Board of Review is of the opinion that the evidence in this case falls short of that proof required to show "an intentional defiance of authority," sufficient to warrant a finding of guilty of willful disobedience in violation of Article of War 64. (CM 269791, Summerford, 45 BR 133, 138; CM 329973, Jolin, 78 BR 231, 232).

There remains for consideration the question of whether, under the facts disclosed, the accused could be charged with a failure to obey the order of his Company Commander, or whether his dereliction constituted but a breach of an administrative restriction. Although the accused's Company Commander testified that he told the accused, "I was not restricting him but I ordered him not to leave the Camp Gordon reservation under any circumstances", it is difficult to conceive how this can be otherwise construed than as a restriction to the Camp Gordon Military Reservation. There can hardly be a case where an accused is placed in restriction or arrest that does not include an order or directive to that effect. Nonetheless, in military law a distinction has been drawn between an act which constitutes a mere breach of restriction and one which constitutes a willful disobedience or failure to obey an order. The difference in the maximum punishment authorized to be imposed upon conviction for such offenses is considerable (par 117c, pp 135, 138, 139, MCM, 1949).

As is further stated in paragraph 152b, Manual for Courts-Martial, 1949, supra:

"Disobedience of an order***which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article."

The Board of Review in CM 336362, Hall, 3 BR-JC 53, at page 55, stated in pertinent part:

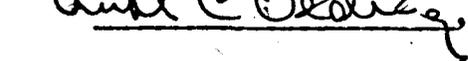
"***It has been held that disobedience of a direct order to remain in quarters or to report to the Charge of Quarters periodically will support only a finding of guilty of breach of arrest or restriction, the disobedience not being the flagrant type contemplated in Article of

JAGV Sp CM 2461

War 64 (CM 124276, Falvey, Dig. Ops. JAG. 1912-40, Sec. 422(5); CM (ETO) 1057, Redmond, 3 BR (ETO) 349). No amount of enlarging upon the circumstances involved in the instant case can import any offense other than breach of arrest."

Regardless of the statement or intention of the Company Commander in the present case, he could not, by the means employed, change the offense shown herein to that of an act of willful disobedience, or a failure to obey an order on the part of the accused. In the words of the Board of Review, supra, no amount of enlarging upon the circumstances disclosed in the present case can import any offense other than a breach of restriction.

5. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty as involve findings that the accused, having been restricted to the limits of the Camp Gordon Military Reservation, did, at the time and place alleged, break said restriction in violation of Article of War 96, and legally sufficient to support only so much of the sentence as provides for forfeiture of fifty dollars of the accused's pay for one month and confinement at hard labor for one month.

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

AUG 5 1950

JAGV Sp CM 2461

1st Ind

JAGO, Department of the Army, Washington 25, D. C. 95
TO: Commanding General, Camp Gordon, Georgia

1. In the case of Recruit Ernest P. Linscott, III (RA 11187647), Student Company Number 4, Signal Training Regiment, Camp Gordon, Georgia, 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 involve findings that the accused, having been restricted to the Camp Gordon Military Reservation, did, at the time and place alleged, break said restriction in violation of Article of War 96, and legally sufficient to support only so much of the sentence as provides for forfeiture of fifty dollars of the accused's pay for one month and confinement at hard labor for one month. Under Article of War 50e this holding and my concurrence vacate so much of the findings of guilty as are in excess of findings that the accused, having been duly restricted to the Camp Gordon Military Reservation, did at the time and place alleged, break said restriction in violation of Article of War 96, and so much of the sentence as is in excess of forfeiture of fifty dollars of the accused's pay for one month and confinement at hard labor for one month.

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

3. When copies of the published order in this case are forwarded to this office, 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 2461).

Incls:

Record of trial
Draft of Sp CMO



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

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

AUG 4 1950

JAGQ Sp CM 2490

UNITED STATES)

v.)

Recruit JAMES G. GOODLUCK
(RA 18174449), Detachment A,
Headquarters Battery, 4052d
Area Service Unit, Fort Bliss,
Texas.)

ANTI-AIRCRAFT ARTILLERY AND
GUIDED MISSILE CENTER

Trial by Sp CM, convened at
Fort Bliss, Texas, 5 June 1950.
Bad conduct discharge, and
confinement for three (3) months.
Post 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 above named and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50e.

2. The accused was arraigned and tried before a special court-martial convened by the Commanding Officer, Headquarters Battery, 4052d Area Service Unit, Fort Bliss, Texas, on 5 June 1950, on a specification alleging absence without leave from his organization from about 3 March 1950 to about 15 May 1950, in violation of Article of War 61. He pleaded not guilty to and was found guilty of the specification and the charge. Evidence of two previous convictions was introduced. He was sentenced to be discharged from the service with a bad conduct discharge and to be confined at hard labor at such place as proper authority may direct for three (3) months. The convening authority approved the sentence and forwarded the record of trial under Article of War 47d. The reviewing authority, the Commanding General, Antiaircraft Artillery and Guided Missile Center, Fort Bliss, Texas, 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 special orders appointing the court which tried the accused designated Warrant Officer (JG) Francis J. Gainey as assistant trial judge advocate. Said warrant officer was present at the convening of the court but was excused and withdrew from the courtroom before the members of the court and the personnel of the prosecution were sworn. The duly appointed trial judge advocate, a commissioned officer, was present and sworn.

4. The only problem presented and which will be considered by the Board is the effect on the legality of the court of the appointment of a warrant officer as assistant trial judge advocate.

5. The Congress has provided that the trial judge advocate of a court-martial shall be a commissioned officer (Articles of War 1 and 11), and has also provided that assistant trial judge advocates "shall be competent to perform any duty devolved * * * upon the trial judge advocate" (Article of War 116). There is no express provision in the Articles that an assistant trial judge advocate shall be a commissioned officer. Such provision does exist by necessary implication, however, in the requirement of Article 116 that an assistant trial judge advocate shall be competent to perform any duty devolving upon the trial judge advocate. Any other interpretation necessarily would result in the absurd conclusion that the Congress intended that a convening authority might, by the appointment of a warrant officer as assistant trial judge advocate, circumvent the requirement that the person appointed to prosecute in the name of the United States (AW 17) be a commissioned officer (AW 11). * * * A literal construction which would lead to absurd consequences will be avoided" (Sutherland, Statutory Construction (3d Ed, 1943) sec. 1929, and cases cited therein). Considered by itself Article 116 is clearly an enabling statute but considered with Article 11 it also must be construed as embodying in its provisions the requirement that an assistant trial judge advocate, as well as the trial judge advocate, shall be a commissioned officer.

6. The foregoing interpretation is supported by the legislative history of the pertinent Articles of War and is sanctioned by usage of the service uninterrupted and unquestioned subsequent to the 1920 revision of the Articles of War.

Prior to the 1916 revision of the Articles of War, and specifically in 1896, nothing in the Articles precluded the appointment of an enlisted man or a civilian as "judge advocate" and, presumably, a warrant officer likewise would then have been eligible, but "the usage of the service, however, has sanctioned the appointment as such of commissioned officers only" (Winthrop, Military Law and Precedents (2d Ed, 1920), p 183). The 1920 revision of the Articles of War (act of 4 June 1920, 41 Stat 787) added, as a proviso to Article 11, the following language:

"* * * Provided, however, That no officer who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, or assistant defense counsel in any case shall subsequently act as staff judge advocate to the reviewing or confirming authority upon the same case."

This proviso required the interpretation that members of courts-martial, and those appointed as members of the prosecution and defense must be

commissioned officers as Article 1 at that time also provided that the word "officer" shall be construed as referring to a commissioned officer. The discussions of Articles of War 11, 17 and 116, contained in the Hearings before the Senate and House Committees on Military Affairs, which considered legislation resulting in the passage of the 1916 and 1920 revisions of the Articles of War, disclose that this interpretation of the legislative intent was mandatory.

"The Chairman. Article 11 carries one change, and that is for the appointment of an assistant judge advocate for general courts-martial.

"Gen. Crowder. My primary purpose in that was to get a chance to educate young officers in the practice of trying cases.

* * *

"Gen. Crowder. * * * New article 115 [116] makes such assistant judge advocate competent to perform in substitution of the regular judge advocate the duties of the latter." (Hearings before the House Committee on Military Affairs on H.R. 23628, 62d Cong., 2d Sess., pp 28, 98 (1912)) (Underscoring supplied)

"Gen. Crowder. * * * Then, again, I wanted this provision [AW 11] for the further reason that I could use it to educate officers in the duties of prosecuting officers.

* * *

"Gen. Crowder. * * * The powers of assistant judge advocates are defined in article 115 [116]. It is necessary to fix the status before a court-martial of the assistant judge advocate authorized by article 11." (Hearings before a Senate Subcommittee on Military Affairs on S. 3191, 64th Cong., 1st Sess., pp 40, 94 (1916))

"Gen. CROWDER. * * * I wanted authority to detail an officer as judge advocate and another to assist him - some junior officer - to come in and prepare summons and papers and that sort of thing, and listen to the trial and see how his chief conducts it and become himself, by virtue of that association with the trial judge advocate, competent to discharge the duties of a trial judge advocate." (Hearings before a House Subcommittee on Military Affairs on Revision of the Articles of War, 64th Cong., 1st Sess., pp 18-19 (1916); also see id., p 33) (Underscoring supplied)

Subsequent to the effective date of the 1920 revision and prior to the 1948 revision, opinions of The Judge Advocate General have uniformly stated that only commissioned officers were legally qualified to be appointed trial judge advocate, assistant trial judge advocate, defense

counsel or assistant defense counsel (e.g., JAG, 211, 19 Feb 1921 and SPJGA 1943/7729, 5 June 1943). The Manual for Courts-Martial, U. S. Army, 1921, which implemented the 1920 Code (MCM, U.S. Army, 1921, pars 94, 95, 107), expressed the same view:

"* * * Where it can be avoided, no officer who has not had experience as a trial judge advocate will be detailed as trial judge advocate of a general court-martial unless he has had experience as a member or as defense counsel of a general court-martial, or as an assistant trial judge advocate of a court-martial, and is otherwise qualified by character and attainments for this duty." (par 94)

The 1948 revision of the Articles of War made no change in the pertinent Articles of War (11, 17, and 116) in this respect. The Hearings of the House Armed Services Committee considering this aspect of the then proposed revision further support the conclusion of the Board that commissioned officers only are competent for appointment as assistant trial judge advocates. During these hearings the statements of the Assistant Judge Advocate General for Military Justice disclose that such was the legislative intent:

"General HOOVER. We do not define the warrant officer as an officer. We leave him where he is.

* * *

"General HOOVER. In these amendments, where we intend to include the warrant officer, he is named as a warrant officer.

* * *

"General Hoover. * * * The changes in articles 5 and 6 are to substitute the term 'members' for 'officers'. It is nomenclature, purely.

* * *

"General HOOVER. * * * The change in article 116, provides that the powers of an assistant trial judge advocate or an assistant defense counsel of a general or special court martial shall be those of the trial judge advocate or the defense counsel. The present clause applies only to general courts martial, and we ask that it be amended to include special courts martial also. The omission of the word 'special' in the present article was perhaps an inadvertence." (Subcommittee hearings before the House Committee on Armed Services on H.R. 2575, 80th Cong., 1st Sess., pp 2018, 2024, 2135 (1947))

The Manual for Courts-Martial, U. S. Army, 1949, in paragraphs 6, 42 and 43, reiterates the pertinent provisions of the 1921 Manual, namely: that commissioned officers only are eligible or qualified to be appointed trial judge advocate.

Although not authoritative on the subject under discussion, it is considered pertinent to note that a Congressional Subcommittee considering Article 27 of the Uniform Code of Military Justice (Pub. Law 506, 81st Cong.) relating to the appointment of trial counsel and defense counsel, recognized and assumed that "officers" were required by this Article for appointment as trial counsel and defense counsel although not expressly so stated in the Code (Hearings before a House Subcommittee on Armed Services on H.R. 2498, 81st Cong., 1st Sess., pp 1157-8 (1949)).

7. Inasmuch as the Board holds that a warrant officer is not qualified for appointment as an assistant trial judge advocate of a court-martial, the effect on the legality of the court of the appointment of such unqualified person must be resolved.

Article of War 11 provides in pertinent part:

"* * * For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and one or more assistant trial judge advocates and one or more assistant defense counsel when necessary:
* * *." (Underscoring supplied)

By purporting to appoint an assistant trial judge advocate, the convening authority expressed his determination that an assistant trial judge advocate was "necessary". The appointment of a competent person as assistant trial judge advocate, in addition to the required trial judge advocate, thereupon became mandatory. The assistant trial judge advocate purportedly appointed was a warrant officer and, therefore, was ineligible for such appointment. In SpCM 1770, Ness, 27 April 1950, it was held that the regularly appointed defense counsel must be a commissioned officer and that the designation of a warrant officer as defense counsel did not meet the requirements of Article 11 and was tantamount to appointing a court that was without a defense counsel. The Board in that case further held that the provision of Article 11 directing the appointment of a defense counsel is mandatory and that failure to comply therewith constitutes fatal error. By the same process of reasoning the attempt to appoint as a "necessary" assistant trial judge advocate an individual who did not meet the requirements of Articles of War 11 and 116 was equivalent to appointing a court-martial that was without a required assistant trial judge advocate. Such failure constituted fatal error.

8. 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. Searle, J.A.G.C.
Laurel L. Chambers, J.A.G.C.
William G. Sitnek, J.A.G.C.

(330)

JAGE SP CM 2490 1st Ind

JAGO, SS USA, Washington 25, D. C. 16 AUG 1950

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

In the foregoing case of Recruit James G. Goodluck, RA 18174449, Detachment A, Headquarters Battery, 4052d Area Service Unit, The Judge Advocate General has withheld his concurrence in the holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Pursuant to Article of War 50e(4) the holding and record of trial are accordingly transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.



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

1 Incl
Record of trial

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

(331)

JAGU Sp CM 2490

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UNITED STATES)

v.)

Recruit JAMES G. GOODLUCK,)
RA 18174449, Detachment A,)
Headquarters Battery, 4052d)
Area Service Unit, Fort Bliss,)
Texas)

ANITAIRCRAFT ARTILLERY AND GUIDED
MISSILE CENTER

Trial by Sp CM, convened at Fort
Bliss, Texas, 5 June 1950. Bad
conduct discharge, and confine-
ment for three months. Post
Stockade.

- - - - -
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 soldier named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by special court-martial the accused pleaded not guilty to and was found guilty of absence without proper leave from his organization at Fort Bliss, Texas, from about 3 March 1950 to about 15 May 1950, in violation of Article of War 61. Evidence of two previous convictions by special court-martial was introduced. He was sentenced to be discharged from the service with a bad conduct discharge 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 approved the sentence, designated the Post Stockade, Fort Bliss, Texas, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50e. The Board of Review has held the record of trial legally insufficient to support the findings of guilty and the sentence. The Judge Advocate General has withheld his concurrence in the Board's holding.

3. The Judicial Council is of the opinion that the evidence establishes the guilt of the accused of the offense alleged. The only question is whether the fact that the appointed assistant trial judge advocate was a warrant officer invalidates the proceedings. The record of trial shows that the officer appointed as trial judge

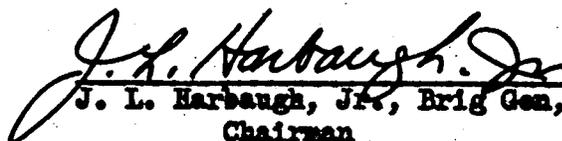
advocate was present and sworn at the trial (R 2, 5), but that the warrant officer (junior grade) appointed as assistant trial judge advocate, although present at the convening of the court, was excused prior to arraignment, by agreement with the convening authority, "due to a case of emergency" (R 2, 4).

4. The question here presented has been considered by the Judicial Council in Sp CM 2432, Ferwerda, decided this day. It was there concluded that the error resulting from the appointment of an ineligible person, i.e. a warrant officer, as assistant trial judge advocate or as assistant defense counsel is not jurisdictional but procedural, and that under Article of War 37 such error is not fatal unless it injuriously affects the substantial rights of the accused. In the Ferwerda case the ineligible assistant trial judge advocate was present at the trial, but the record did not disclose the extent and nature of his participation. So far as the record showed, he might have conducted substantially the entire proceedings for the prosecution. It was the opinion of the Judicial Council that it could not be presumed that his participation was not prejudicial to the substantial rights of the accused, and that this situation required the disapproval of the findings and the sentence. In the instant case, however, the record shows that the unauthorized assistant trial judge advocate was excused from the trial and left the courtroom prior to arraignment, and could not have participated in the proceedings. The situation is somewhat similar to that in the Ferwerda case with respect to the ineligible assistant defense counsel, who was not present during the trial. The Judicial Council there expressed the opinion that the mere appointment of a warrant officer as assistant defense counsel who did not participate in the proceedings did not injuriously affect any of the accused's substantial rights. So here, the Judicial Council is of the opinion that the mere appointment of a warrant officer as assistant trial judge advocate who did not participate in the proceedings did not injuriously affect any of the accused's substantial rights (see CM 324235, Durant, 73 BR 49, 124).

5. 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

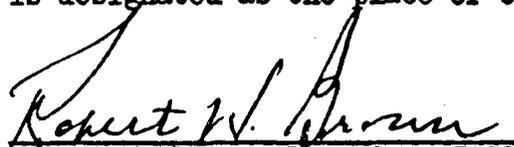

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

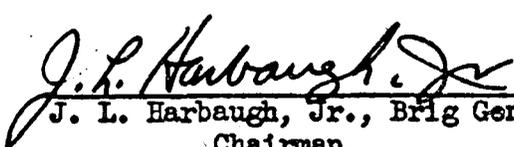
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Recruit James G. Goodluck,
RA 18174449, Detachment A, Headquarters Battery, 4052d Area
Service Unit, Fort Bliss, Texas, upon the concurrence of
The Judge Advocate General the sentence is confirmed and
will be carried into execution. An appropriate Guardhouse
is designated as the place of confinement.

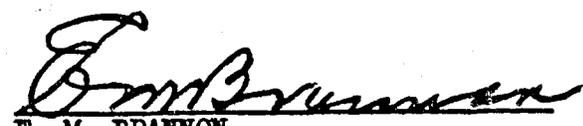

Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC

SEP 20 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

21 September 1950

He pleaded not guilty to all Charges and Specifications. The Court, by exceptions and substitutions, made the following findings:

"Of the Specification of Charge I, Guilty, except the words 'with disrespect toward 1st Lt Claude D Houbler, his superior officer, by saying to him', substituting therefor, respectively, the words 'in a disorderly manner in command by saying in the presence of 1st Lt Claude D Houbler'; of the excepted words, Not Guilty; of the substituted words, Guilty.

"Of Charge I: Not Guilty, but Guilty of a violation of the 96th Article of War.

"Of specification of Charge II, Guilty, except the words 'strike Corporal Fred C Rasmussen, a non-commissioned officer who was then in the execution of his office, by striking him', substituting therefor respectively the words 'wrongfully strike Corporal Fred C Rasmussen'; of the excepted words, Not Guilty; of the substituted words, Guilty.

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

Evidence of two previous convictions by summary court-martial and special court-martial were received. Accused was sentenced to be discharged from the service with a bad conduct discharge, to forfeit fifty dollars 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, Trieste United States Troops, approved the sentence, designated the Branch, United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement and forwarded the record of trial for action under Article of War 50e.

3. The only question requiring consideration is whether the offense of which the accused was found guilty by the court is lesser and included within the offense as originally charged in the Specification of Charge I, a violation of Article of War 63. We think not.

4. Paragraph 78c, page 77, Manual for Courts-Martial, 1949, states in part:

"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."

Stated in different language the Board of Review said:

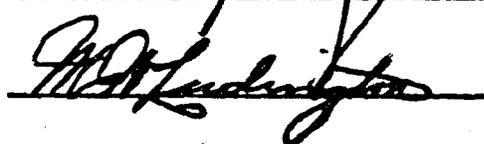
"To be lesser included of a greater offense, the elements of the lesser offense must be included in the greater and necessarily proven when the elements of the greater offense are established (CM 254312, Buchanan, 35 BR 205)."
(CM 296630, Siedentop, 58 BR 191, 197)

It is clear that the elements of "behaving himself in a disorderly manner in command" as found by the court is not an element of proof which is necessary and required to prove the offense of disrespect to a superior officer in violation of Article of War 63 (Par 151 [Proof], p 204, MCM, 1949). A soldier may be disorderly in command and never be disrespectful to a superior officer. Thus, the two offenses are entirely separate and distinct and it has been so held. (CM 247391, Jeffrey, 30 BR 337, 341)

It has, as a matter of fact, been specifically held in an opinion by The Judge Advocate General that:

"Being drunk and disorderly in violation of A.W. 96 is not an offense lesser than and included in the offense of behaving with disrespect towards a superior officer in violation of A.W. 63. The two offenses are separate and distinct one from the other." (C.M. 148099 (1921) Dig. Op. JAG 1912-40, p 283)

5. For the foregoing reasons, the Board of Review holds the record of trial not legally sufficient to support the findings of guilty of Charge I and its Specification, but legally sufficient to support the findings of guilty of Charge II and its Specification and legally sufficient to support only so much of the sentence as involves forfeiture of fifty dollars per month for six months and confinement at hard labor for six months.

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

AUG 4 1950

JAGN-SpCM 2549 1st Ind
JAGO, Department of the Army, Washington 25, D. C.

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

1. In the case of Private Ronald R. Pinard (RA 11143280), Company I, 351st Infantry, APO 209, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge I and its specification, legally sufficient to support the findings of guilty of Charge II and its specification and legally sufficient to support only so much of the sentence as involves forfeiture of fifty dollars per month for six months and confinement at hard labor for six months. Under the provisions of Article of War 50 this holding and my concurrence therein vacate the findings of guilty of Charge I and its specification, and vacate so much of the sentence as is in excess of forfeiture of fifty dollars per month for six months and confinement at hard labor for six months. Under Article of War 50 you now have authority to order the execution of the sentence as modified in accordance with the holding.

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

(SpCM 2549).

W403 unit



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

1 Incl
Record of Trial

RECORDED
AND INDEXED

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

JAGV Sp CM 2576

16 AUG 1950

U N I T E D S T A T E S)	82D AIRBORNE DIVISION
))
v.))
Private First Class )	) Trial by Sp CM, convened at
LAWRENCE MULLEN (RA 13 )	) Fort Bragg, North Carolina,
299427), Headquarters )	) 12 June 1950. Bad conduct
Company, Third Battalion, )	) discharge, forfeiture of \$50
505th Airborne Infantry )	) pay per month for six (6)
Regiment )	) months and confinement for
)	) six (6) months. Post Guardhouse.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: I. In that Private First Class Lawrence Mullen, Headquarters Company, Third Battalion, 505th Airborne Infantry Regiment, Fort Bragg, North Carolina did, at Fort Bragg, North Carolina, on or about 27 April 1950, unlawfully enter the Post Exchange #93 (Lion's Den), of Fort Bragg, North Carolina, 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 and was sentenced to be discharged from the service with a bad conduct discharge, to forfeit fifty (\$50.00) dollars 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. (One previous conviction considered) The convening

JAGV Sp CM 2576

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, designated the Post Guardhouse, Fort Bragg, North Carolina, or elsewhere as the Secretary of the Army may direct, as the place of confinement and forwarded the record of trial for action under Article of War 50g.

3. The only question to be considered is the propriety of the investigating officer in this case subsequently acting as the assistant trial judge advocate. It affirmatively appears from the record of trial and the allied papers attached thereto that the action of the assistant trial judge advocate as investigating officer in this case was taken in accordance with the provisions of Article of War 46b. Before the accused was arraigned the following colloquy was had at page 3 of the record of trial:

"***

TJA: No member of the prosecution has acted as member, defense counsel, assistant defense counsel, but the assistant trial judge advocate has acted as investigating officer in this case.

TJA: Does the accused consider the assistant trial judge advocate, the investigating officer in this case, prejudicial to his interest?

DC: The accused does not.

TJA: Does the accused object to the assistant trial judge advocate acting as such in this case?

DC: The accused does not.

TJA: Does the accused desire the assistant trial judge advocate to withdraw or continue as assistant trial judge advocate in this case?

DC: He has no objection to the assistant trial judge advocate continuing as such.

***"

Article of War 11 states in pertinent part:

"Provided further, That no person who has acted as member, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act

JAGV Sp CM 2576

in the same case as a member of the prosecution: ***"
(Underscoring supplied).

In discussing Article of War 11, supra, the Manual for Courts-Martial, 1949, paragraph 41 at page 36, states:

"The trial judge advocate must be fair and free from bias, prejudice, or hostility. If he has acted as a member of the court, defense counsel, assistant defense counsel, or investigating officer in any case he shall not subsequently act in the same case as trial judge advocate or assistant trial judge advocate (A.W. 11). A report of facts will be made at once to the appointing authority through appropriate channels whenever it appears to the president of the court, or to the trial judge advocate himself, that the latter is for any reason, including bias, prejudice, hostility, or previous connection with a particular case, disqualified or unable properly and promptly to perform his duties."

And in a further discussion in paragraph 58b at page 54, the following appears:

"***When it appears, however, that a member of the prosecution is disqualified because of previous participation in the same case as a member, defense counsel, assistant defense counsel or investigating officer (A.W. 11), that member of the prosecution will be excused by the president forthwith. If the trial cannot continue because a particular member of the prosecution is excused, the court will adjourn and report the fact to the appointing authority." (Underscoring supplied).

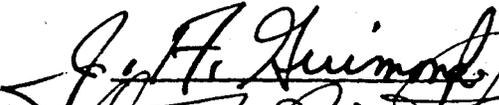
It is to be noted, that in the Articles of War and in the Manual for Courts-Martial, 1949, no provision is made whereby the accused may waive that portion of Article of War 11, supra, as distinguished from the situation where a member of the defense had previously acted as investigating officer, member, or trial judge advocate in the case (par 43a, p 40; App 6a, p 350, MCM, 1949).

Consequently, the Board of Review is of the opinion that the language and intent of Article of War 11 are clear and unambiguous that no person who shall have acted as member, defense counsel, assistant defense counsel or investigating officer in a case shall subsequently act as a member of the prosecution in the same case. The conclusion is inescapable that this provision of Article of War 11 is mandatory, cannot be waived by the accused, and a failure to comply therewith constitutes fatal error.

(342)

JAGV Sp CM 2576

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

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

JAGE SP CM 2576 1st Ind

JAGO, SS USA, Washington 25, D. C. 24 AUG 1950

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

In the foregoing case of Private First Class Lawrence Mullen (RA 13299427), Headquarters Company, Third Battalion, 505th Airborne Infantry Regiment, 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.

1 Incl
Record of trial



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

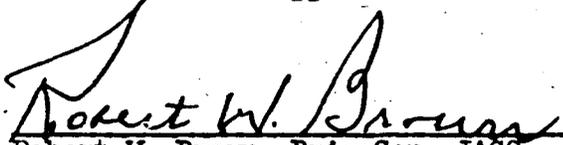
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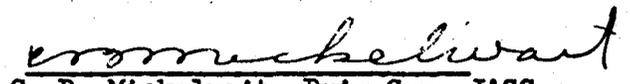
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Private First Class Lawrence Mullen, RA 13299427, Headquarters Company, Third Battalion, 505th Airborne Infantry Regiment, upon the concurrence of The Judge Advocate General, the findings of guilty and the sentence are disapproved.

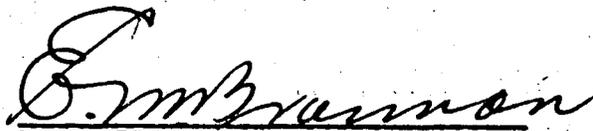

Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

SEP 11 1950

I concur in the foregoing action.


E. M. BRANNON
Major General
The Judge Advocate General

13 September 1950

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

(345)

JAGN-SpCM 2674

29 August 1950

UNITED STATES

KOBE BASE

v.

Private First Class
EDWARD E. BROWN (RA 12250381),
565th Military Police Service
Company.

Trial by SpCM, convened at Kobe,
Honshu, Japan, 29 June 1950.
Bad conduct discharge, forfeiture
of \$50 pay per month for six (6)
months and confinement for six
(6) months. Eighth Army Stockade.

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private First Class Edward Eddie Brown, 565th Military Police Service Company, APO 317 did, at Kobe, Honshu, Japan, on or about 27 May 1950, feloniously receive, have, and conceal, Seven (7) lbs. of Butter, value about \$4.41, Twenty (20) lbs. of Sugar, value about \$1.80, Ten (10) lbs. of Cocoa, value about \$3.48, Twenty (20) lbs. of Coffee, value about \$7.60, of the total value \$17.29, the goods and chattels of the U.S. Government, then lately before feloniously stolen, taken, and carried away; he, the said Private First Class Edward Eddie Brown, then well knowing the said goods and chattels to have been so feloniously stolen, taken, and carried away.

The accused pleaded not guilty to and was found guilty of the Charge and Specification thereof. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit fifty dollars per month

for six months, and to be confined at hard labor at such place as proper authority may direct for six months. The convening authority having approved the sentence, the officer authorized to appoint a general court-martial for the command then approved the sentence, designated the Eighth Army Stockade, APO 503, as the place of confinement, and forwarded the record of trial for action under Article of War 50e.

3. Evidence.

a. For the Prosecution.

Accused was a member of the 565th Military Police Service Company. Between 1500 and 1600 hours on 27 May 1950 two Japanese employed by the 565th Military Police Service Company, one as a wash boy and the other as a table boy, saw the accused inside the company mess hall seated at a desk engaged in conversation with two cooks, one of whom was a soldier named Williams (R 9-13). Thereafter the Japanese wash boy observed cook Williams inside the mess hall store-room (R 10).

At about 1900 hours on 28 May 1950 the Officer of the Day at Kobe Base, Kobe, Japan, observed the accused driving a military police vehicle along one of the streets (R 14). The Officer of the Day, who became suspicious because the accused was alone in the vehicle, followed and stopped him. Upon inquiry the accused stated that the barracks bag, which was in the rear of the vehicle, contained "some equipment". After the accused made contradictory statements as to his destination, he displayed the barracks bag's contents, which consisted of five gallons of coffee, weighing approximately twenty pounds; seven pounds of butter; twenty pounds of sugar; and two large cans of cocoa. The Officer of the Day advised the accused of his rights under Article of War 24 and asked the accused where he had obtained the material, and where he was taking it; to each question the accused replied, "I don't know" (R 15).

After he heard of accused's apprehension on 28 May 1950, the mess sergeant of the 565th Military Police Service Company inventoried the supplies in his mess hall and found missing certain items of like description to those found in the possession of the accused. The shortage had occurred within the two days next preceding 28 May 1950, and none of the missing supplies had been served in the mess (R 16, 17). The mess sergeant had not authorized anyone to take supplies from the mess hall on 27 May 1950. In the absence of the mess sergeant the

senior cook present for duty had custody of the keys to the supply room. Williams was not the ranking noncommissioned officer, but if he were the only cook present he would have had custody of the keys (R 18). However, there were three cooks, including Williams, on duty in the 565th Military Police Service Company mess on the afternoon of 27 May 1950 (R 10).

b. For the Defense.

After his rights as a witness were explained to him, the accused elected to remain silent. No evidence was offered by the defense. (R 19)

4. The essential elements of the offense of knowingly receiving stolen property are (1) that the goods were stolen by some person other than accused; (2) that accused received the goods; (3) that, at the time of so doing, he knew they had been stolen; and (4) that in so doing he acted with criminal intent (CM 265038, Williams, 42 BR 383, 389; CM 324095, Driscoll, 73 BR 33,36).

The burden was on the prosecution to prove each of the foregoing essential elements. Careful scrutiny of the evidence presented fails to disclose one scintilla of evidence that the property in question was in fact stolen by some one other than the accused. Viewing the evidence of record in a light most favorable to the prosecution, it would appear that the accused's unexplained possession of articles of the same description and quantity as were found to be missing from the 565th Military Police Company mess hall indicates a theft of the alleged property by the accused. The offenses of larceny and receiving, however, are substantially distinct and there can be no guilty reception unless there be a prior stealing by another.

In connection with the above, it is recognized as an elementary principle of law that the principal in a theft, or the person who actually steals the property, cannot be convicted of the crime of receiving, concealing, or aiding in the concealment of the property stolen (Cartwright v. U.S., 146 F. 2d 133, 5th Cir (1944); 138 ALR 1087; 2 Wharton, Criminal Law (12th ed) sec 1234).

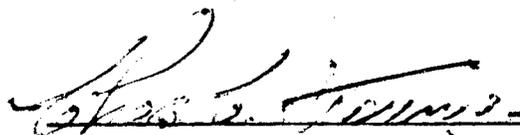
5. Consideration has also been given to the question of whether the offense of larceny is lesser and included within the offense of receiving stolen property. Subparagraph 78c, Manual for Courts-Martial, U.S. Army, 1949, states in pertinent part:

"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."

It is clear that the elements of larceny are not necessary and are not required to prove the offense of receiving stolen property. As a matter of fact, the essential elements of proof as to larceny are incompatible with those of receiving stolen property. In larceny, it must be established that the accused unlawfully appropriated property, whereas the accused must have received property which has been stolen by a person other than the accused in order to constitute the offense of receiving stolen property. Thus, the two offenses are entirely separate and distinct and it has been so held (CM 120948 (1918) Dig. Op. JAG 1912-40, p. 327).

The complete failure to establish that the property in question was stolen by a person other than the accused, an essential element of the alleged offense, makes it unnecessary to consider the sufficiency of the evidence as to the remaining elements (CM 266734, Murphy et al. 43 BR 301, 303; CM 324095, Driscoll, 73 BR 33, 38).

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

 _____, J.A.G.C.

Absent _____, J.A.G.C.

 _____, J.A.G.C.

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

(349)

JAGU Sp CM 2674

UNITED STATES

v.

Private First Class
EDWARD E. BROWN, RA
12250381, 565th Military
Police Service Company

KOBE BASE

Trial by Sp.C.M., convened at
Kobe, Honshu, Japan, 29 June
1950. Bad conduct discharge,
forfeiture of \$50 pay per month
for six months and confinement
for six months. Eighth Army
Stockade.

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 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 plead not guilty to and was found guilty of feloniously receiving, having, and concealing seven pounds of butter, twenty pounds of sugar, ten pounds of cocoa, and twenty pounds of coffee, of the total value of \$17.29, property of the United States Government, then lately before stolen, knowing it to have been stolen, at Kobe, Honshu, Japan, on or about 27 May 1950. No evidence of previous convictions was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit \$50 of his pay per month for six months and to be confined at hard labor for six months. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47d. The officer exercising general court-martial jurisdiction approved the sentence, designated the Eighth Army Stockade as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50e. The Board of Review has held the record of trial legally insufficient to support the findings of guilty and the sentence. The Judge Advocate General has not concurred in the Board's holding.

(350)

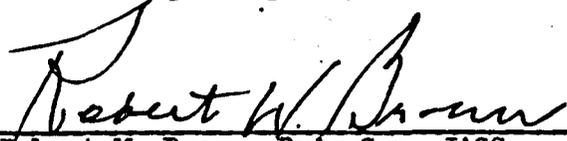
3. The evidence for the prosecution is substantially as set forth by the Board of Review in its holding. The accused was charged with and convicted of feloniously receiving, having, and concealing various quantities of stolen goods, knowing them to have been stolen, in violation of Article of War 96. The specification follows the form prescribed in the Manual for Courts-Martial, 1949 (App 4, form 174, p 331). We concur generally with the Board's statement that it was incumbent on the prosecution to show that the goods were stolen by some person other than the accused (see CM 265038, Williams, 42 BR 383, 389; CM 266734, Murphy and Wedge, 43 BR 301, 303; CM 324095, Driscoll, 73 BR 33, 36). We do not concur, however, with the Board's conclusion that the record does not contain a scintilla of evidence to that effect.

We recognize the soundness of the rule of law that the person who actually steals property cannot properly be convicted of the crime of receiving the property, knowing it to have been stolen (see Cartwright v. United States (CCA 5, 1944), 146 F. 2d 133). As hereinafter indicated, however, this rule properly has no application in a case where the evidence permits the reasonable inference that the accused himself did not steal the property but received it with guilty knowledge after its theft by another. The essential question here is one of the law of evidence and not of substantive law. Evidence of recent and exclusive possession of stolen property, if unexplained or falsely explained, constitutes a sufficient basis for the factual inference that the possessor stole it; but where, in addition to evidence of possession of the character indicated, there is also evidence tending to show and from which it may reasonably be inferred that the possessor did not actually commit the larceny himself but that another was the thief, this combined evidence constitutes a sufficient basis for the factual inference that the possessor received the stolen property from another, knowing it to have been stolen (Goldstein v. People (1880), 82 N.Y. 231, 234-235; Rosen v. United States (CCA 2, 1920), 271 F. 651; People v. Galbo (1916), 218 N. Y. 283, 112 N.E. 1041, 1044, 2 ALR 1220, 1224; and see MCM 1949, par 125a, p 151). The facts regarding the acquisition of the property lie peculiarly within the knowledge of its possessor, and where the evidence is such as to warrant the inference that a person other than the possessor was the actual thief, it is not unfair or improper to conclude that he received the stolen property from another with guilty knowledge (see Jordon v. State (1920), 17 Ala App 575, 87 So 433, 434; State v. Ross (1920), 46 N. D. 167, 179 N.W. 993, 994).

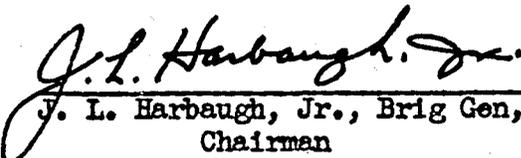
The evidence shows that at about 1900 hours on 28 May 1950, the accused was apprehended under suspicious circumstances, and found to be in possession of food, identical in amount and description with food found to be missing later the same day from the mess facilities of his organization. After due warning as to his rights, the accused stated to the Officer of the Day who apprehended him that he did not know either the source or destination of the food. The only evidence bearing in any degree upon the question whether a person other than

the accused actually stole the food, is that on the preceding day the accused conversed in the mess hall with the cook, Williams, and that thereafter the latter was seen inside the mess hall storeroom. That Williams as a cook had authority to be there cannot be doubted on this record. This evidence at most raised a possibility or suspicion that Williams and not the accused actually stole the food. We are unable to conclude that this evidence tended to show or constituted an adequate basis for the inference that a person other than the accused stole the food. It follows that the evidence did not justify the court in inferring the accused's guilt as charged.

4. For the foregoing reasons, the Judicial Council is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

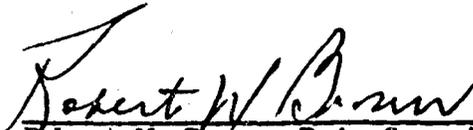
(352)

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 First Class Edward
E. Brown, RA 12250381, 565th Military Police Service Company,
upon the concurrence of The Judge Advocate General, the
findings of guilty and the sentence are disapproved.



Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC



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

19 October 1950

I concur in the foregoing action.



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

20 October 1950

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

(353)

Board of Review

SP CM 2706

SEP 26 1950

UNITED STATES

v.

Recruit JAMES L. FANCHER
(RA 14 294 277),
82d Ordnance Battalion.

NURNBERG MILITARY POST

Trial by SPCM, convened at
Bamberg, Germany, 24 July 1950.
Bad Conduct Discharge.

HOLDING by the BOARD OF REVIEW
JOSEPH, HYNES and TAYLOR

Officers of the Judge Advocate General's Corps

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

Robert Joseph, J.A.G.C.
Joseph J. Hynes, J.A.G.C.
John J. Taylor, J.A.G.C.

JAGC SP CM 2706

1st Indorsement

JAGO, SS USA, Washington 25, D. C. 8 OCT 1950

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

In the foregoing case of Recruit James L. Fancher (RA 14 294 277), 82d Ordnance Battalion, The Judge Advocate General has not concurred in

(354)

JAGE SP CM 2706

the holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Pursuant to Article of War 50e(2) the holding and record of trial are accordingly transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.



FRANKLIN P. SHAW

Major General, USA

The Assistant Judge Advocate General

1 Incl
Record of trial

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

Sp CM 2706

OCT 11 1950

UNITED STATES

NURNBERG MILITARY POST

v.

Trial by Sp.C.M., convened
at Bamberg, Germany, 24 July
1950. Bad conduct discharge.

Recruit JAMES L. FANCHER,
RA 14294277, 82d Ordnance
Battalion

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 guilty to and was found guilty of wrongfully and unlawfully operating a motor vehicle while under the influence of alcohol, at Bamberg, Germany, on or about 12 July 1950. Evidence of one previous conviction by special court-martial was introduced. He was sentenced to be discharged from the service with a bad conduct discharge and to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence. The convening authority approved so much of the sentence as pertains to the bad conduct discharge and forwarded the record of trial for action under Article of War 47d. The officer exercising general court-martial jurisdiction approved only so much of the sentence as provided for a bad conduct discharge and withheld the order directing the execution of the sentence pursuant to Article of War 50e. The Board of Review has held the record of trial legally sufficient to support the findings of guilty and the approved sentence. The Judge Advocate General has not concurred in the Board's holding.

3. We are of the opinion that the evidence establishes the guilt of the accused of the offense charged. The only question we deem necessary to decide is whether the fact that the appointed assistant trial judge advocate was a warrant officer invalidates the proceedings.

4. The record of trial shows that the appointed trial judge advocate, Second Lieutenant Ross B. Langston, and the appointed assistant trial judge advocate, Warrant Officer (Junior Grade) Edwin D. Livermore, were present (R 2) and sworn (R 5). The accused pleaded guilty to the specification and charge and after a thorough explanation of the consequences of such a plea and his right to plead not guilty, he adhered to his plea of guilty (R 8). Nevertheless the prosecution called witnesses and made out a prima facie case. The record further shows that, with three exceptions, questions directed to the witnesses by the prosecution were labeled by the reporter as "Questions by prosecution." Two questions directed to witnesses by the prosecution were labeled by the reporter as "Questions by Asst. TJA" (R 16), and in one other instance a question was prefaced "Asst. TJA" (R 30). Examination by the defense was uniformly designated as "Questions by defense" and questions by members of the court were prefaced by identification of the members putting the questions.

5. We have previously held that the error resulting from the appointment of an ineligible person, i.e. a warrant officer, as assistant trial judge advocate is not jurisdictional but procedural, and that under Article of War 37 such error is not fatal unless it injuriously affects the substantial rights of the accused (Sp CM 2432, Ferwerda; Sp CM 2570, Combs; Sp CM 2572, Wurst; Sp CM 2573, Maines; Sp CM 2490, Goodluck; all decided 20 September 1950). Thus in the Goodluck case we held that the mere appointment of a warrant officer as assistant trial judge advocate who did not participate in the proceedings did not injuriously affect the accused's substantial rights and therefore constituted harmless error.

In each of the other cases cited, the appointed trial judge advocate, a commissioned officer, and the appointed assistant trial judge advocate, a warrant officer, were sworn and were present throughout the proceedings. The record of trial in none of those cases reflected the extent or nature of the participation in the proceedings by the ineligible assistant trial judge advocate. Under these circumstances, we were unwilling to conclude that there had not been active participation in the proceedings by the assistant trial judge advocate prejudicial to the substantial rights of the accused.

The instant case is distinguishable from the Ferwerda, Combs, Wurst, and Maines cases in that the accused pleaded guilty and the full extent and nature of the participation by the ineligible assistant trial judge advocate has been meticulously recorded. The record shows that his participation consisted only of asking three questions which resulted in answers merely cumulative to and corroborative of the accused's plea of guilty and testimony already received at the trial. Under these circumstances, active participation by the ineligible assistant trial judge advocate of the extent and nature indicated could not in our

opinion have injuriously affected the accused's substantial rights within the meaning of Article of War 37.

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 as approved by the reviewing authorities.


Robert W. Brown, Brig Gen, JAGC


C. B. Mickelwait, Brig Gen, JAGC


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

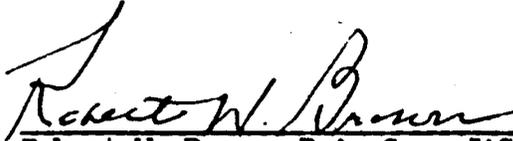
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DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

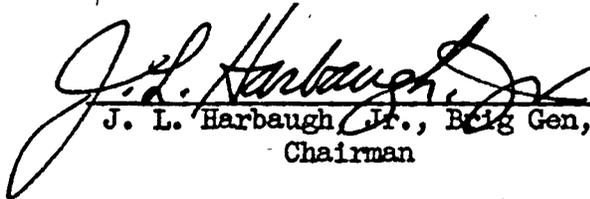
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Recruit James L. Fancher,
RA 14294277, 82 Ordnance Battalion, upon the concurrence
of The Judge Advocate General the sentence as modified by
the reviewing authorities is confirmed and will be carried
into execution.



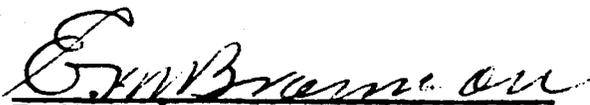
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC



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

I concur in the foregoing action.



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

12 October 1950

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

19 SEP 1950

JAGV Sp CM 2735

UNITED STATES)
)
 v.)
 Recruit RUSSELL G. KING)
 (RA 15380002), Company G)
 (Operating), 6012 Area)
 Service Unit, Station)
 Complement.)

SIXTH ARMY

Trial by Sp CM, convened at
Camp Stoneman, California,
21 August 1950. Bad conduct
discharge, forfeiture of
fifty dollars (\$50.00) pay per
month for six (6) months, and
confinement for six (6) months.
Post Stockade.

HOLDING by the BOARD OF REVIEW
GUILMONT, 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. Upon trial by special court-martial convened by the Commanding Officer, Camp Stoneman, California, on 21 August 1950, the accused was found guilty of desertion from 29 December 1948 until he surrendered himself on or about 18 July 1950, in violation of Article of War 58. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit fifty dollars pay per month for six months, and to be confined at hard labor for six months. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47d. The officer exercising general court-martial jurisdiction, the Commanding General, Sixth Army, Presidio of San Francisco, California, approved the sentence on 6 September 1950, designated the Post Stockade, Camp Stoneman, California, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50e.

3. The record of trial is legally sufficient to support the findings of guilty and so much of the sentence as provides for partial forfeitures and confinement. The only question presented by the record of trial is whether a special court-martial convened after 1 February 1949, the effective date of Title II, Selective Service Act of 1948 (62 Stat 627), had the power to adjudge a bad conduct discharge for offenses committed prior to 1 February 1949.

4. The Judicial Council has held (Sp Cl. 9, McNeely, 2 BR-JC 363, 371) that a special court-martial did not have the power to adjudge a bad conduct discharge for an offense committed prior to 1 February 1949. In its opinion the Judicial Council stated:

"It is a cardinal principle of statutory construction that if a statute is capable of more than one interpretation, that interpretation which is clearly consistent with the constitution is to be preferred, and one which will bring the statute into conflict with the constitution, in whole or in part, or raise a grave or doubtful constitutional question is to be avoided (Knight Templar's and Masons' Life Indemnity Co. v. Jarman, 187 U.S. 197, 205; Chippewa Indians v. U.S. 301 U.S. 356, 376; National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U.S. 1, 30; 16 CJS sec 98 and cases therein cited). Any law which operates in any manner to the substantial disadvantage of an accused in respect of an offense committed prior to the effective date of the law is an ex post facto law within the meaning of Article I, Section 9, Clause 3, Constitution of the United States (Medley, Petitioner, 134 U.S. 160, 171; Thompson v. Utah, 170 U.S. 343, 351).

"* * * The Supreme Court has held that a statute which reduced the number of triers of fact, and consequently the number of members who must concur in a finding of guilty or sentence, operated to the substantial disadvantage of the accused (Thompson v. Utah, supra). To authorize trial by a special court-martial which may be composed of a lesser number of members than the minimum competent to adjudge a penal discharge prior to 1 February 1949, would raise a grave and doubtful question which would not arise if the statute were given only prospective operation. The fact that a particular special court-martial may have been composed of five or more members is not considered material. There is nothing in the language used to indicate that the Congress intended the application of the statute to depend upon the facts of particular cases.

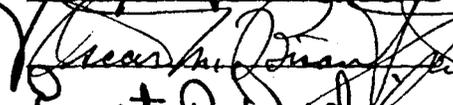
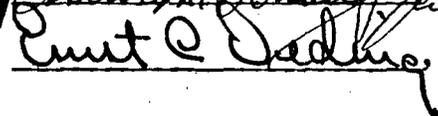
"* * * Applied only to sentences based on convictions of offenses committed on or after 1 February 1949 the additional punishing power vested in special courts-martial by Article of War 13, as amended, can be exercised with uniformity and in such a manner as to avoid many and serious complications which would result if it were exercised as to offenses committed prior to the effective date of the amendment. The language used is clearly capable of an interpretation giving it prospective operation only. We find nothing in the Executive Order of

JAGV Sp CM 2735

7 December 1948 or in the Manual for Courts-Martial, 1949, which requires, or indicates, a contrary interpretation. Under the circumstances the Council feels forced to the conclusion that the added punishing power of special courts-martial to adjudge bad conduct discharge must be held to apply prospectively, that is only to offenses committed on and after 1 February 1949."

5. The Board has noted that the accused was absent without authority for more than sixty days subsequent to 1 February 1949. Desertion and absence without leave, however, are not continuing offensesⁿ for the purpose of computing the time under the statute of limitations or for the purpose of determining whether the offenses were committed in time of war (CM 298315, Stevens, 58 BR 277; CM 313057, Siwy, 63 BR 5; par. 67, MCM, 1928; par. 67, MCM, 1949) and we conclude that no distinction may be made in the rule for the purpose of authorizing the imposition of an additional penalty by a court not previously empowered to impose it simply because the absence extends more than sixty days beyond the date of the law granting the court authority to impose the increased penalty (see Sp CM 102, Lillenbeck, 3 BR-JC 365, and opinion of General Crowder cited therein; Sp CM 256, Lightfoot, decided 5 October 1949).

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of fifty dollars pay per month for six months.

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

JAGV Sp CM 2735.

1st Ind

JAGO, Department of the Army, Washington 25, D. C. 7-1
TO: Commanding General, Sixth Army, Presidio of San Francisco, California

1. In the case of Recruit Russell G. King (RA 15380002), Company G (Operating), 6012 Area Service Unit, Station Complement, 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 fifty dollars pay per month for six months. Under Article of War 50e(3), this holding and my concurrence vacate so much of the sentence as is in excess of confinement at hard labor for six months and forfeiture of fifty dollars pay per month for six months. Under the provisions of Article of War 50, you now have authority to order the execution of the sentence as modified in accordance with the foregoing holding.

2. When copies of the published order in the case are forwarded to this office, 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 2735).



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.

CSJAGH CM 337189

30 September 1949

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

YOKOHAMA COMMAND

v.)

Trial by G.C.M., convened at
Yokohama, Honshu, Japan, 26-29
April, and 2 May 1949. Death.

Private JAMES W. HARRIS, RA)
16255661, Battery C, 933rd)
Antiaircraft Artillery Auto-)
matic Weapons Battalion, APO)
503.)

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 soldier named above and submits this, its opinion, to The Judge Advocate General and the Judicial Council.
 2. The accused was tried upon the following Charge and Specification:
- CHARGE: Violation of the 92nd Article of War.

Specification: In that Private James W. Harris, Battery C, 933rd Antiaircraft Artillery Automatic Weapons Battalion, Army Post Office 503, did at Yokohama, Japan, on or about 5-6 January 1949, with malice aforethought, wilfully, deliberately, feloniously, and unlawfully and with premeditation, kill one Shimako Mitsuhashi, a human being, by stabbing her with a dangerous weapon, to-wit: a knife.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. Evidence of one previous conviction by summary court-martial for an absence without leave of three days was introduced. He was sentenced to be put to death in such manner as the proper authority may direct, all members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

On the date of the offense alleged, accused was a member of Battery C, 933rd Antiaircraft Artillery Automatic Weapons Battalion, which was stationed at Yokohama, Japan. He had joined the battery sometime in October 1948 (R 20,24).

Accused absented himself without leave from his battery at 2400 hours, 2 January 1949 (R 19; Pres Ex4). About 1830 hours, 5 January 1949, he appeared at the residence of Mrs. Yuri Wakui in Yokohama (R 211,212). The deceased Shimako Mitsuhashi, also known as "Keiko", and another girl by the name of Chizuko Nishikawa roomed with Mrs. Wakui (R 115,116,211). At the time accused arrived, two soldiers from accused's battalion, Privates Joe L. Robertson and Junior Miller, were visiting the girls (R 81,91,92,93). Some commonplace conversation between accused and the others occurred, after which the two couples left the Wakui residence to visit "the club" (R 94,95). Accused accompanied the others for a block or two and then turned off on another street remarking, "I'll see you later" (R 90,95). Between 1830 and 1900 hours accused was at the home of a girl called "Katie" (R 77,78). Accused got into an argument there with Private Johnnie Sterling over the girl and Sterling struck accused three or four times in the face. Accused did not retaliate (R 78,80).

Keiko and her companions returned to the Wakui residence from the club about 2200 hours (R 82,85). Keiko took Private Miller to her room at the rear of the house and Chizuko took Private Robertson to her room at the front of the house (R 82,95,96,115; Pres Ex 1). About 2330 hours Private Miller went back to camp and Private Robertson followed him five minutes later (R 84,85). After Private Robertson's departure, Chizuko "went to sleep" (R 214). She was not sound asleep, however, and soon she heard the footstep of someone going around the house to the rear (R 214). The voice of Keiko came from the latrine which adjoined her room. She was heard to ask, "Who?" in English and then "Dare?", which is Japanese for "who" (R 123). Keiko then called out "Obo-san," a word meaning grandmother. Mrs. Wakui thought Keiko's tone of voice was "normal" (R 116,121,215). According to Mrs. Wakui it was then about midnight (R 116). As Mrs. Wakui came around the house from her room at the front she encountered a colored soldier. She testified she could not identify this person because of the darkness and her haste (R 118,121,122). The soldier brushed past Mrs. Wakui and walked out the gate in front of the house (R 121,215). Mrs. Wakui found Keiko standing between the latrine and the house. (R 116; Pres Ex 1). Keiko told her that "the kowai soldier has come so I will go and sleep at Harumi san's house" (R 116). The word "kowai" means "fearful, frightful,

dreadful, terrible, horrible or awful" and was the nickname by which Keiko, Chizuko and Mrs. Wakui referred to the accused (R 114,120,121, 211,212,219). The accused had been labeled "the kawai soldier" by Keiko sometime in December after he had struck her. She had called him by this name on five or six occasions (R 121). Chizuko had also been struck by accused on a prior occasion when he attacked Keiko (R 210).

Mrs. Wakui asked Keiko if she was not scared to leave the house alone but she replied in the negative (R 121). Mrs. Wakui returned to her room and Keiko left (R 215,216). In a few minutes Chizuko heard Keiko talking with someone as she descended the steps which led from the street to the gate in front of the house (R 216,217; Pros Ex 1). Keiko was speaking in English but Chizuko could not understand what she said (R 216). As Keiko reached the gate Chizuko heard "very vaguely" a voice ask in English, "Where you go too late?" It was not "too distinct" but it sounded as though those were the words spoken. When asked on the witness stand to identify the voice Chizuko first replied, "I am not positive but it resembled Jim Harris' voice." When asked further if there was any doubt in her mind she said, "The voice I heard I am sure was his" (R 217,218). On subsequent cross-examination Chizuko insisted that she knew the voice was that of accused (R 219,220). A short time after the words "Where you go too late" were spoken, Chizuko heard Keiko say in English, "I don't know why. I scare of you" (R 218). Keiko then cried out in a loud voice, "Obo-san" (R 122,218). Her voice sounded as though she was being choked (R 218). Mrs. Wakui yelled, "'Nani, Nani' (What, What)?", and hurried outside. She found Keiko sprawled out dead on the ground in front of the gate (R 120,123). The time then was about 0010 hours, 6 January (R 120).

A butcher knife (Pros Ex 17) "was sticking through her clothes down into the body" and the front of her body was covered with blood (R 15,119,123,144,145; Pros Exs 10a,10b,10c). Pictures taken of the body on 6 January show two stab wounds in the chest between the neck and the left breast and six stab wounds across the back about half way between the shoulder and the waistline, and ranging from about six inches to the left of the spinal column to about one inch to the right of it (R 19,147; Pros Exs 2,2a). The report of an autopsy performed on the body states that the two wounds in the thorax were serious, one of them reaching deeply into "the arch region of the aorta" and the other reaching the entrance of the lung and cutting the pulmonary artery. The wounds in the back reached the lungs but were shallow. The cause of death was hemorrhage caused by the two wounds in the thoracic cavity (R 18; Pros Ex 3).

A bed check of Battery C was made between 0015 and 0035 hours on the morning of 6 January and accused was not present. His bed had previously been turned in to the supply room since he was absent without leave. There were no other absentees (R 205,206,207). Sometime between 0100 and 0200 hours a soldier, whom the guard on duty at the main gate entrance to the battalion area did not recognize, came through the gate, asked the time and went on to the area in which Battery C was located (R 203,204). Sometime during the night accused returned to his barracks and borrowed a comforter from another soldier (R 208). At 0230 hours an officer on duty at the Yokohama Central Police Station went to accused's barracks and found accused asleep on the floor. Accused was clad in an OD shirt, OD trousers and socks. Nearby was a blouse, a cap and shoes which accused donned when placed under arrest (R 110,111,112). Accused was taken to the Yokohama Central Police Station where the trousers (Pros Ex 12) and the cap (Pros Ex 13) were removed from him (R 149,150). The trousers and cap were taken to the Criminal Investigation Laboratory on 7 January 1949, and turned over to Richard D. Tenney, a chemist and serologist (R 128,129,145,146). A benzidine test showed the presence of blood on the trousers and a precipitin test showed that the blood was human blood. The blood was typed and established as Type O. Similar tests were applied to the cap, and, while the presence of human blood was established, the quantity was insufficient to enable it to be typed (R 133,134). Tests were also performed on the skirt, jacket and sweater worn by Keiko on the night of the homicide and Type O human blood was found on them (R 129,130,134,146,150,151; Pros Exs 14,15,16). Blood taken from the body of Keiko was found to be Type O (R 135,142,146,166). Blood taken from the accused, however, was found to be Type B (R 135,136,142,146,165,166). Mr. Tenney testified that it was impossible to mistake Type B blood for Type O blood and that although in typing blood an error in method might result in an inconclusive result, i.e., the blood could not be typed, in no instance would the test erroneously identify the wrong type (R 136,139).

On 6 January 1949, Chizuko was taken to the Central Police Station and a test made to ascertain if she could identify the voice of the person who spoke to Keiko immediately prior to the homicide. Accused's rights under the 24th Article of War were not explained to him prior to the test (R 229). Ten soldiers, including the accused, were lined up and required to read from a fire poster, to state the months of the year, and to say, "Too late. Where are you going tonight?" (R 228, 236). Chizuko stood with her back to the men as they spoke and was not aware of accused's position in the lineup (R 233,234). She identified accused's voice as the voice of the person who spoke to Keiko. The lineup was shifted twice and a second and a third time Chizuko identified the voice of accused (R 237).

Accused was interrogated by Agents Ozell P. Henry and Rolland A. Newlun of the Criminal Investigation Detachment on 11 January, 12 January, 14 January and 2 March 1949 (R 165,172,181,328,329). The time of questioning on each occasion ranged from one hour to three hours (R 180). Prior to questioning accused the 24th Article of War was read and explained to him (R 173,201). Agent Henry asked accused if he had killed Keiko and accused replied that he did not know whether he had or not; he could have killed her; he did not know. Accused added that he thought for a long time he might do something like that. He told the agents that he had worked in a slaughter house in Chicago killing pigs. The further questioning of accused by the agents was developed by the prosecution as follows:

"Q Did you make any inquiry of the accused as to the manner in which he killed the pigs?

A Yes, we asked him to describe ...

PRES: 'We asked'?

A (Cont'd) I asked him to describe the manner in which he killed the pigs.

Q Did he tell you?

A Yes, he said that the pigs would come through, hanging up, and he would stick them with a long curved knife in the throat.

Q And then what would he do, if he told you?

A He said after he stick the pig, after he stuck the pig—Several pigs came through on a chain affair, I think it is, as he described it, and he would stab the pig in the throat, then he would stab the next pig, and go in sort of a production line affair.

Q Did he tell you anything further about the manner in which he killed the pigs?

A Well he said some pigs were stabbed in the spine and others were stabbed in the throat." (R 183)

During the questioning by the CID accused was also asked, "When you stabbed Keiko, what interrupted you?" To which accused replied, "I didn't stab Keiko" (R 186). Accused said he had used narcotics on 5 January 1949, and had taken a hypodermic. Accused admitted that he had used narcotics since he was ten years old. In accused's words, narcotics make you feel "like you are the boss" (R 183,184). When questioned

as to the presence of bloodstains on his clothing accused said that another soldier hit him, his (accused's) nose bled, and he got the blood on his trousers (R 185).

Investigation into the origin of the murder weapon (Pros Ex 17) disclosed that the knife had been purchased by a colored soldier about 1930 hours on the night of 5 January 1949 from the Shimisu hardware store in Yokohama (R 153,155,156,163,164).

Evidence as to the accused's prior possession of various kinds of knives and as to acts of violence was introduced by the prosecution for the avowed purpose of showing "a series of circumstances in which the motive and the intent of the accused are involved" (R 24). Miss Beniko Nagata testified that in the latter part of November 1948, as she was going into a house, accused intercepted her. She attempted to run away but he insisted that she remain and he opened his jacket revealing a wooden handled butcher knife (Pros Ex 6) protruding from his trousers. He removed the knife, pointed it at her throat, and told her that she should "associate" with him. She told him he would not kill her but he said he would because he loved her (R 50,51,52,53,54). Subsequently, on 22 December 1948, accused came to Miss Nagata's house and threatened to kill her unless she said she loved him (R 54,55). He brought out a wooden handled, pointed, dagger type knife (Pros Ex 8) but she would not say she loved him. She snatched the knife away from accused and was holding it when another soldier, Recruit Lawrence Grayes, intervened (R 28,29,30,55,56). Grayes remarked that she might hurt accused who replied that if she "batted an eye" he would kill her (R 40). Grayes knocked the knife out of her hand and put it in his boot (R 45,56). Grayes testified that he and accused left the girl's house but returned later and accused told Grayes to go around to the back and stop the girl if she came out that way while he, accused, would go in the front. Grayes went to the back, picked up the girl and took her to another house (R 43). The girl, however, testified that accused came back to her house, procured her to open the door on the pretext that he was an "MP", and, after obtaining entry beat her and forced her to accompany him to another house where they spent the night (R 47,48).

Private Eddie Love, whose bunk adjoined accused's in their barracks, testified that he had seen accused in possession of a pen knife, a switch blade knife, and a wooden-handled butcher-type knife (Pros Ex 9). It was sometime in December that accused had the switch blade knife (R 61,62). Love said he had seen accused holding the wooden handled, dagger type knife (Pros Ex 8) while talking to a girl. In the course of the conversation accused told the girl he would "club" her (R 60,61). Accused once showed Love the proper way to use a knife (R 63). Another

member of accused's battalion, Private Lynn Ford, testified that he saw the wooden handled dagger type knife (Pres Ex 8) and also a switch blade knife in the possession of accused. The latter incident was in October 1948 (R 67,68).

Another incident involving the wooden handled butcher-type knife (Pres Ex 9) was related by Shizu Hamamura. Accused came to Mrs. Hamamura's home in the early morning of 3 January 1949. He fell asleep with the knife in his hands and Mrs. Hamamura removed and secreted it (R 71,72, 73). In the morning when he awoke he asked her for the knife but she disclaimed any knowledge of it (R 75). Testimony that the wooden handled butcher-type knife (Pres Ex 9) was purchased at the Shimizu Hardware store on 2 January 1949 by a colored soldier was given by a son of the proprietor of the store (R 154). After accused's arrest in the present case he told the CID agents that he had purchased the wooden handled, dagger type knife (Pres Ex 8) at the Shimizu Hardware store (R 171). The Shimizu Hardware store was located about eight blocks from the scene of the killing (R 180).

4. Evidence for the defense.

Accused, after being advised of his rights as a witness, elected to testify in his own behalf (R 252).

Accused testified that he had absented himself without leave from his battery on 3 January 1949 and was still absent without leave on 5 January 1949 (R 253). On the latter date he visited at "Chizuko's house" and, about 1730 hours, left the house in the company of Chizuko, the deceased Keiko, Junior Miller and Joe Robertson. After walking with them about 300 yards he turned off on a side road leading to the "Scotch house." He met several soldiers who asked him if he knew where they could purchase Scotch whisky. Accused volunteered to buy the Scotch, went to the Scotch house, and returned with the whiskey in about twenty minutes (R 253,291).

From here he proceeded to the house of a girl named "Katie" (R 254). He had been there in the afternoon and had sexual intercourse with her before going on to Chizuko's house (R 288). While he was in Katie's house that evening, Private Johnnie Sterling arrived. An argument over Katie developed and Sterling struck accused but accused did not return the blows. Accused departed from Katie's house about 2000 hours and went "to a lady's house called Cho Cho" where he stayed until 2230 hours (R 254). He then went to a Japanese restaurant. Here he saw Henry Dorsey of his battery, a soldier named Spencer of Battery A, two other soldiers whose names he did not know, and two Japanese girls (R 254,256). At 2355 hours he left the restaurant and returned to camp. He knew the time he left because he looked at the restaurant

clock. It was about 0100 or 1930 hours, he estimated, that he arrived at the main gate of the camp. As he had no bed he borrowed a comforter from another soldier and laid down to sleep. He was awakened later and taken into custody (R 255,256).

Accused categorically denied that he had killed Keiko. He denied that he had a knife in his possession the night she was killed or that he had seen her after the time that he left her and her companions early that evening (R 250).

On cross-examination accused said he did not know Keiko "personally" although he had seen her and talked to her. On one occasion he had slapped her twice because she "put her nose in my business" (R 266). He asserted that when he came to the restaurant from Katie's house his nose was bleeding from the blow he had received. The blood on his trousers came from his nose. He could not account for the fact that the blood on the trousers was not his blood type (R 264). As to the blood on his cap accused stated that when he was hit his cap fell off and as he picked it up he got blood on it (R 290). He admitted that he had been smoking marijuana in the afternoon (R 258). He also had been drinking gin in the restaurant (R 257). The effects of marijuana continued for two or three hours and made him enjoy life more (R 259). By the time he left the restaurant, however, he was not drunk or "doped up" (R 257). He denied that he had taken cocaine that evening or that he had made a statement to the contrary to the CID (R 259). He reiterated that he left the restaurant at 2355 hours and arrived at camp at 0130 hours. The distance was a mile and a half to two miles (R 271).

Concerning his interrogation by the CID accused said he told them he would rather not talk to them but they kept on questioning him. He denied telling them that he was so drunk on the night of 5 January that he did not know where he had been (R 262). He also made further denials in response to the following questions asked by the prosecution:

"Q Did you tell them that you were formerly employed in a slaughter house?

A He told me.

Q Did you agree that was correct?

A I shook my head, yes, sir.

Q Did you tell him that was correct?

A He said, 'You were employed in the stockyards', and I said, 'Yes.'

Q Did you tell him it was part of your duties to stab pigs?

A I was employed as a butcher, sir; not a slaughterer.

Q. Did you tell him that?

A It is on my record.

Q Did you tell him that?

A No, sir, I didn't tell him I was a slaughterer.

Q You didn't tell him you killed pigs?

A Yes, sir, I did tell him I killed pigs. I told him I was a butcher, not a slaughterer.

Q Did you tell him how you would stick the pigs in the throat rather than slash the throat?

A I didn't tell him anything about sticking the pigs.

Q Did you tell him about stabbing pigs in the spine if the first thrust wasn't effective?

A No, sir.

Q You didn't tell him anything about stabbing pigs in the spine or in the back?

A No, sir.

Q Did you tell the CID how you would kill a human being if you were ordered to do so, without having him make a noise?

A No, sir.

Q You didn't talk about that at all?

A Not about me killing a human being; I didn't tell him.

Q You didn't tell him about how you would kill a human being if you were going to?

A No, sir.

Q Didn't talk about that at all?

A No, sir.

Q Did you tell him about visiting slaughter houses in the Tokyo-Yokohama area to watch them kill pigs?

A No, sir.

Q Nothing about that at all?

A No, sir." (R 279,280)

At this juncture the defense objected and asked that the preceding "seven or eight" questions and answers be stricken unless the prosecution would prove that accused did in fact make the statements referred to in

the questions. Upon the representation of the prosecution that such proof would be forthcoming the objection was overruled (R 280). The questioning then continued as follows:

- Q Did you tell Agent Newlun and Agent Henry on the 14th of January that you never missed killing the hogs by hitting them in the shoulder and the back?
- A No, sir, I didn't tell them that.
- Q Did you tell them that you have missed killing ducks if you tried to kill them in that manner?
- A No, sir.
- Q Did you talk about killing ducks at all?
- A No, sir, not as I remember.
- Q Then you may have talked about killing ducks and you may not have talked about killing ducks?
- A They may have said something about ducks. I never said anything about ducks.
- Q Are you sure of that?
- A Yes, sir.
- Q Now at any time in the questioning you might possibly have any doubt in your mind, will you please make that known to me?
- A I will, sir.
- Q Do you recall the CID asking you this question: 'When you kill a hog with a knife you don't get very bloody?'
- A Remember me asking that question?
- Q No, the CID asking you that question.
- A No, sir, I don't.
- Q Do you recall replying to that question, 'Not unless you are standing in front of it.'?
- A I couldn't have gave him that answer, sir.
- Q Do you recall the CID asking, 'Do you know how to put the knife in and take it out without getting bleed on you?', referring to stabbing with a knife?
- A No, sir, I don't.
- Q Do you recall making this answer, 'You could stab me and maybe I would just spit blood.'?
- A No, sir, I don't remember." (R 281)

Accused was cross-examined about his past record as follows:

Q Do you remember shooting a policeman in Chicago?

A No, sir, I do not.

Q Did you?

A No, sir, I did not.

Q Were you convicted for it?

A No, sir, I was not.

Q When did you join the Army?

A June 14, 1948, sir.

Q Where were you working when you joined the Army?

A I wasn't employed at that time.

Q You say you have a good memory; is that right?

A Yes, I have.

Q Where were you between the 9th of March 1945 and the 16th of August 1946?

A 9th of March 1945?

Q Yes.

A And the 16th of August 1946?

Q Yes.

A Well, sir, I believe I was in the Illinois State Training School, sir.

Q At St. Charles, Illinois?

A Yes, sir.

Q Did a conviction by a court put you there?

A It did, sir.

Q What was the charge upon which you were convicted?

A Carrying a concealed weapon.

Q What was the weapon?

A A .32-20 revolver, sir." (R 260)

Considerable cross-examination of accused concerning his possession of knives occurred. Accused denied any knowledge of the murder weapon (Pros Ex 17) although he admitted possession of the wooden handled, pointed dagger-type knife (Pros Ex 8). The latter was the knife that Beniko took from him and which Grayes then took from the girl. Accused denied that during this incident he threatened to kill Beniko. He did

tell her that if she moved he would hit her (R 266,267). He admitted that after his arrest he took the CID agents, at their request, to the Shimizu Hardware store where he had purchased the knife (R 266,275). Accused denied any knowledge of the knife (Pros Ex 9) which "the old lady" (Mrs. Hamamura) testified she took from accused while he slept (R 267). He also denied any knowledge of the wooden handled butcher knife (Pros Ex 6) or a switch blade knife, or a pen knife (R 267,268).

The prosecution questioned accused concerning previous assaults as follows;

"Q How many girls have you beat up around the Namamugi area?
A I haven't beat up none of them.

Q How many have you threatened with a knife?
A I haven't threatened any girls with a knife." (R 283)

* * *

"Q Was Toshiko your girl friend?
A I don't have any special girl friend. She was one of the girls I went to.

Q You said you was going with her?
A She is merely a girl you go by to pick up on.

Q Did you fight with her?
A No, I never did.

Q Ever hit her?
A No.

Q Ever threaten her with a knife?
A No, sir." (R 298)

Upon examination by the court accused stated that Keiko was not his girl friend, that he had never slept with her, and that he did not know her right name (R 294). Keiko had moved to Mrs. Wakui's house about the first of December (R 295). Accused used to visit the Wakui house often as he went with a girl there named Toshiko (R 297,298).

Private Frank Dorsey testified that he was in the "chop-chop" house (restaurant) the night of the killing (R 302,303). Accused, a boy named Spencer, and two waitresses were there (R 303,305). Accused was drinking "Shechu" but wasn't drunk (R 305). Dorsey left about 2350 hours at which time accused was still there (R 303,304).

5. Rebuttal evidence for the prosecution.

Captain Harry C. Eisenhart, commanding officer of accused's battery, testified that accused had admitted having a knife similar to Prosecution's Exhibit 6 (R 310,312).

Agent Holland A. Newlun, 44th CID, testified that during the course of their interrogation of accused he told them that "he believed that he was drunk" on the night of 5 January (R 329).

There was received in evidence in accordance with a stipulation between the prosecution and defense, a map of the Namamugi area of Yokohama, showing the entrance gate to the 933rd AAA AW Bn., the house of Yuri Wakui, the Chop Chop House, and other places referred to in the testimony. The distance by the most direct route, between the Chop Chop House and the gate was 1.24 miles; by way of the Wakui house 1.29 miles. From the Chop Chop House to the scene of the killing was .6 miles and from the scene of the killing to the battalion entrance .8 or .9 depending on the route taken (R 340).

6. Accused was convicted of premeditated murder in violation of Article of War 92, the specification alleging that he "did, at Yokohama, Japan, on or about 5-6 January 1949, with malice aforethought, wilfully, deliberately, feloniously, and unlawfully and with premeditation, kill one Shimako Mitsuhashi, a human being, by stabbing her with a dangerous weapon, to wit: a knife."

Murder is the unlawful killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse. The presence of malice aforethought distinguishes the offense of murder. Malice aforethought may mean one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: an intention to cause the death of, or grievous bodily harm to, any person (except if death be inflicted in the heat of sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person. Premeditated murder is murder committed after the formation of a specific intention to kill someone and consideration of the act intended. Premeditation import substantial, although brief, deliberation or design (MCM, 1949, Par 179g).

The uncontradicted evidence shows that about midnight 5-6 January 1949, the deceased Shimako Mitsuhashi, commonly known as "Keiko," left the home of Mrs. Yuri Wakui, with whom she resided, and went to spend

the night with a friend. She returned in a few minutes accompanied by a person who engaged her in conversation in front of the Wakui house. Keiko cried out for Mrs. Wakui and her voice sounded as though she was being choked. Mrs. Wakui ran outside and found Keiko dead on the ground. There were six stab wounds in her back and two in her chest above the left breast. From one of the chest wounds a butcher knife protruded. The chest wounds penetrated the "arch region of the aorta" and cut the pulmonary artery causing a hemorrhage and resulting in death. The wounds in the back were not fatal. The time of death was shortly after midnight.

The circumstances of the homicide clearly establish murder. The existence of an intention to cause death is obvious in view of the use of the knife in the manner related. The manner of the killing also leads to the conclusion that there was substantial deliberation and design present. It is apparent that the assailant inflicted the six stab wounds in the back before delivering the two fatal thrusts in the chest. Such repeated stabbing necessarily required a specific intent to kill as well as adequate consideration of the intended act.

Proof that the accused committed the murder consists of circumstantial evidence. With respect to circumstantial evidence the following rule laid down in Buntain v. State, 15 Tex. App. 490, has been quoted with approval by the Board of Review in several prior cases.

"While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of defendant's guilt. We must look alone to the evidence as we find it in the record, and applying it to the measure of the law, ascertain whether or not it fills the measure. It will not do to sustain convictions based upon suspicions. * * *. It would be dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens." (CM 333525, Abston, 1 BR-JC 9,44; CM 233766, Nicholl, 20 BR 121,123, II Bull. JAG 238, and cases cited therein).

The principal circumstantial evidence relied upon by the prosecution to connect the accused with the murder may be summarized as follows:

(1) A statement by Keiko to Mrs. Wakui just prior to leaving the Wakui residence, that accused had been there;

(2) Identification by Chizuko, a girl who roomed in the Wakui residence, of the voice of the person talking to Keiko at the time of the killing, as that of accused;

(3) The finding of bloodstains on accused's trousers after the killing, shown to be the same type of blood as that of Keiko and a different type from that of accused;

(4) A false explanation by accused that the blood on the trousers was his own blood; and

(5) An equivocal statement by accused to the CID after his arrest to the effect that he might have killed her, he did not know.

The statement by Keiko that accused had come [to the Wakui residence] was admitted by the law member as a part of the res gestae over objection by the defense. The admissibility of res gestae evidence is a matter resting largely in the discretion of the trial court (CM 324109, Newirth et al, 73 BR 41,45, citing Bast v. Mutual Life Ins. Co. of N.Y., 112 F.2d 769,774, C.C.A. 4th 1940). The Manual for Courts-Martial provides with respect to the admissibility of declarations as a part of the res gestae as follows:

"* * * Circumstances, including exclamations, declarations, and statements of participants and bystanders, substantially contemporaneous with the main fact under consideration and so closely connected with the main fact as to throw light upon its character, are termed res gestae. Evidence of anything constituting a part of the res gestae is always admissible.

* * *

"It sometimes happens, * * *, that an utterance constituting a part of the res gestae was made under such circumstances of shock or surprise as to show that it was not the result of reflection or design but made spontaneously. Evidence of an utterance shown to have been made under those circumstances may be introduced for the purpose of proving the truth of the utterance itself. * * *" (MCM, 1949, Par. 128b).

Based on the foregoing exposition in the Manual for Courts-Martial it appears that the statement of Keiko may be received in evidence for the purpose of proving the truth of the statement if it satisfies these requirements: (1) The utterance must have been substantially contemporaneous with the murder; (2) The utterance must throw light upon the murder; and (3) The utterance must have been made under conditions

showing that it was spontaneous. To recapitulate the pertinent facts, some individual visited the deceased about midnight; deceased called out for her landlady, Mrs. Wakui; Mrs. Wakui went to the deceased and the visitor fled; deceased then told Mrs. Wakui that the visitor was "the terrible one," the nickname of the accused, and that she, deceased, was going to spend the night at another house; deceased left the house but returned in a few minutes accompanied by some individual; deceased was then stabbed. It appears that not more than fifteen minutes elapsed from the time of the utterance in question until the time of the homicide. Under the circumstances we are of the opinion that the utterance was "substantially contemporaneous" with the "main event", i.e., the murder. Substantial contemporaneity does not require that the utterance precisely accompany the main event.

"Statements or acts of the injured person made or performed immediately or just prior to the offense, or so near thereto as to preclude the idea of forethought, and tending to elucidate a main fact in issue, are admissible as part of the res gestae;" (22 C.J.S. 1063). (Cf. cases cited in Wharton's Criminal Evidence, 11th Ed, Vol I, p. 777).

Since the utterance tends to place the accused at the scene of the crime about fifteen minutes before its occurrence, it is apparent that it does throw light upon the crime. Finally, the facts clearly indicate that deceased was in a state of fright as the result of the accused's visit so that her declaration was spontaneous and unreflecting. The ruling of the law member admitting deceased's statement as a part of the res gestae is deemed to be without error.

The witness Chizuko testified that the voice of the person talking to the deceased at the time she was stabbed was that of accused. Although the testimony of Mrs. Wakui that Chizuko was asleep in her room at the time of the events leading up to the murder, would seemingly discredit Chizuko's testimony, it is apparent from the record that Mrs. Wakui's statement was purely a conclusion and had no factual basis. Concerning admission of testimony as to voice identity it is said:

"* * The sound of the voice is a relevant circumstance to be considered on the question of identity. Such evidence is not a statement of opinion, but of a conclusion reached directly and primarily from the sense of hearing, and that such evidence is not to be considered as circumstantial, but as direct and positive proof of a fact, the evidentiary value of which is a question for the jury. But it is unquestioned that the value of such testimony depends upon some peculiarities of the voice, and upon the acquaintance of witness with the voice. The previous

acquaintance required to render such testimony relevant varies from hearing the voice but once, to that knowledge of it which is derived from an intimate acquaintance with the accused. * *." (Wharton's Criminal Evidence, 11th Ed., Vol. I, pp. 331,332).

Since Chizuko was shown to have talked to accused on several previous occasions, her identification of his voice is manifestly entitled to considerable weight. When questioned on the witness stand, she first stated that she was not positive but the voice resembled that of accused. On further direct examination, however, and on vigorous cross-examination, she stated that she had no doubt whatever and that she knew the voice was that of accused. Her competency as a witness in this regard is demonstrated by the fact that after accused's arrest, at an identification parade, she correctly identified the voice of accused out of some ten voices, the speakers in each instance being out of her sight. The lineup was shifted three times and each time Chizuko correctly picked out the voice of accused. There is nothing in the record to indicate that those tests were not fairly conducted. Evidence was introduced by the defense tending to show that in these lineups the accused may have been dressed differently but since we are not concerned with visual identification such fact, if true, would be immaterial. In our opinion evidence of her pretrial identification was admissible to corroborate her testimony in court that the voice of the person talking to Keiko was that of accused.

Objection was made by the defense to the introduction of the evidence of the voice identification on the ground that the voice identification test violated the accused's privilege against self-incrimination. The record shows that the accused and the other participants in the identification parade were instructed to read from a fire poster, to say the months of the year and the words, "Too late. Where are you going tonight?" Accused was not warned of his rights under Article of War 24 prior to the identification parade. The record does not show that any duress, threats, or other form of compulsion was exercised over accused in order to have him speak the prescribed words, nor does the record show that any objection was offered by the accused to participating in the test.

The present Article of War 24 provides as follows:

"No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate

himself or to answer any question the answer to which may tend to incriminate him or to answer any question not material to the issue [or] when such answer might tend to degrade him.

"[The use of coercion or unlawful influence in any manner whatsoever by any person to obtain any statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission, or confession shall be received in evidence by any court-martial. It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, and that any statement by the accused may be used as evidence against him in a trial by court-martial."] (Words in brackets added by amendment effective 1 February 1949).

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

"No person * * * shall be compelled in any criminal case to be a witness against himself."

Interpreting Article of War 24 and its predecessor, the Board of Review has held, in general, that failure to warn an accused of the rights provided by the Article vitiated a subsequent confession (e.g. CM 331849, Estrada, 80 BR 183,194). Prior to the adoption of the amendment to Article of War 24 on 1 February 1949, it has been the rule that a failure to warn an accused of his rights under the Article would not render inadmissible accused's admission, as distinguished from a confession (e.g., CM 274482, Talbott, 47 BR 185). This distinction between the admissibility of a confession, and of an admission, no longer prevails under the revised Article and the Manual for Courts-Martial, 1949, at least to the extent that when objection is made to the introduction of an admission, the prosecution is now required to establish its voluntary nature, proof of which would include a showing that the accused was warned of his rights in accordance with Article of War 24. The foregoing rules of evidence, which require that the prosecution establish that the accused was cognizant of his rights under Article of War 24, have been applied only in the case of an admission or a confession. In our opinion the evidence in question is not rendered inadmissible by the fact that he was not previously advised of his rights under Article of War 24, it appearing that such evidence was otherwise voluntarily furnished by the accused.

The further question is presented whether accused's privilege against self-incrimination was violated by instructing and procuring

the accused to repeat prescribed words while he was in the custody of the law. In an extensive discussion of the privilege, in so far as it relates to judicial proceedings, contained in 171 A.L.R. 1144-1200, it is said (at 1158):

"It is well known that the privilege against compulsory self-crimination is a personal privilege and may be waived by the defendant. Generally speaking, the privilege must be asserted and claimed at the time the privileged act or exhibition is called for, and where the defendant, without interposing any objection, complies with the prosecutor's request that he perform some act during the trial, he cannot subsequently maintain a claim that his rights were thereby violated, for, if he was vested with a privilege not to perform the act, by performing without objection he has waived his privilege in that respect. This principle of waiver of the privilege has been applied in a good many cases involving the performance of some physical act or exhibition during his trial by a defendant in a criminal case."

The foregoing rule was applied by the Board of Review (ETO) in CM 257057, Poe, 4 BR (ETO) 235,240, as shown by the following excerpt from the opinion:

"Colonel Kilian, during the course of his examination by the court on the issue of accused's identity, requested that the accused speak. Upon inquiry from the Law Member as to whether there was objection, both the prosecution and defense declared that there was none. Thereupon the following colloquy occurred.

'Accused: What do you want me to say?

Witness: The voice is not the same as they were down there. Say, "Buddy, give me a lift", or something.

Accused: Buddy, give me a lift, will you?

Witness: That's the fellow.

Q. You're positive in your identification that this man is the one that attacked you and is the one that you described as the smaller of the two fellows?

A. Yes.' (R 17).

It is not necessary to consider the question as to whether accused's immunity against being a witness against himself under the Fifth Amendment to the Federal Constitution was infringed by these proceedings inasmuch as it is self evident that he

personally and voluntarily waived same (14 Am. Jur. Criminal Law, sec. 162, p. 880; Ann. 64 ALR. 1099; 1 Wharton's Criminal Evidence - 11th Ed - sec. 382, p. 607, footnote 16). In any event, he was positively identified by the witness Fletcher who apprehended him at the scene."

Similarly, in CM 282913, Atkinson, 55 BR 21,25-26, the Board of Review held admissible in a forgery case specimens of handwriting obtained from an accused out of court without first advising him of his rights under Article of War 24 and the Fifth Amendment. The opinion reads in pertinent part:

"Counsel for the accused objected to the introduction in evidence of the specimens of the handwriting of accused (Pros. Ex. 2), upon the ground that they formed a part of a confession which had been illegally obtained because accused was not advised of his rights under the Fifth Amendment to the Constitution and the 24th Article of War (R 13,15,16). The objection was properly overruled (R 18,19).

"The testimony of Mr. Bennett was that accused 'appeared quite willing' to furnish these specimens (R 17). There was no evidence of threats or compulsion to obtain them. In 20 American Jurisprudence 623, 624, it is stated:

'The weight of authority is to the effect that a writing made out of court by a person accused of crime, at the request of a public officer, is admissible at his trial for comparison with a writing the authorship of which is in dispute, provided it was obtained without duress.'
(See also People v. Molineaux, 168 NY 264, 61 NE 286).

As an accused may be compelled to try on clothing or shoes, or place his bare feet in tracks, or submit to having his fingerprints made, all without violating the rule against self-incrimination (MCM, 1928, par. 122b, p. 130), so it is no infringement upon this constitutional privilege to obtain specimen handwriting from an accused to be used at the time of his trial. As the genuineness of the handwriting of the accused upon the check in question was involved, the proved specimens of his writing were competent evidence as a basis for comparison by witnesses and by the court to prove such genuineness (MCM, 1928, par. 116b, p. 120)."

In accordance with the foregoing, we are of the opinion that by his participation in the voice identification parade without objection,

accused waived his privilege against self-incrimination. Accused had a vital interest in the outcome of the test. If the result had been a failure by the prosecution's witness to identify accused, the prosecution's case would have been severely damaged and the defense would have been presented with a most valuable piece of evidence. We do not think he should be allowed to stand by and speculate on the outcome of the test asserting his constitutional rights only when the result became adverse to him.

In reaching this conclusion we have considered the cases of State v. Taylor, (S.C.), 49 S.E. 2d 289; and Beachem v. State, 144 Tex. Crim. R. 272, 162 S.W. 2d 706, in which a contrary conclusion was announced. In neither case, however, did the court consider the question whether the privilege was waived by accused. Whether accused's participation was voluntary or compelled does not clearly appear in the reported cases.

Evidence was also introduced showing that at the time of his arrest, about two hours and a half after the murder, accused had blood on his trousers. On examination this blood was found to be Type O, the same type as the blood of deceased. Accused's blood was shown to be Type B. The law pertaining to the admissibility of blood tests was reviewed in the case of Shanks v. State, (Md. 1945, 45 A.2d 85). The Maryland Court of Appeals therein held that evidence that the same type of blood as the blood of the prosecutrix was found upon accused's coat was admissible as a link of circumstantial evidence corroborating prosecution's identification of accused as the person who raped her. The Court said:

"When it comes to the admission of the result of the tests of the blood of the prosecuting witness, of the blood from her clothes and of the blood on the snow where the crime was committed, a different question is presented. The evidence shows that all of this blood was Type O, which was exactly the same as that on the coat of the accused. This, then, was evidence that the blood on the coat of accused could have come from the prosecuting witness, but according to the testimony of Dr. Freimuth, 45% of all the population have this same blood."

After discussing the requirements of inductive proof the court continued:

"The objection of remoteness goes to the weight of the evidence rather than to its admissibility. To exclude evidence merely because it tends to establish a possibility, rather than

a probability, would produce curious results not heretofore thought of. In this case the fact that the accused was somewhere near the scene of the crime would not, in itself, establish a probability that he was guilty, but only a possibility, yet such evidence is clearly admissible as a link in the chain. Similar evidence has never been questioned as being too remote. That is a question of weight to be determined by the Court or the jury.

* * *

"* * * In the case at bar the similarity of blood type tends to corroborate the State's theory that the accused assaulted the prosecuting witness and caused her blood to stain his coat and the snow at the scene of the crime, by showing conclusively that it could have been her blood."

The Board of Review is of the opinion that the law member did not err in admitting evidence showing that the same type of blood as that of deceased was found upon accused's trousers.

The admissibility of the blood tests must also be considered in connection with the statements of accused purporting to account for the presence of blood on his clothes. He told the CID investigators, and he testified on the witness stand, that he had a fight with one Sterling during the evening of 5 January, and that he, accused, sustained a nose-bleed thereby staining his clothes. Since the blood found on his clothes was Type O and his own blood was Type B his explanation was patently false. The results of the tests made of his own blood and of the bloodstains on his trousers were clearly admissible for the purpose of refuting and establishing the falsity of his explanation. The fact that accused made false explanations in his own defense was evidence to be weighed by the court together with the other facts and circumstances of the case. It is stated in Wilson v. United States, 162 U.S. 613, 16 U.S. Sup. Ct. 895, 40 L. Ed. 1090, as follows:

"Nor can there be any question that if the jury were satisfied from the evidence that false statements in the case were made by defendant on his behalf, at his instigation, they had the right, not only to take such statements into consideration in connection with all the other circumstances of the case in determining whether or not defendant's conduct had been satisfactorily explained by him upon the theory of his innocence, but also to regard false statements in explanation or defense made, or procured to be made, as in themselves tending to show guilt. The destruction, suppression, or fabrication of evidence undoubtedly gives rise to a presumption of guilt to be dealt with by the jury." (underscoring supplied).

(acc: Lindsey v. United States, 264 Fed. 94,96; Shana v. United States, 94 F.2d 1,4; Seeman v. United States, 96 F.2d 732,733; United States v. Graham, 102 F.2d 436,442-443).

Finally, the prosecution showed that, when questioned by the CID agents and asked if he had killed Keiko, accused replied that he did not know, that he could have, and that he thought for a long time he might do something like that. Although on subsequent questioning accused categorically denied killing Keiko, his statements were admissible for whatever inferences the court might reasonably draw therefrom. Prior to the questioning accused was advised of his rights under the 24th Article of War. While the questioning was prolonged there is no showing of duress or undue influence. We are of the opinion that the record amply shows that his statements were voluntarily given.

The prosecution, therefore, established by competent proof, that accused called on the deceased, Keiko, at the Wakui residence shortly before midnight, 5-6 January. Keiko cried out for Mrs. Wakui and accused fled. Keiko told Mrs. Wakui that the accused had been there and that she was going to spend the night at another house. Keiko left the Wakui residence but returned in a few minutes followed by accused. He was heard to ask Keiko where she was going so late. Keiko told him she was afraid of him and cried out for Mrs. Wakui. Keiko's voice sounded as though she was being choked. Mrs. Wakui hastened outside and found Keiko dead on the ground with eight stab wounds in her back and chest. A knife protruding from her chest had been purchased by a colored soldier at a nearby hardware store earlier in the evening. Accused was arrested about two hours later and human blood was found on his trousers. When questioned he said he had a nosebleed earlier in the evening. Analysis revealed, however, that the blood on his trousers was a different type than accused's blood type, and that it matched the blood type of the deceased. When interrogated by the CID agents accused first said he did not know whether or not he killed Keiko and that he could have done it although subsequently he denied killing her.

Although accused took the witness stand and denied his guilt, the surrounding circumstances lend little credibility to his denial. In detailing his actions on 5 January, he freely admitted that during the afternoon he had been smoking marijuana and that during the evening he had been drinking gin. He contended, however, that the effect of these stimulants had worn off before he left the restaurant, where he spent the latter part of the evening, and returned to camp. According to his testimony he left the restaurant at 2355 and arrived at camp, by way of the "usual route," at 0100 or 0130. According to the map in evidence,

the most direct route between the restaurant and the camp was 1.24 miles. Why it took accused from one hour to an hour and a half to walk such a distance he did not explain. It appears from the map that his route from the restaurant to camp would have taken him very near the Wakui residence. Since the evidence showed that the deceased's assailant first came to the Wakui residence just before midnight and that she was killed about 0010 his opportunity to kill the deceased is apparent. Consequently, his denials carry little weight.

We are of the opinion that the circumstantial evidence adduced in this case not only established that accused murdered the deceased Keiko but that every reasonable hypothesis except that of guilt is excluded.

There remains to be considered the question of the admissibility of certain other evidence introduced by the prosecution, exclusive of that previously noted and discussed, and the determination of the effect of its introduction if held to be inadmissible.

For the declared purpose of proving that the murder was a part of a series of events in which accused demonstrated a design or intent to do bodily harm to the deceased and others, and for the purpose of proving identity, the prosecution introduced evidence to show that some time in late November 1948, accused committed an assault with a knife on one Beniko Nagata; another assault with a knife by accused on the same person on 22 December 1948; his possession in October and December 1948 of a switch blade knife; his possession on an unspecified date of a pen knife; his possession on an unspecified date of a butcher knife; and his possession on 3 January 1949 of a butcher knife. It was not contended that any of these knives was the murder weapon.

Concerning the admissibility of evidence of this character the Manual for Courts-Martial states:

"Evidence of other acts of the accused, closely connected in point of time and circumstances of commission to the offense for which he is on trial, is admissible if it tends to establish the identity of the accused as the perpetrator of the offense in question, to show the motive of plan of action of the accused, to show his intent or guilty knowledge if intent or guilty knowledge is an element of the offense charged, or to refute his claim that his participation in the offense charged was the result of accident or mistake. Such evidence is admissible even though it tends to establish the commission of an offense not charged. The court should not consider evidence so offered as bearing in any way upon the question of the general moral character of the accused." (MCM, 1949, Par 125b)

The conditions governing the admission of evidence of other acts to prove identity are set out by Wharton as follows:

"* * Evidence of an independent and separate crime, while inadmissible to prove the guilt of one on trial for a criminal offense, is admissible where such evidence tends to aid in identifying the accused as the person who committed the particular crime under investigation. When a crime is committed by novel means or in a particular manner, the proof of other distinct crimes may be admitted for the purpose of identifying the accused as the perpetrator thereof. In order, however, for evidence of another crime to be admissible to prove the identity of the accused, there must be such a logical connection between the crimes that the proof of one will naturally tend to show that the accused is the person who committed the other. Where the two offenses are entirely different, in no way or manner connected with each other, and do not tend to aid in identifying the accused, it is error to admit on the trial for one evidence of the other, under the claim of identification." (Wharton's Criminal Evidence, 11th Ed, Vol. 1, pp.509-511)

There does not appear to be any necessary connection between accused's possession of knives, or his assaults with knives on a girl other than deceased, and the instant homicide. There is nothing so novel or distinctive about the mere use of a knife in committing a murder as to link with it a person who possesses knives or has previously committed an assault with a knife. Furthermore, these other acts of accused throw no light on his intent in the present case. There is no suggestion in the record of trial that the present killing might have been committed by accident or in self-defense or in heat of passion caused by adequate provocation. The evidence in question has no conceivable relation to the question of intent. Finally, the other offenses or acts of accused do not in any way tend to establish a common scheme or plan embracing the commission of a series of crimes so related to each other that proof of the other offenses tend to prove the commission of the instant offense. We believe that the only effect that the introduction of this evidence had was to prove that the accused was a person of evil disposition and hence more apt to commit murder than a peaceable person. But this is precisely what the rules of evidence forbid. As the Manual for Courts-Martial states:

"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. * * *." (MCM, 1949, Par 125b)

The general rule is also given in the following Federal cases (cited in CM 196371, Steenberg, 2 BR 349,354):

"To receive evidence of like offenses to those charged in the indictment under which the accused is on trial is neither competent, fair, nor just, where no question of intent is in issue, and no connection between such offenses and those charged is proved." (Grantello v. U.S., 3 F.2d 117)

"That the doing of one act is in itself no evidence that the same or a like act was again done by the same person has been so often judicially repeated that it is commonplace." (Dyer v. U.S., 186 Fed. 614).

Among the cases specifically holding that evidence of possession by accused of weapons other than the murder weapon is inadmissible are People v. McGeoghegan, 325 Ill. 337, 156 N.E. 378; People v. Zackewitz, 254 N.Y. 192, 172 N.E. 466. Evidence of other assaults was held inadmissible in the following cases involving homicide or aggravated assault: People v. Dowd, 127 Mich. 140, 86 N.W. 546; People v. Klide, 156 Mich. 373, 120 N.W. 989; Herring v. State, 122 Miss. 647, 84 So. 699; State v. Maldox, 339 Mo. 840; 98 S.W. 2d 535; Maddox v. State, Tex. Cr., 115 S.W. 2d 644; Kirby v. State, 182 Tenn. 16, 184 S.W. 2d 41; People v. Lane, 300 Ill. 422, 133 N.E. 267; Underhill v. State, 185 Ind. 587, 114 N.E. 88; Hanson v. Boots, 41 S.D. 96; 168 N.W. 798.

In the course of further cross-examination of accused the prosecution asked if accused remembered shooting a policeman in Chicago and if he was convicted for it. To both questions accused answered "No." The prosecution failed to introduce any evidence to support the implication contained in these questions.

The propounding of accusatory questions to an accused on cross-examination, without subsequently refuting the accused's denials, is the subject of detailed comment in CM 333525, Abston, 1 BR-JC 9, at page 39 to 42,59. The Board of Review held as follows:

"We likewise conclude that the propounding to an accused by the prosecution, by way of impeachment or otherwise, of questions, which if answered in the affirmative by accused would be inculpatory or would attribute to him damaging admissions, without judicially refuting accused's denial thereof, or if by reason of inability so to refute, failing to take all steps possible to erase from the minds of the court the effect of the inculpatory matter or of the purported admissions, may result in the reversal of a conviction."

The opinion of the Board of Review was concurred in by the Judicial Council in so far as it related to a question, propounded to the accused on cross-examination, which inferred that the accused had done an act strongly indicative of his guilt of the offense charged against him. In the instant case the import of the questions being considered is not to show accused's guilt of the offense charged but rather to impeach his credibility. Nevertheless, the propounding of such questions appears to fall within the rule expressed in the Abston case, supra.

The prosecution also introduced evidence that during the course of his interrogation by CID agents accused stated that he had been a butcher or slaughterer in the Chicago stockyards. Since this statement followed immediately upon accused's admission that he might have killed Keike and that he had thought for a long time he might do such a deed, the statement could be interpreted as explanatory of his admission, and therefore, it was properly admissible in evidence. The prosecution went on further to bring out the manner in which accused killed pigs. This questioning appears to be a logical development from that preceding it and tended to shed some light on the prior admission. Subsequently, when accused took the witness stand, he was asked on cross-examination whether he had made the statements attributed to him and for the most part he denied making them. The prosecution then asked accused if he had made other statements to the CID agents concerning how to kill a human noiselessly and as to his visiting slaughter houses in the Tokyo-Yokohama area to watch slaughtering. His denials on these two points were never refuted by the prosecution. The record does show that the prosecution, on rebuttal, attempted to introduce a transcript of accused's examination by the CID agents and that the transcript was excluded because its accuracy could not be established. Presumably this transcript was introduced for the purpose of refuting accused's denials. Under the circumstances we do not believe that any bad faith can be attributed to the prosecution. The law member, however, should have instructed the court to disregard any inferences that might be drawn from the questions referred to above.

In holding that evidence of prior assaults by accused and of his possession of knives was erroneously received, and that asking him accusatory questions without refuting his denials was error, we are confronted with the question whether the substantial rights of the accused were injuriously affected thereby.

Article of War 37 provides as follows:

"The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: Provided, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles: Provided further, That the omission of the words 'hard labor' in any sentence of a court-martial adjudging imprisonment or confinement shall not be construed as depriving the authorities executing such sentence of imprisonment or confinement of the power to require hard labor as a part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishments."

In interpreting this provision The Judge Advocate General in CM 12749 (1919) held:

"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."

This rule has been repeated in substantially the same form in many subsequent cases.

In the recent case of CM 335123, Green, the Judicial Council quoted and applied the interpretation given by the United States Supreme Court to the Federal harmless error statute, "the provisions of which are substantially similar to those of Article of War 37." The rule therein applied is summarized in Kotteakes, v. United States (1946), 328 U.S. 750, 757, 90 L.Ed. 1557, as follows:

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment shall stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. Bruno v. United States, supra,

at 294. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

In the Green case, supra, the erroneous reception of a laboratory report was held to have injuriously affected the substantial rights of the accused, the Judicial Council being of the opinion that the findings of guilty were substantially swayed, if not controlled, by this evidence.

Since the facts vary widely from case to case, and in each instance it is necessary to weigh and consider the incompetent evidence with respect to that legally admitted, the precedents of the Board of Review interpreting Article of War 37 are of little assistance in resolving the problem in the present case. As stated by the Board of Review in CM 273791, Gould, 47 BR 29, 74:

"It is the general rule that the prejudicial effect of errors in the admission of irrelevant, incompetent or immaterial evidence offered by the prosecution is to be measured by consideration whether the legal evidence of guilt is relatively conclusive or inconclusive, and the extent to which the evidence for the prosecution is contradicted, or explained consistently with innocence by the evidence on behalf of the accused. It seems obvious that evidence improperly admitted might affect the ultimate result in one case, and not in another. * * *."

We have previously stated our conclusion that the competent evidence of record introduced by the prosecution not only established accused's guilt but excludes every reasonable hypothesis of innocence. When considered in the light of the compelling case made out against accused, the erroneously received evidence appears to be of little consequence. We believe that we can say with "fair assurance" that the judgment of the members of the court was not substantially swayed by evidence of his prior misconduct or by the insinuations contained in the accusatory questions. We conclude that the substantial rights of the accused were not injuriously affected.

7. Accused is presently about 20 years and 7 months of age. It appears from the history contained in the Staff Judge Advocate's

review that accused was tried in the Boys Court of Chicago in December 1943, for carrying a concealed weapon and was sentenced to three years in jail. In January 1945, he was tried in that court for breaking parole and sentenced to six months in jail. On 9 March 1945 he was arrested on charges of "shooting a police." Accused admitted in the court-martial that he had served seventeen months in the Illinois State Training School between March 1945 and August 1946 but he stated that the charges involved carrying a concealed weapon, a pistol. Accused enlisted in the Army on 14 June 1948.

8. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence of death or life imprisonment is mandatory upon a conviction of premeditated murder in violation of Article of War 92.

Signed _____, J.A.G.C.

Signed _____, J.A.G.C.

Signed _____, J.A.G.C.

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

(393)

CSJAGU CM 337189

MAR 8 1950

UNITED STATES

YOKOHAMA COMMAND

v.

Private JAMES W. HARRIS, RA
1625661, Battery C, 933rd
Antiaircraft Artillery
Automatic Weapons Battalion,
APO 503

Trial by G. C. M., convened
at Yokohama, Honshu, Japan,
26-29 April, and 2 May 1949.
Death.

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

1. The record of trial and the opinion of the Board of Review in the case of the soldier named above have been submitted to the Judicial Council pursuant to Article of War 50(d)(1). The Judicial Council submits this, its holding to The Judge Advocate General.
2. Upon trial by General Court-Martial convened at Yokohama, Japan, 26-29 April and 2 May 1949 the accused was found guilty of the murder of Shimako Mitsuhashi at Yokohama, Japan, on the night of 5-6 January 1949 by stabbing her with a knife. Evidence of one previous conviction by summary court-martial was introduced. All members present at the time the vote was taken concurring, he was sentenced to be put to death in such manner as the proper authority may direct. 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 Judicial Council finds the evidence to be as stated in the opinion of the Board of Review. The competent evidence is briefly summarized as follows:

For some time prior to January 1949 the accused was a member of Battery C, 933rd AntiAircraft Artillery Automatic Weapons Battalion, which was stationed in Yokohama, Japan. It was his habit from time to time to visit the house of Mrs. Wakui which was located in Yokohama approximately one mile from the Battalion Barracks. His particular friend there was a Japanese girl by the name of Toshiko, who had left prior to January 1949. Two other Japanese girls, the deceased, Shimako Mitsuhashi, commonly called "Keiko" and Chizuko Mishikawa, lived in the house. In December 1948 the accused had been involved in an altercation

with the deceased and had struck her several times because she "put her nose in * * * his business". On another occasion when he was arguing with the deceased, accused had struck both her and Chizuko. As a result of these incidents accused was called the "Kowai" soldier by the deceased, Chizuko and Mrs. Wakui. The word "Kowai" means "fearful, frightful, dreadful, terrible, horrible, or awful".

Accused absented himself without leave from his battery at 2400 hours 2 January 1949 and on 5 January 1949 at about 1800 hours he visited the Wakui house. At the time of accused's arrival at the house, the deceased and Chizuko were with two soldiers of the accused's battalion, Privates Joe L. Robertson and Junior Miller. Shortly thereafter the two couples together with accused left the house, the former stating that they were going to the "club". After 200 or 300 yards the accused left the two couples, remarking "I'll see you later". Accused went to the house of a girl called Katie and remained there between 1830 and 1900 hours and while there became involved in an argument with another soldier, Private John E. Sterling, who struck the accused several times in the face. The accused did not strike Sterling. The accused was seen drinking "shochu" at about 2350 hours the same evening in a chop house approximately .6 a mile from the Wakui house.

The deceased, Chizuko and the two soldiers, Robertson and Miller, returned to the Wakui house at about 2200 hours and went to bed, the deceased taking Miller to her room at the rear of the house and Chizuko taking Robertson to her room at the front of the house. Miller got up and went back to camp at about 2330 hours. Robertson followed him in about five minutes. After Robertson's departure Chizuko went back to bed and while dozing she first heard footsteps going around to the rear of the house and then the voices of the deceased and a soldier conversing, followed by the deceased calling "Obo-san" (Grandmother), the nickname commonly applied to Mrs. Wakui. The latter heard the call, which occurred in her opinion at about midnight. She got up and went outside her room where she encountered a colored soldier walking toward the gate to the yard in front of the house. She was unable to identify the soldier. Mrs. Wakui met the deceased standing in the vicinity of the latrine and after talking with her for a while she returned to her room and went back to bed. A few minutes later Chizuko heard the deceased talking with someone near the gate to the yard in front of the house, which was approximately 36 feet from her room. The deceased was speaking in English but Chizuko could not understand everything that she said, but she did hear "very vaguely" a soldier's voice asking in English "Where are you going too late?" and shortly thereafter the deceased said in English, "I don't know why. I scare of you." The deceased then cried out in a loud voice, "Obo-san" in a tone as though she were being choked. Mrs. Wakui heard the cry, went outside and found the deceased dead on the ground in front of the gate. It was then about 0010 hours 6 January.

A butcher knife "was sticking through her clothes down into the body" and the front of her body was covered with blood. Pictures taken of the body on 6 January show two stab wounds in the chest between the neck and

the left breast and six stab wounds across the back about half way between the shoulder and the waistline, and ranging from about six inches to the left of the spinal column to about one inch to the right of it. The report of an autopsy performed on the body states that the two wounds in the thorax were serious, one of them reaching deeply into "the arch region of the aorta" and the other reaching the entrance of the lung and cutting the pulmonary artery. The wounds in the back reached the lungs but were shallow. The cause of death was hemorrhage caused by the two wounds in the thoracic cavity.

Accused was absent from the bed check at his barracks which was made between 0015 and 0035 hours 6 January. His bed had been previously turned in to the supply room because he was absent without leave. There were no other absentees. Between 0100 and 0200 hours that morning an unidentified soldier came through the gate to the battalion area and inquired of the guard the time and then went toward the area in which Battery C was located. The accused admitted that some time during the night he returned to his barracks and borrowed a comforter from another soldier. The accused was found asleep on the floor of his barracks at 0230 hours that morning. At this time he was dressed in an OD shirt, trousers and socks and nearby was a blouse, cap and shoes which he put on when placed under arrest. The clothes of the accused were taken from him and subjected to tests. Human blood, type O, was discovered on the trousers. Human blood was also discovered on the cap but it could not be typed. Tests of the blood on the clothes worn by the deceased were made and it was found to be type O human blood. Blood taken from the body of the deceased was found to be type O. A sample of the blood of the accused was taken and found to be type B. In his pretrial statement and on the stand at the trial the accused explained the bloodstains on his trousers by stating that the blood came from his nose as a result of the fight at Katie's house. He could not account for the fact that the blood on his trousers was of a different type than his own.

Investigation into the origin of the murder weapon (Pros. Ex. 17) disclosed that the knife had been purchased by a colored soldier about 1930 hours on the night of 5 January 1949 from the Shimizu Hardware Store in Yokohama. There was no direct evidence of record showing that the accused had purchased or possessed that weapon. However it was shown that on 3 January 1949 the accused had possession of a similar knife (Pros. Ex. 9) which had been purchased at the Shimizu Hardware Store by a colored soldier on 2 January 1949.

While testifying that the voice she had heard in conversation with the deceased was that of the accused, Chizuko stated "I am not positive but it resembles James Harris' voice". She also testified that she had "had occasion to pick the voice of James Harris from the voices of other persons" and that she was sure that the voice she heard was that of the accused (R 218). On cross examination Chizuko testified that the accused had beaten her two or three times, but that she did "not

necessarily" hate him, although she called him the fearful and horrible soldier because he struck her. She was positive that the voice she heard near the front gate was the voice of the accused and insisted that she recognized it as such at the time when she heard it (R. 218, 219, 225). She also had "known the voice of James Harris for a long time." (R. 227).

Mr. Ozell P. Henry, a CID Agent, testified that on 6 January accused was placed in a lineup of ten men at the CID headquarters. He had not been advised of his rights under Article of War 24. This was not done until 11 January. At the first lineup held on 6 January Chizuko saw the faces of all persons therein and identified the accused "as the soldier who had come to her house previously and caused trouble." Thereafter the men in the lineup were shifted about and instructed to read from a fire poster, repeat the months of the year and to say "Too late. Where you go now?" Chizuko was required to walk in the room backwards and placed approximately ten feet in front of the lineup with her back toward the men. She did not know the sequence in which the men in the lineup were to talk. Over objection by the defense that accused had not been advised of his rights Mr. Henry was permitted to testify that Chizuko identified accused's voice in the lineup in three consecutive tests (R. 238). Accused was in custody at the time (R. 111, 344).

CID Agents Ozell P. Henry and Rolland A. Newlund interrogated the accused on 11, 12, and 14 January and 2 March 1949 (R. 165, 172, 181, 328, 329). The interrogations ranged from one hour to three hours in duration and totaled about seven hours (R. 180). Prior to the interrogations Article of War 24 was read and explained to him (R. 173, 179, 201). In reply to a question as to whether he had killed the deceased, accused said "that he didn't know whether he had or not. He could have killed her and he might have not killed her. He didn't know." and that "he thought for a long time he might do something like that." (R. 182). Over the objection of the defense Mr. Henry was permitted to testify that the accused had said in reply to questions propounded to him that he had formerly worked in a slaughter yard in Chicago killing pigs. He killed the pigs by sticking them in the throat with a long curved knife as they passed him in a production line. Also over the objection of the defense counsel Mr. Henry testified that accused had admitted that on 5 January 1949 he had smoked narcotics and taken a hypodermic and that he had used narcotics since he was ten years old (R. 183). According to the accused use of narcotics "makes you feel like you are the boss." (R. 184). Mr. Henry informed the accused of the result of the tests made of the blood found on his clothing and accused explained this by saying "He was hit by a soldier and his nose bled and he got blood on his trousers." (R. 185).

On cross examination Mr. Henry admitted having asked the accused "When you stabbed Keiko, what interrupted you?" and receiving the reply "I didn't stab Keiko." (R. 186).

Accused, after being advised of his rights as a witness, elected to take the stand in his own behalf. On direct examination, his testimony as to his movements on the night of the murder does not differ substantially

from that given by the prosecution witnesses. He testified that he left the Japanese chop house at 2355 hours, 5 January, and went directly to the camp, arriving there between 0100 and 0130, 6 January. Another soldier testified that the accused, was at the chop house at 2350 hours. The accused denied that he had killed the deceased, that he had a knife in his possession that night, or that he had seen the deceased since early in the evening (R. 252-257).

On cross examination he admitted having slapped the deceased because she "put her nose in my business", smoking marijuana on the afternoon of the murder and drinking Japanese gin in the chop house in the evening and that his camp was between one and one-half and two miles from the chop house. The blood on his trousers, he explained, came from his nose, but he could not account for the fact that this blood was of a type other than his own. In many particulars he denied the statements attributed to him by the CID. In particular he denied that he told them how he used "to stick" pigs, how he could kill a human being without noise, how he killed ducks, visiting slaughter houses in the Tokyo-Yokohama area, or how a hog could be killed without much bleeding (R. 257-281). Furthermore, he denied shooting a policeman in Chicago, but admitted he was in the Illinois State Training School from 9 March 1945 to 16 August 1946 as the result of a conviction for carrying a concealed weapon.

He was cross examined at considerable length concerning the possession of knives. He denied any knowledge of the murder weapon (Pros. Ex. 17) but admitted possession of a dagger-type knife (Pros. Ex. 8). He denied threatening to kill a Japanese girl other than the deceased, but admitted threatening to strike her. He admitted that after his arrest he took the CID agents to the Shimizu Hardware Store where he had purchased a knife (R. 266-268). He denied any knowledge of two other knives (Pros. Exs. 6 and 9). He was also questioned regarding various assaults upon Japanese women other than the deceased (R. 283, 298).

4. Discussion.

The evidence clearly establishes that the deceased was deliberately murdered by being stabbed eight times in the back and chest with a butcher knife as she was leaving the Wakui house shortly after midnight on the night of 5-6 January 1949. The principal issue of fact presented by the evidence is the identity of the accused as the murderer. The competent circumstantial evidence tending to show the accused's connection with the crime is as follows:

a. Motive and known prior hostility by accused against the deceased as evidenced by prior assaults against her.

b. The accused's presence at the Wakui house at about 1800 hours, 5 January 1949 and his movements later at night indicating that he could have been at the scene of the crime at the time of the murder.

c. Identification of the accused as the person with the deceased immediately prior to the murder by Chizuko who testified that she recognized

his voice in conversation with the deceased. Although this testimony was unquestionably competent the court had the duty in determining the weight to which it was entitled, to consider Chizuko's hostility toward the accused, the equivocal character of her first testimony in this respect as contrasted with the positive nature of her later remarks, and the fairly great distance from her bedroom to the place from where the voice came.

It is also true that the circumstances of Chizuko's extra judicial identification of accused's voice decreases the probative and corroborative force of that identification. Such evidence is most effective when it is shown that the witness at the identification parade has identified as the perpetrator of an offense a person whom the witness has seen or heard for the first time at the time of the alleged crime. When, as in the instant case, it is shown that the witness has selected as the assailant a person she had known for some time and against whom she had motive for animosity, the corroborative effect is greatly weakened. This is particularly true in the case of a voice identification parade when it is shown that the witness knew that the accused was in the lineup and that she had known the accused and has frequently heard his voice before the fatal assault.

d. The finding of bloodstains on the trousers of the accused shown to be of the same type of human blood (Type O) as that of the deceased, which type was a different one from that of the accused (Type B).

e. A false explanation by the accused to the CID and in his testimony on the stand that the blood on his trousers was his own and the result of a bloody nose which he had sustained in a fight with another soldier. It was shown that the accused had engaged in such a fight but it appears from his own testimony that he alone received blows during the fight. Consequently it cannot reasonably be inferred that the blood came from the other soldier.

f. An equivocal statement by the accused upon lengthy interrogation by the CID that he might have killed the deceased and that he had been afraid that he might do such a thing. It is to be noted, however, that he categorically denied any connection with the crime throughout the rest of the interrogation.

g. A showing that the accused's civilian occupation had been that of a hog butcher, from which circumstance it may be inferred that the accused was skilled in killing pigs with a butcher knife.

The accused took the stand in his own behalf and testified to an alibi. The defense produced another witness in support of the alibi but this testimony did not preclude the possibility that accused could have been at the scene of the crime at the time of the murder.

If given full credit by the court, the competent circumstantial evidence showing a coincidence of opportunity, some motive, voice identification at the time and place of the murder and bloodstains on the clothing of the accused was sufficient to make out a fairly persuasive

case of guilt. It is readily apparent, however, that the key circumstance of the prosecution's case was the voice identification. Had the court elected to disbelieve Chizuko in view of the circumstances recounted in subparagraph c, above the prosecution's case would have to be regarded as extremely weak.

The record contains a substantial amount of erroneously admitted and demaging evidence - all of which had a tendency to identify the accused as the murderer in the minds of the court. Whether these errors had a substantial effect on the findings and thus constituted prejudicial error is the principal issue of law presented by the record of trial. The most serious errors are summarized and discussed below:

Res gestae identification of accused by deceased some 15 minutes before the fatal assault.

Over objection by the defense that such evidence was inadmissible as hearsay Mrs. Wakui was permitted to testify as to what the deceased had said to her about midnight in the vicinity of the latrine after she had been summoned by the deceased's call for "Obo-san". She testified that the deceased had told her in a normal tone of voice that "the Kowai soldier had come so I will go and sleep at Harumi-san's house". Mrs. Wakui then asked the deceased if she was afraid to leave the house alone and received the reply that "Everything would be all right." Chizuko also testified that she had heard the deceased make substantially the same remark. Mrs. Wakui further testified that approximately ten minutes elapsed between the deceased's call from the vicinity of the latrine until she again called from the vicinity of the gate where her dead body was found. The conversation was received in evidence on the theory that it was part of the res gestae.

In discussing the admissibility of res gestae declarations, the Manual for Courts-Martial provides:

"Circumstances, including exclamations, declarations, and statements of participants and bystanders, substantially contemporaneous with the main fact under consideration and so closely connected with the main fact as to throw light upon its character, are termed res gestae. Evidence of anything constituting a part of the res gestae is always admissible.

"Thus, when an accused, A, is charged with the murder of B, evidence given by any person who was present is admissible to show that immediately before the killing the wife of the accused exclaimed to him, 'B has just assaulted me.' This evidence is admissible because the making of the remark was substantially contemporaneous with the main fact under consideration—the alleged killing—and so closely connected therewith as to throw light upon its character in that the remark tends

to indicate the motive in the mind of the accused, regardless of whether his wife had in fact been assaulted. The admissibility of such evidence does not constitute an exception to the hearsay rule because it is introduced, not for the purpose of proving the truth of the remark, but merely to show that the remark was made.

"It sometimes happens, however, that an utterance constituting a part of the *res gestae* was made under such circumstances of shock or surprise as to show that it was not the result of reflection or design but made spontaneously. Evidence of an utterance shown to have been made under those circumstances may be introduced for the purpose of proving the truth of the utterance itself. This does constitute an exception to the hearsay rule. For example, an accused, A, is charged with having shot B. A witness testifies that he, as well as A, B, and a fourth man, C, were present at the time of the shooting; that A and C had pistols; that he did not actually see the shot fired; that he was looking at B and not at A and C when he heard a shot, and saw B, who was looking toward A and C, fall; and that as B fell B exclaimed 'A has shot me!' The testimony as to B's exclamation is admissible as part of the *res gestae*; but, because of the circumstances under which the exclamation was made, the evidence may also be considered as tending to prove that it was A who shot B." (MCM 1949, par 128b)

Although there is little uniformity in the adjudicated cases and in legal writings as to what is comprehended by the term *res gestae* (See Wigmore on Evidence, (Third Edition) Vol VI, Section 1745; U.S. v. Matot (C.C.A. 2, 1944) 146 F. 2d 197)), the Manual for Courts-Martial recognizes two classes of statements:

a. Verbal acts contemporaneous with the main fact which throw light upon the circumstances and are admissible to show that the remark was made and not the truth of the remark. As indicated above such verbal acts are not regarded as hearsay.

b. Spontaneous remarks made under such circumstances of shock or surprise as to show they were not the result of reflection or design. Such remarks are admissible, as an exception to the hearsay rule, to show the truth of the declaration. (Wigmore op cit, Sections 1749-1750.)

It is clear that the deceased's remark relative to the "kawai" soldier could have relevance only to show that the accused had confronted her in the vicinity of the latrine. Therefore, if admissible at all, it must be regarded as a spontaneous exclamation, admissible as proof of the truth of the declaration. The prerequisites for the admissibility of a spontaneous exclamation which may be spelled out from the rule of the Manual are:

- a. The utterance must have been substantially contemporaneous with the main fact - the alleged murder.
- b. It must throw light upon the murder.
- c. It must have been made under circumstances showing such shock or surprise as to show that it was not the result of reflection or design but made spontaneously.

In the instant case the deceased's remarks were not made under the stimulus of the fatal assault but rather under the stimulus of her confrontation by a colored soldier in the vicinity of the latrine some ten minutes before the fatal assault. This event was not the main fact under consideration. Although it may have contributed to set the stage for the events which followed, there were nevertheless subsequent intervening events which engender doubt as to whether the utterance was substantially contemporaneous with the main fact. Moreover, it has been held by some courts that:

"It is not enough that the speaker was under the stress of nervous excitement or pain when the statement was made, but it must appear that the speaker was under the stress of nervous excitement and shock produced by the act in issue."
(Hamilton v. Haubner (Neb 1945) 12 N.W. 2d 553, 558)

Under this rule the deceased's remarks, if made under shock or surprise produced by a collateral fact, are not admissible as a spontaneous exclamation.

Another serious problem in the consideration whether a sufficient foundation for a spontaneous res gestae exclamation was laid is whether the confrontation of the deceased by a colored soldier near the latrine was to her a startling, exciting or shocking event sufficient to meet the requirement of the rule. This appears to be negated by Mrs. Wakui's testimony that the deceased's utterance was made in a normal tone of voice and that she stated that she did not fear to venture forth alone to spend the night with a friend. It is recognized that confrontation by a colored soldier at midnight near a latrine would be a startling circumstance to most women. That the occupational hazards of the deceased's profession rendered her immune to shock under such circumstances is probable in view of her relatively calm reaction thereto. It is probable that the occupants of the Wakui house were quite accustomed to confrontation by colored soldiers at all hours of the day and night, within and without the house. Thus they might not be expected to display great excitement when confronted with what to them was not an uncommon occurrence.

It is not our view that there is anything in the circumstances which suggests that the deceased's remarks were likely to be false or fabricated. But it is not enough that no motive for falsehood is suggested by the record, else there would be an effective end to the rule against hearsay. In order to be admissible as a spontaneous exclamation the record must clearly and

unequivocally show that the exclamation was stimulated by shock or surprise. Where such stimulus is not shown the declaration should be excluded (Upton v. Commonwealth, 172 Virginia 654; 2 S.E. 2d 337; Hamilton v. Heubner, supra). The Council concludes, therefore, that the deceased's declaration to Mrs. Wakui was not properly admitted as a spontaneous exclamation.

There remains for consideration whether the declaration was admissible as evidence of the deceased's state of mind under the doctrine of Mutual Life Insurance Company v. Hillmon (1892) 145 U.S. 285.

In the Hillmon case one Walter, a resident of Wichita, Kansas, wrote letters to his sister and his sweetheart declaring his intention to leave on an early date "with a certain Mr. Hillmon, a sheep-trader for Colorado or parts unknown to me". This was the last heard of either Walter or Hillmon. Two weeks later a dead body was found at Crooked Creek, Kansas. The beneficiaries of Hillmon's insurance policy contended that the body was that of Hillmon and the insurance company contested the claim on the ground that the body was that of Walter.

After extended litigation resulting in several jury disagreements a jury found for the plaintiff. The Supreme Court of the United States reversed the judgment and took occasion to state that the court erred in excluding Walter's letters because:

a. The declaration in the letters tended to prove Walter's "intention of going, and of going with Hillmon."

b. Thus rendering it "more probable that he did go and that he went with Hillmon".

c. Which increased probability, in turn made possible the inference that Walter, an available victim, was murdered and that his corpse was used in the nefarious way asserted.

Applying the doctrine of the Hillmon case, it has been suggested, that the deceased's declaration in the instant case may properly show her state of mind immediately following her confrontation by a colored soldier, i.e. fear or annoyance and an intention to go to the house of Haruni-san. By doing so it also tends to show that it was the accused who confronted her at the latrine.

It is to be noted that the Hillmon situation was one in which the declaration pertained to the speaker's present intention to perform acts in the future. Such declarations were held to be competent to show the probability that what was intended was in fact later performed. In the instant case the most obvious aspect of the deceased's declaration to Mrs. Wakui was to show that the accused had been near the latrine. It pertains to the speaker's intention only with respect to her plan to spend the night at Haruni-san's.

The United States Supreme Court expressly limited the application of the Hillmon doctrine to declarations showing the declarant's future intention, and excluded from its scope declarations showing recollection of past events or to show the intention of some one other than the declarant. In Shepard v. United States, 290 U.S. 96, 105 (1933) the Supreme Court, speaking through Mr. Justice Cardozo said:

"The ruling in that case [Hillmon] marks the high water mark beyond which courts have been unwilling to go. It has developed a substantial body of criticism and commentary. Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.

"The testimony now questioned faced backward and not forward. This at least it did in its most obvious implication. What is even more important it spoke to a past act, and more than that, to an act by some one not the speaker. Other tendency, if it had any, was a filament too fine to be distinguishable by a jury."

The most obvious implication of the deceased's remark in the instant case is that the accused had been near the latrine. Thus it points back and evidences the speaker's recollection. It also speaks of acts of another rather than of the deceased. It is true that it also evidences the speaker's intention to spend the night at Haruni-san's house, but that is a fact of only limited materiality and so remote as to be irrelevant to the contested issue in the case. It was not denied that she was killed shortly after leaving the house. That fact was completely established without calling into play the hearsay declaration of the deceased which tended strongly to impress the court with the fact that it was the accused who was physically present at the scene of the murder, approximately ten minutes before the fatal assault.

Although unnecessary, it may not have been improper to show that the deceased intended to spend the night at Haruni-san's house. If admissible for the purpose of showing the speaker's state of mind, may her remarks be received without qualification to show all inferences which may be drawn from the statement? Similar reasoning was applied by the Supreme Court of Oregon in State v. Farnam, 82 Ore. 211, 161 Pac 417 (1916) although even in that case the court recognized that it was error to draw any inferences from a speaker's declared intention as to what some other person's conduct or intention might be. The court, however, assumed that failure to instruct the jury as to the limited inference which could be drawn was not fatal error. The Farnam case was discussed in the light of the Hillmon case by Professor Maguire in The Hillmon Case - Thirty-Three Years After, 38 Harvard L. Rev. 717, as follows:

"In a prosecution for murder it appeared that the body of a young girl was found one morning in the ruins of a burning barn. The state's theory was that the defendant had travelled by night five miles from his home to the victim's home, had gone with the girl from her home to the barn about three-quarters of a mile distant, and at the barn killed his companion:

"The defendant denied being with the girl on the fatal night. Witnesses for the prosecution testified that during the afternoon before her death the girl declined an invitation to leave home and visit some friends, saying 'she could not because she thought Roy [the defendant] was coming down.' Over objection the trial judge admitted the evidence and allowed it to stand. The appellate court sustained a conviction for manslaughter, stating that as the evidence was competent to show what the victim intended to do, it was not to be excluded entirely because it was incompetent to connect the defendant with the crime. A cautionary instruction would have been proper, but the omission of such an instruction was not fatal, since the defendant, instead of calling for a qualification of the evidence, demanded its entire rejection.

"A lengthy dissenting opinion points out the practically unavoidable risk that the jury would think this testimony tended to prove the acts of the defendant as well as of the declarant.

"Indeed, it is hard to believe that the state used the testimony with any other idea. So far as it fixed the girl's whereabouts it was unnecessary. Her father saw her at home only a few hours before she was killed. Probably the prosecutor rather reasonably hoped the declaration would induce a belief that the defendant travelled five miles, met the deceased, took her to the barn, and there committed the crime."

In Shepard v. United States, supra, the United States Supreme Court apparently adopted the view of the dissent in the Farnam case. In that case the court decided the question whether the remote materiality of a deceased speaker's declaration to show her intention renders nonprejudicial the reception of the entire declaration despite its obvious and damaging bearing on the most bitterly contested issue in the case.

In the Shepard case, Major Shepard, a medical officer of the Army, was charged with the murder of his wife by poison. The trial court received in evidence as a dying declaration a statement by the wife to a nurse during her illness to the effect that Major Shepard had poisoned her with some bichloride of mercury dissolved in whiskey.

Because she was not really in extremis at the time of the remark the evidence was erroneously received. It may also be noted that the remark was probably a conjecture and opinion on the part of the wife and not an expression of testimonial knowledge, but the Supreme Court reserved its holding in that respect.

On appeal it was conceded by the Government that Mrs. Shepard's remark was not a dying declaration. The Government, however, argued that the accusatory statement was nevertheless proper as bearing upon Mrs. Shepard's state of mind in that it tended to rebut the defense contention that she committed suicide. Mr. Justice Cordoza disposed of this contention as follows:

"The testimony was received by the trial judge and offered by the Government with the plain understanding that it was to be used for an illegitimate purpose, gravely prejudicial. A trial becomes unfair if testimony thus accepted may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected. People v. Zackowitz, 254 N. Y. 192, 200; 172 N. E. 466. Such at all events is the result when the purpose in reserve is so obscure and artificial that it would be unlikely to occur to the minds of uninstructed jurors, and even if it did, would be swallowed up and lost in the one that was disclosed.

* * *

"* * * It [the Government] did not use the declaration by Mrs. Shepard to prove her present thought and feeling, or even her thought and feelings in times past. It used the declaration as proof of an act committed by someone else, as evidence that she was dying of poison given by her husband. * * * It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that the rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."

In view of the Shepard case it appears that the Supreme Court declined to follow the reasoning of the majority of the Supreme Court of Oregon in the earlier Farnam case to the effect that if a theory of admissibility can be conceived the entire statement may be admitted without qualification as to purpose unless the defendant demands such limitation. In the instant case, as in the Shepard case, there was no suggestion that the evidence was to be admitted for any more subtle purpose than that announced by the trial judge advocate - i.e. to show the accused's presence at the scene by a so-called res gestae declaration.

In the opinion of the Council the Shepard case precludes consideration of the deceased's remarks as proof of the accused's presence at the latrine.

It is obvious that the erroneous admission into evidence of the deceased's identification of the accused as the person she had seen about ten minutes before the fatal assault tended to lend significant corroboration to Chizuko's voice identification at the time of the fatal assault. Thus any doubt as to the credibility of Chizuko's identification would be resolved against the accused in the minds of the court.

Evidence tending to show accused's bad character, violent propensities, and possession of numerous knives.

For the declared purpose of proving that the murder was a part of a series of events in which the accused demonstrated a design or purpose to do bodily harm to the deceased and others, and for the purpose of proving identity, the prosecution introduced evidence to show that some time in late November 1948, and on 22 December 1943 accused committed assaults with a knife on another prostitute, one Beniko Nagato. In argument against the objection to the admissibility of this evidence the trial judge advocate argued:

"* * *the prosecution--the government in this case, should be permitted to show to the court by competent testimony the propensity of the accused and the probability of the accused having committed the crime as charged." (R. 37)

The suggestion that the court consider evidence of the unrelated assaults as bearing on the accused's propensity to commit acts of violence was not challenged by the law member.

The general rule governing the receipt of proof of other criminal acts by an accused is stated in the Manual for Courts-Martial as follows:

"The general and fundamental rule is that the doing of an act may not be evidenced by showing the bad character of the accused. * * * It * * * 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, p. 153)

It has been stated that the reasons for excluding such evidence are:

"(1) The over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts; (2) The tendency to condemn, not because he is guilty of the present charge, but because he has escaped punishment from other offenses; * * * (3) The injustice of attacking one necessarily unprepared to demonstrate that the attacking evidence is fabricated * * * (4) The confusion of new issues * * *" (1 Wigmore on Evidence (3rd Ed. 1940), Sec 174, p. 650. See *Com v. Jackson*, 132 Mass 20; *Denison v. State*, 17 Ala App. 674, 88 So. 211; *People v. Mangano*, 375 Ill 72,

30 N.E. (2d Ser) 428; Butler v. Commonwealth, 284 Ky. 276; 144 SW 2d 510)

In Magee v. State, 198 Miss 642, 22 So 2d 245, 247, the court had occasion to say:

"Mr. Wigmore, makes the observation that the testimony is objectionable, not because it has no appreciable probative value, but because it has too much. The admission of evidence as to the details of the previous misconduct of an accused, and to establish as a fact a prior commission of a crime by him, would result in raising a great number of collateral issues, the trial of which might be almost interminable, and divert the minds of the jury from the main issue, with a natural tendency to give excessive weight to the prior misconduct in determining the guilt of a present charge."

If the proof of prior misconduct is admissible with respect to a legitimate issue such proof is legal despite the fact that it may prejudice the triers of fact. The exceptions to the general rule recognized by the Manual for Courts-Martial are:

- a. To rebut evidence of good character adduced by the defense.
- b. To attack the credibility of the accused who testifies in his own behalf by evidence of prior conviction of offenses involving moral turpitude or his credibility may be introduced by the prosecution.
- c. "Evidence of other acts of the accused, closely connected in point of time and circumstances of commission to the offense for which he is tried, is admissible if it tends to establish the identity of the accused as the perpetrator of the offense in question, to show motive or plan of action, to show his intent or guilty knowledge if intent or guilty knowledge is an element of the offense charged or to refute his claims that his participation in the offense was the result of accident or mistake." (MCM 1949, par 125b, pp 153, 154)

It is apparent that the evidence of accused's bad character was introduced neither to rebut any evidence of good character nor for purposes of impeachment. Since the evidence of the corpus delicti adequately showed an intent to kill and premeditation, intent or guilty state of mind was not a controverted issue in the case. Similarly there was no contention that the killing was the result of accident or mistake. It follows that the only circumstances which need be considered as tending to justify this evidence are:

- a. Identity of the accused as the murderer, or
- b. Circumstances showing motive or plan of action.

Had the crime been committed by novel means, evidence of previous similar novel or unusual acts by the accused would have been admissible

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as tending to identify the accused as the perpetrator of the crime. Thus the prosecution attempted to show the accused's professional skill in killing pigs in a particular fashion. But the murder in the instant case was accomplished by eight random stabs in the chest, back, and throat of the victim. The wounds are more indicative of frenzied bungling than of professional skill. Therefore it cannot be said that there was anything unusual, unique or novel in the manner in which the crime was perpetrated. The assaults on Beniko were similar to the murder only in that a knife was used both times. It is a matter of common knowledge that knives are frequently so used. It follows that the evidence under consideration was not admissible as tending to show the identity of the accused.

Similarly the evidence of assaults upon Beniko had no legitimate tendency to show motive or plan of action with respect to the fatal assault upon the deceased. Accused's previous assaults upon the deceased were admissible to show his hostility toward her, but his assaults upon other Japanese women certainly did not show hostility toward the deceased. The prosecution argued that these assaults showed hostility toward a class and cited authority to the effect that threats of violence or expressions of hatred toward a class of which the victim is a member are admissible to show motive (See Underhill, Crim. Ev. 4th Ed, p. 1109; State v. Davis (Idaho, 1898) 53 Pac. 678, 682). The evidence in this case does not, however, show any hatred toward any recognized class of which the deceased was a victim. The accused was not shown to bear hostility toward Japanese, Japanese women, or prostitutes. His display of violence were apparently limited toward prostitutes who failed to demonstrate affection toward him. It is unreasonable to consider that the deceased earned the accused's hostility by virtue of her membership in a definite class.

The unrelated assaults formed no part of the circumstances connected with the murder and had no legitimate tendency to prove that they were links in a series of transactions, schemes or designs. Accordingly, evidence of such acts cannot be considered as admissible to prove a motive or plan of action (Grantello v. United States, 3 F 2d 117; Dyar v. United States, 186 F. 614). As stated in Wharton's Criminal Evidence (11th Ed. Vol. 1, page 352) -

"It is certainly not enough to show that the person on trial committed one or more other crimes of the same general nature in the vicinity of the place where he is charged with committing the crime for which he is on trial, and that he committed such other crime or crimes at approximately the same time."

On the same subject Wigmore states:

"The added element, then, must be, not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations. (Wigmore on Evidence, 3rd Ed. Vol. 11, page 202)."

Over objection by the defense the prosecution was also permitted to show that in October and December 1948 the accused had possession of a switch blade knife; his possession on an unspecified date of a butcher knife and his possession on 3 January 1948 of a butcher knife, in violation of standing orders. It was not contended that any of these knives was the murder weapon.

This evidence, like that of the unrelated assaults, had a tendency to show the accused's predilection for owning and using knives from which circumstance the court might be led to infer that he wielded the knife with fatal consequence against the deceased. A similar problem was considered by the Court of Appeals of New York in People v. Zackowitz, 254 N. Y. 192, 172 N.E. 466. In that case the defendant was charged with murder in the first degree. The homicide was admitted but the defense contended that the killing was committed in the heat of passion. The prosecution introduced evidence of the possession by the accused of weapons other than the one with which the killing had been perpetrated. In reversing the conviction the court said:

"* * * Almost at the opening of the trial the people began to endeavor to load the defendant down with the burden of an evil character. He was to be put before the jury as a man of murderous disposition. To that end they were allowed to prove that at the time of the encounter and at that of his arrest he had in his apartment * * * three pistols and a tear gas gun. There was no claim that he had brought these weapons out at the time of the affray, no claims that with any of them he had discharged the fatal shot * * * The end to be served was something very different. The end was to bring persuasion that here was a man of vicious and dangerous propensities, who because of these propensities was more likely to kill with deliberate and premeditated design than are men of irreproachable life and amiable manners. * * * The weapons were not brought * * * to the scene of the encounter. * * * In such circumstances, ownership of the weapons, if it has any relevance at all, has relevancy only as indicating a general disposition to make use of them thereafter, and a general disposition to make use of them thereafter is without relevance except as indicating a 'desperate type of criminal', a criminal affected with a murderous propensity.

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"We are asked to extenuate the error by calling it an incident: * * * The virus of the ruling is not so easily extracted * * * Here in the forefront of the trial * * * testimony was admitted that weapons, not the instrument of the killing had been discovered by the police in the apartment of the killer; and the weapons with great display were laid before the jury, marked as exhibits, and thereafter made the subject of animated argument. Room for doubt there is none that in the thought of the jury, as in that of the district attorney, the tendency of the whole performance was to characterize the defendant as a man murderously inclined.

* * *

"Fundamental hitherto has been the rule that character is never an issue in a criminal prosecution unless the defendant chooses to make it one * * *

"The principle back of the exclusion is one, not of logic but of policy * * * There may be cogency in the argument that a quarrelsome defendant is more likely to start a quarrel than one of milder type * * *. The law is not blind to this, but equally it is not blind to the peril to the innocent if character is accepted as probative of crime. 'The natural and inevitable tendency of the tribunal - whether judge or jury - is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of the present charge'. Wigmore, Evidence, Vol. 1, Sec. 194, and the cases cited."

The Council concludes, as did the Board of Review that the effect of the evidence of the previous unrelated assault upon Beniko and the possession of unrelated knives with the exception of the knife purchased at the Shimizu Hardware Store on 2 January 1949 was to show the propensity or disposition of the accused to commit crimes of violence with knives. Such evidence was inadmissible and its receipt constituted error (MCM 1949, par 125b, p. 153).

Failure to rebut negative answers to accusatory questions.

As pointed out by the Board of Review the accused on cross examination made negative replies to several accusatory questions which were not rebutted by the prosecution. For example, the accused was asked on cross examination if he remembered shooting a policeman in Chicago. Although he replied in the negative, no proof in rebuttal was later adduced. This was error. (MCM, 1949, par 139b, p. 186; CM 333525, Abston, 1 BR-JC 9; Berger v. U. S. 295 U. S. 79; U. S. v. Nettl, 121 F. 2d 927; Wigmore, 3 Ed. Sec. 1802; Jones v. Commonwealth, 191 Ky. 485, 231 S.W. 31)

Hearsay evidence tending to show that accused had purchased the murder weapon.

Saburo Shimizu, a fifteen year old Japanese boy, was called as a witness for the prosecution and on 28 April 1949 testified in part as follows:

During December 1948 and January 1949 he worked in his father's hardware store. On the 2nd of January he sold a knife (Pros. Ex. 9, not the murder weapon) to a colored soldier and on the evening of 5 January his brother sold a butcher knife (Pros. Ex. 17, the murder weapon) to a colored soldier. Saburo was unable to identify the accused as the purchaser of either one of these knives or that the two colored soldiers were one and the same person. He did testify, however that on three occasions at lineups (two held on 6 January and one on 2 March) he "picked out" the same individual, as resembling the soldier who had bought a knife at his father's store on 2 January, but at the trial he was unable to identify that individual as the accused. Mr. Ozell P. Henry was then called as a witness and testified over the objection of the defense that on each of these occasions Saburo identified the accused as the person who had bought the knives on the 2nd and 5th of January 1949. On the following day, 29 April, the law member ruled that inasmuch as Saburo had not identified the accused in court his identification of the accused at the lineups as well as all evidence concerning the lineups at which the witness was involved should be stricken from the record.

The admitting of Mr. Henry's testimony regarding Saburo's identification of the accused in the lineups of 6 January and 2 March 1949 was error (par 126b, p. 166, MCM 1949; CM 318341, Wolford, 67 BR 233, 235). It is true that the next day the law member directed that the evidence be stricken from the record, but the cat was out of the bag. Ordinarily appropriate instructions by the law member will cure such error (CM 302963 Kimbrough, 59 BR 235, 241) but in this case, in the light of the other highly inflammatory evidence remaining in the record, it is extremely doubtful that the instruction could have accomplished the end desired.

Prejudicial effect of errors.

There remains for consideration whether the errors enumerated above prejudicially affected the substantial rights of the accused. As pointed out above, the legal evidence of guilt was sufficient to connect the accused with the crime; but any reasonable doubt as to the credibility or accuracy of Chizuko's identification of the accused by means of his voice as the person talking with the deceased immediately before her death, would greatly have weakened the case. Chizuko's motives for hostility toward the accused and her initial equivocal identification of him as well as the other circumstances surrounding the identification might not unreasonably have led the court to question the strength of her testimony. Under those circumstances, the Council cannot agree with the Board of Review that the legal evidence of guilt was of a compelling nature although the entire record including the evidence which the Council believes should have been excluded, engenders a strong sense of guilt.

In CM 335123 Green, 2 BR-JC 58, 64, 65, the Judicial Council pointed out that Article of War 37 is substantially similar to the Federal harmless error rule (Rule 232, Federal Rules of Criminal Procedure; formerly Section 296, Judicial Code as amended, 28 U.S.C. sec. 391), and indicated that both harmless error rules should be construed alike.

The Federal rule was discussed at length by the Supreme Court in Kotteakos v. United States (1946), 328 U.S. 750, 759. The court said that Section 296 comes down to the simple command:

"Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects."

The court continued:

"Easier was the command to make than it has been always to observe. This, in part because it is general; but in part also because the discrimination it requires is one of judgment transcending confinement by formula or precise rule. * * * That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with the circumstances. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another.

* * *

"In criminal cases that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

"This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.

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

Considered in the light of the foregoing, it is clear that the improperly admitted res gestae exclamation of the deceased placing the accused at the scene of the crime shortly before the murder must have strongly influenced the court in resolving any doubt about the strength of Chizuko's testimony against the accused. The erroneously admitted evidence dealing with the unrelated assault upon Beniko and possession of unrelated knives must have resulted in the conviction that the accused was the type of person who would commit the crime charged. In the words of Judge Cordozo in the Zackowitz case, *supra*, he was put before the court as a man of murderous disposition. This circumstance was further aggravated by the original error of the law member in admitting testimony as to the extra-judicial identification of the accused as the purchaser of the murder weapon. The attempted corrective action by the law member, one day later, was not likely, under the circumstances of this record, to undo the damage.

In the view of the Council, the errors enumerated above had substantial influence on the findings and on the sentence. Accordingly they injuriously affected the accused's substantial rights within the meaning of Article of War 37.

5. Because a rehearing may be directed, it is appropriate for the Council to comment upon the questions of evidence presented by the extra-judicial identification of the accused by Chizuko.

In order to corroborate Chizuko's identification of the accused by means of his voice, the testimony of Mr. Ozell P. Henry and of Chizuko was introduced to the effect that she had correctly picked the accused out of a lineup on three different occasions by recognizing his voice in comparison with the voices of several other soldiers. Each participant in the lineup was required to read from a fire poster and to utter a phrase said to have been uttered by the murderer. It was shown that Chizuko knew that the accused was in the lineup and that she had known him and heard his voice on a number of occasions prior to the murder. The defense objected on the grounds that the accused did not voluntarily participate in the identification parade in that he had not been warned of his rights against self incrimination. This testimony presents two questions:

a. Was any substantial right of the accused prejudiced by the fact that before he was advised of his rights under Article of War 24 and while he was in custody he was instructed to repeat at an identification lineup certain words including those Chizuko said she had heard on the night of the murder, and

b. If not, was the testimony of Chizuko and Mr. Henry admissible as to the former's extra-judicial identification of the accused's voice?

For convenience of discussion question b will be considered first. As a general rule evidence of an extra-judicial identification is admissible only in corroboration of an identification made in open court. Since Chizuko had identified the accused in open court, it was not per se error to receive evidence of her extra-judicial identification (MCM 1949, par 139a; CM 232790, Brandon, 19 BR 193; 206, 207; CM 279112 Smith, 10 BR (ETO) 367; CM 291957 Williams, 18 BR (ETO) 7; CM 307404 Jones, 3 BR (CBI-IBT) 219; CM 318341 Wolford, 67 BR 233).

With respect to the problem posed by the first question, the Board of Review implies that the privilege against self incrimination comprehended by the Fifth Amendment and the first paragraph of Article of War 24 includes utterances made for the sole purpose of voice identification, but that the second paragraph of Article of War 24 covers only testimonial communications in the forms of statements, confessions and admissions. Therefore, the Board reasons, that by participating in the identification parade without objection, the accused waived his right against self incrimination.

The Judicial Council does not agree that it can be presumed that a military prisoner in custody of the military authorities may be deemed to have waived any rights by complying with the orders of his custodians merely because he fails to object to such orders.

The significant problem presented by this phase of the evidence is whether the right against self incrimination comprehends involuntary utterances made for the purposes of enabling a witness to identify an accused and not as a communication of some past fact. Article of War 24 as amended by Title II of the Selective Service Act of 1948 (62 Stat. 627) reads as follows:

"Compulsory Self-Incrimination Prohibited. - No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him or to answer any question not material to the issue or when such answer might tend to degrade him.

The use of coercion or unlawful influence in any manner whatsoever by any person to obtain any statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission, or confession shall be received in evidence by any court-martial. It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, and that any statement by the accused may be used as evidence against him in a trial by court-martial."

Paragraph 136b, Manual for Courts-Martial, 1949, implementing Article of War 24 provides in pertinent part:

"b. Compulsory self-incrimination. - The fifth amendment to the Constitution of the United States provides that in a criminal case no person shall be compelled 'to be a witness against himself.' The principle embodied in this provision applies to trials by courts-martial and is not limited to the person on trial, but extends to any person who may be called as a witness. See Article 24 as to the prohibition against compelling a witness to incriminate himself or to answer any question the answer to which may tend to incriminate him.

* * *

"The prohibition against compelling one to give evidence against himself is a prohibition of the use of physical or moral compulsion to extort communications from him and not an exclusion of his body as evidence when it is material. It follows that it would be appropriate for the court to order the accused to expose his body for examination by the court or by a surgeon who would later testify as to the results of his examination. Upon refusal to obey the order, the clothing of the accused may be removed by force. The accused may likewise be compelled to try on clothing or shoes, or to place his bare foot in tracks, or to submit to having his fingerprints made."

The last paragraph quoted above is based upon the decision of the United States Supreme Court in the case of Holt v. United States, 218 U. S. 245, where the court declared:

"Another objection is based upon an extravagant extension of the Fifth Amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be

witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof." (page 252)

It appears from the foregoing that the privilege against self incrimination is a privilege against testimonial communication, written, oral, or otherwise.

"Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of facts and the operation of his mind in expressing it, the demand upon him is not a testimonial one." (Wigmore, supra, Section 2265, p. 375)

The privilege against self incrimination was intended to put an end to the practice of extracting from a person an admission of guilt. Consequently the privilege does not prevent the authorities from requiring an accused to do certain things to permit others to identify him.

There is considerable diversity among the decisions of state courts as to the legality of requiring an accused to exhibit himself or to perform some physical act before trial as well as in the presence of the jury. It is recognized that some state courts have extended the privilege against self-incrimination to embrace the furnishing of the basis for testimony by others as to acts which cannot reasonably be regarded as testimonial communications. (See 171 ALR 1145 et seq.)

No Federal cases have been discovered dealing directly with compelled oral non-testimonial utterances, either in court or before trial. There are, however, several state cases on this point. In Johnson v. Commonwealth (1887) 115 Pa.369, 9 Atl. 78, the court on appeal dismissed the appellant's claim that his constitutional rights had been violated because during trial he had been called upon to stand up in the presence of a witness and the jury and repeat aloud certain words which the witness had heard the murderer use on the night of the murder, on the ground that the request was promptly acceded to without objection either by the prisoner or his counsel. The court, however, said:

"But, assuming for the sake of argument that timely objection was made and exception taken, we are not prepared to say it would be of any avail to the prisoner. He was not asked, much less compelled, 'to give evidence against himself.' The sole object of the request was to afford the witness, . . . then on the stand, an opportunity of seeing the prisoner and hearing the sound of his voice, so that she might the more intelligently testify whether he was or was not the man by whom she was confronted on the night in question. To hold that this was a violation of the clause, in Sec. 9 of the Declaration of Rights, which declared the accused 'cannot be

be compelled to give evidence against himself,' would in my judgment be a strained construction of that instrument. If it should be sanctioned, what would prevent a person accused of having stolen property in his possession from successfully interposing a like plea of constitutional immunity and thus thwarting any attempt to search for and recover the property? While the constitutional rights of those accused should never be violated, care must be taken not to deprive the commonwealth of any legitimate means of detecting and punishing crime. It is not our purpose, however, to pass upon the question, . . . until it is properly presented."

Beachem v. State (1942) 144 Tex Crim. R. 272, 162 S.W. 706, was a robbery case in which the accused was identified by the victim both in court and before trial. In the extra-judicial identification the accused was required to repeat certain words allegedly uttered by the robber at the time of the crime. In reversing the conviction the court held (quoting from the syllabus):

"Where identity of defendant as robber was necessary to establish state's case, and one witness to the robbery was unable to identify defendant until she had heard defendant speak certain words, the compelling of defendant to speak the designated words while he was confined in jail before trial violated the constitutional prohibition against 'self-incrimination'."

In denying the state's motion for a rehearing the presiding judge said:

"We think a fair construction of the bill shows that a question of identification of appellant by the witness was involved; that while appellant was in the city jail the witness was taken to said jail and appellant was required by officers to say certain things suggested to the officers by the witness; that after hearing his voice in repetition of the things appellant was told to say the witness identified appellant from his 'general appearance, build and voice.' There is no doubt that it was not improper for witness to inspect appellant and, if she could do so, identify him from his appearance, and his 'voice' as well, if heard in conversation in which words were not put in his mouth at her suggestion, and he required to repeat them. The recital in the bill that it had been shown that appellant was in custody at the time 'he was required to appear before the witness and repeat things that the officer told him to say' was sufficient, we think, to apprise the court that appellant was objecting to such proceeding and to any identification based on that circumstance."

State v. Taylor (S.C. (1948)) 49 S. E. 2d 289 was a rape case in which prior to trial the accused while in arrest was required to participate

in a lineup and repeat several times, in the presence of the victim, the words which she had previously stated were used by the person who assaulted her. The court in reversing the conviction declared:

"We think the question before us is controlled by the principles stated by this court in *State v. Griffin*, supra. It is difficult to draw any distinction between compelling a defendant to put his foot in a track at the scene of the crime in order to afford a basis for comparison and requiring a defendant to repeat certain words used at the scene of the crime in order to establish a basis for identity.

"It must be conceded that any testimony tending to establish the identity of appellant based on utterances voluntarily made by him would be competent. We need not pass upon a situation where an accused is merely compelled to speak for the purpose of identification and there is no compulsion as to subject or words to be used. Assuming, without deciding, that such testimony would be admissible on the same theory as requiring an accused to reveal any physical characteristic, the procedure followed here went much further. Appellant was required to repeat certain words which the prosecutrix says were used by the person who assaulted her. The effect of this was to require him to partially reenact the scene. The conclusion of the prosecutrix as to appellant's identity was based in part at least on the enforced conduct of the defendant."

The cases summarized above indicate the wide diversity of legal thinking respecting whether the right against self incrimination is limited to oral or written communications of a testimonial character requiring the operation of the accused's mind in formulating and expressing his utterances or whether it should embrace all acts as well.

In the opinion of the Council the rule to be followed by courts-martial is laid down in paragraph 136h of the Manual for Courts-Martial 1949, and by the United States Supreme Court in the Holt case.

We are unable to distinguish in principle between requiring a prisoner to expose his body for examination or to furnish fingerprints and requiring him to expose the characteristics of his voice. Neither are testimonial communications. The distinction apparently drawn by the courts in the Beacham and Taylor cases between compulsory random utterances and the compulsory utterance of designated words allegedly spoken by the assailant is, in our opinion, one without a difference. We cannot understand how requiring a prisoner to speak designated words is tantamount to a testimonial communication. Surely no jury and no court-martial can reasonably be presumed to consider the utterance of such designated words as an admission on the part of the prisoner that he uttered them at the time the crime was committed. In the instant case the accused was required to repeat the words

allegedly spoken by the murderer not for the purpose of testimonially reenacting a part of the crime, but merely to disclose to an identifying witness his vocal characteristics necessarily employed in pronouncing the words. (Imbau, Self Incrimination - What can an accused person be compelled to do? 37 Journal of Criminal Law, 261, 280)

We, therefore, conclude that the rights of the accused under Article of War 24 were not infringed when he was instructed, while in custody, and while participating in an identification parade, to make certain vocal utterances including those said to have been spoken by the murderer at the time of the crime.

6. For the reasons stated in paragraph 4 above, the Judicial Council holds that the record of trial is not legally sufficient to support the findings of guilty and the sentence.

(Dissent)

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait

C. B. Mickelwait, Brig Gen, JAGC

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

(420)

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

MAR 8 1950

CSJAGU CM 337189

UNITED STATES

YOKOHAMA COMMAND

v.

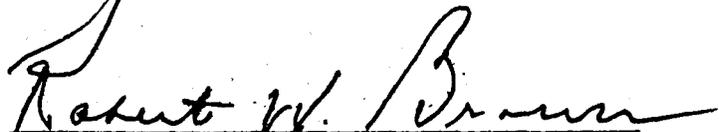
Private JAMES W. HARRIS, RA
1625661, Battery C, 933rd
Antiaircraft Artillery
Automatic Weapons Battalion,
APO 503

Trial by G.C.M., convened at
Yokohama, Honshu, Japan, 26-29
April, and 2 May 1949. Death.

DISSENTING OPINION BY
BROWN

Member of the Judicial Council

I am unable to concur in the majority opinion of the Judicial Council. It is a long opinion covering a number of subjects and makes numerous interpretations and inferences, many of which are subject to disputation and argument. It would seem futile to add to the multitude of words which have already been written in this case. The majority opinion, with reference to what constitutes res gestae, in my view, is too restricted and technical. It puts the worst possible interpretation upon the admission of evidence of prior acts of the accused and his possession of weapons in violation of regulations and the manner and purpose for which he carried them. I am not prepared to concede that some of the acts were not admissible in evidence to establish the identity of the accused and to show his motive for the murder. The remainder were not under the circumstances prejudicial to the substantial rights of the accused. It is my view that the opinion of the Board of Review contains a sound and fair evaluation of the evidence and errors in this case and reaches a result in accord with substantial justice to the accused and better serves the ends of the administration of military justice. I, therefore, concur in the opinion of the Board of Review and dissent from the majority opinion of my associates. I am of the further view that the ends of justice will be served by the commutation of the death sentence to imprisonment for life.


Robert W. Brown, Brig Gen, JAGC

JAGU CM 337189

1st Ind

23 Jun 1950

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

TO: Commanding General, Yokohama Command, APO 503, c/o Postmaster,
San Francisco, California

1. In the case of Private James W. Harris, RA 16255661, Battery C, 933rd Antiaircraft Artillery Automatic Weapons Battalion, APO 503, I concur in the foregoing holding by the Judicial Council that the record of trial is not legally sufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50 the findings of guilty and the sentence are hereby vacated. You have authority to direct a rehearing.

2. When copies of the published order in this case are forwarded to this office, together with the record of trial, they should be accompanied by the foregoing holding and the 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 337189)

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

2 Incls

1 Record of trial

2 Opinion of Bd of Review



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