OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

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AND
JUDICIAL COUNCIL

HOLDINGS
OPINIONS
REVIEWS

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and

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Holdings, Opinions and Reviews

Volume 3

including

CM 336001 - CM 336894

also

CM 332151
CM 335138
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OFFICE OF THE JUDGE ADVOCATE GENERAL

Washington, D. C.

1949

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

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

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

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

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

(b) Basic case cited and quoted.

(c) Basic case cited and discussed.

(d) Basic case cited and distinguished.

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

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

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

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

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

CSJAGN-CM 336001

22 JUN 1949

U N I T E D S T A T E S	)	2d INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Lewis, Washington, 18 February 1949. Dishonorable discharge (suspended) and confinement for two (2) years. Disciplinary Barracks.
	)	
Recruit STEVE W. SHAFER (RA 15250888), Headquarters Company, 1st Battalion, 9th Infantry, Fort Lewis, Washington.	)	

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

---

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

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

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

Specification: In that Recruit Steve W. Shafer, Headquarters Company, 9th Infantry, did, at Fort Lewis, Washington, on or about 20 October 1948, feloniously take, steal and carry away one (1) Waltham wrist watch of the value of about $16.00, property of the United States furnished and intended for the military service thereof.

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

Specification: In that Recruit Steve W. Shafer, Headquarters Company, 1st Battalion, 9th Infantry, did, at Fort Lewis, Washington, on or about 27 October

1948, wrongfully, unlawfully and feloniously and without the consent of the owner thereof, namely the United States, take, use, operate and remove from the motor vehicle parking area of the Post Heating Detail, a motor vehicle, to wit, one (1) four by four (4x4) one-quarters (1/4) ton truck, value of about $1051.00, the property of the United States, and did operate and drive said motor vehicle for his own use and purpose.

CHARGE III: Violation of the 84th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that Recruit Steve W. Shafer, Headquarters Company, 1st Battalion, 9th Infantry, did, at Tacoma, Washington, on or about 3 November 1948, feloniously take, steal and carry away about $39.00, lawful money of the United States, the property of Recruit Frank A. Montouri, Jr., Company C, 72d Heavy Tank Battalion.

Specification 2 (formerly Specification 4): In that Recruit Steve W. Shafer, Headquarters Company, 1st Battalion, 9th Infantry, did, at Tacoma, Washington, on or about 4 November 1948, feloniously take, steal and carry away 1 billfold, value of about $2.00, and about $45.00, lawful money of the United States, a total value of about $47.00, the property of Private Charles E. Neal, Service Company, 9th Infantry.

Specification 3 (formerly Specification 5): In that Recruit Steve W. Shafer, Headquarters Company, 1st Battalion, 9th Infantry, did, at Tacoma, Washington, on or about 10 November 1948, feloniously take, steal and carry away 1 billfold, value of about $2.00 and about $7.00, lawful money of the United States, a total value of about $9.00, the property of Recruit Billy R. Waters, Company E, 9th Infantry.

CHARGE V: Violation of the 69th Article of War.

Specification 1: In that Recruit Steve W. Shafer, Headquarters Company, 1st Battalion, 9th Infantry, having been duly placed in confinement in the Post Stockade,

Fort Lewis, Washington, on or about 15 November 1948, did, at Fort Lewis, Washington, on or about 15 November 1948, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that Recruit Steve W. Shafer, Headquarters Company, 1st Battalion, 9th Infantry, having been duly placed in confinement in the Post Stockade, Fort Lewis, Washington, on or about 15 November 1948, did, at Fort Lewis, Washington, on or about 2 December 1948, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charges I and II and the Specifications thereunder; not guilty of Charge III and the Specification thereunder; guilty of Charge IV and Specification 1 thereunder; guilty of Specification 2 of Charge IV except the words "value of about $2.00" and "about $47.00," substituting therefor respectively the words "of some value" and "more than $45.00," of the excepted words not guilty, of the substituted words guilty; guilty of Specification 3 of Charge IV except the words "value of about $2.00" and "of $9.00," substituting therefor respectively the words "of some value" and "more than $7.00," of the excepted words not guilty, of the substituted words guilty, and guilty of Charge V and Specifications 1 and 2 thereunder. Evidence of two previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for six years. The reviewing authority approved the sentence, reduced the period of confinement to two years, ordered the sentence executed but suspended execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army may direct, as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 52, Headquarters 2d Infantry Division, Fort Lewis, Washington, 31 March 1949.

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

Article of War 16, in part, provides:

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

Executive Order No. 10020, promulgating the Manual for Courts-Martial, 1949, provides that it shall be in force and effect on and after 1 February 1949 with respect to all court-martial processes taken on or after that date. Paragraph 115, page 126, Manual for Courts-Martial, 1949, citing Article of War 16, provides that no accused shall, prior to the order directing execution of the approved sentence, be made subject to any punishment or penalties other than confinement. Paragraph 116g, page 130, provides that a forfeiture becomes legally effective on the date the sentence adjudging it is promulgated.

In CM 335803, Berry, decided 11 May 1949, the Board of Review in a similar case stated:

> "The prescribed forms of sentences to forfeitures (Appendix 9, pp. 364-365, Forms 8, 9b, 17, 20, MCM, 1949) are worded 'to become due after the date of the order directing execution of the sentence.' These forms are an integral part of the Manual promulgated by the Executive Order. There is no authority in Article 16 nor in the implementing provisions of the Manual which warrants the forfeiture of pay and allowances due at the date of the order executing the sentence nor does authority exist for forfeitures to become due at the date of the order executing the sentence. And to further clarify appropriate imposable sentences there is no authority in law to impose a forfeiture of all pay and allowances due or to become due after the date of the order directing execution of the sentence. The sentence should be clear and unambiguous, which may be accomplished by observing the approved forms set out in the Manual."

It is the opinion of the Board of Review in the instant case that the forfeiture of all pay and allowances is illegal as to all pay and allowances except those accruing after the date of the order directing the execution of the sentence.

4. For the foregoing reasons the Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Specifications and Charges, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for two years.

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

J. R. Sturmond, J. A. G. C.

John J. Taylor, J. A. G. C.

CSJAGN-CM 336001 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C. [illegible] 1949
TO: Commanding General, 2d Infantry Division, Fort Lewis, Washington.

1. In the case of Recruit Steve W. Shafer (RA 15250888), Headquarters Company, 1st Battalion, 9th Infantry, Fort Lewis, Washington, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Specifications and Charges, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for two years. Under Article of War 50e this holding and my concurrence vacate so much of the sentence relating to forfeitures as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence.

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

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

(CM 336001).

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

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

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

(7)

CSJAGK - CM 336065

3 MAY 1949

U N I T E D S T A T E S	MARIANAS-BONINS COMMAND
v.	Trial by G.C.M., convened at Guam, Marianas Islands, 26 March 1949.
First Lieutenant SERGIO A. NONO (O-1896439), Quartermaster Corps, Headquarters and Headquarters Company, 55th Quartermaster Base Depot, APO 246.	Dismissal, total forfeitures and confinement for two (2) years.

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

---

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

2. Accused was tried upon the following charges and specifications:

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

Specification: In that First Lieutenant Sergio A. Nono, Headquarters and Headquarters Company, 55th Quartermaster Base Depot, did, at Guam, Marianas Islands, on or about 6 February 1949, feloniously steal currency of the United States in the amount of $1539.65, property of the Far East Command Motion Picture Division Fund.

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

Specification: In that First Lieutenant Sergio A. Nono, ***, did, at Guam, Marianas Islands, on or about 6 February 1949, with intent to deceive Major Claude D. Crain, the Field Officer of the Day, Headquarters, Marianas-Bonins Command, officially state to the said Major Crain, in substance, that his quarters had been broken into and that several hundred dollars, representing receipts from the McNair Theatre, Guam, Marianas Islands, had been stolen from a steel box in his foot-locker while he had been absent from his quarters, which statement was known by the said First Lieutenant Sergio A. Nono to be untrue, in that he knew that his said quarters had not been so broken into and in that he knew that he, the said First Lieutenant Sergio A. Nono, had wrongfully converted the said monies to his own use.

Accd'd 2

He pleaded guilty to and was found guilty of all charges and specifications. No evidence of any previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor at such place as proper authority might direct for five (5) years. The reviewing authority approved the sentence, reduced the period of confinement to two (2) years and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

Irrespective of accused's plea of guilty, evidence was presented which will be summarized substantially as it appears in the review of the Staff Judge Advocate.

Accused was the Theater Officer of the McNair Memorial Theater on the Island of Guam and Corporal Lawrence R. Moore was his assistant. Moore collected the daily receipts of the theater and made weekly reports together with delivery of the receipts to accused. On 1 February 1949 Corporal Moore delivered to accused $1527.90 representing the theater receipts for the previous week. On 5 February 1949 accused handed to Private Paul G. Carriedo a package stating that it contained money. Accused requested Carriedo to hold the package for him until he (accused) left for the Philippines. Carriedo locked the package in his footlocker (R 6-7, Pros Ex 2).

At about 2115 hours on 6 February 1949, accused reported to Major Claude D. Crain, the Field Officer of the Day for MARBO, that his footlocker had been broken into during an absence from his quarters, and that several hundred dollars of receipts from the McNair Theater had been stolen. Major Crain went to accused's quarters and found that the lock on the door to accused's room had been pried loose and the lock on accused's footlocker broken. Nearby was a steel box which accused said had contained the missing receipts. A semi-annual audit of McNair Theater funds made on 13 February 1949 disclosed a shortage of $1539.65 (R 9-12, Pros Exs 2,3,4,5).

Subsequently accused admitted that the reported theft was purely fictitious. He asserted that he had used theater funds for gambling and because of his losses, a shortage of about $800 developed. On 26 January 1949 he received about $1500 in theater receipts from his assistant. Of this amount he used $800 to cover the existing shortage. The remaining $700 he gave to Private Carriedo on 6 February 1949. He then broke his door lock and footlocker lock and reported that the money had been stolen. About 23 February accused revealed the truth to the Criminal Investigation Division. When the money in the hands of Private Carriedo was counted, it amounted to $419.60 (R 13-14, Pros Ex 6).

Accused subsequently reimbursed the Motion Picture Division Fund $1120.05, which, with the $419.60 recovered from Carriedo, made up the entire loss (R 12).

4. Evidence for the Defense

Accused, after being advised of his rights as a witness, elected to testify as to his personal background only. He stated that he was married and the father of two children, ages 3-1/2 years and 7 years. His wife had been operated on for goiter and suffered from heart trouble. Prior to the war he had been employed as an inventory clerk in the United States Navy Yard at Cavite. His education consisted of four years of college and two years of law. In July 1942 he joined the guerrillas under "Major Lapham" and "Major McKenzie." He was assigned to patrol duty and participated in engagements with the Japanese. Subsequently he became Major Lapham's liaison officer and was sent out on intelligence missions. On these missions he made maps of ammunition dumps, troop centers and other strategic points. In September 1944 he carried a message from General MacArthur, and supplies to "Colonel Volkmann," the leader of guerrillas in Northern Luzon. While in Baguio he was apprehended, but secured his release and reached Colonel Volkmann. Accused then carried intelligence reports from Colonel Volkmann back to Major Lapham, who in turn sent them on to General MacArthur. During his guerrilla service accused attained the rank of captain. After his discharge from the guerrillas, he obtained a commission in the Army of the United States (R 17-21).

Accused submitted a written request for a discharge from the Army other than dishonorable, and for assignment on an "intelligence mission against Philippine Communists" (R 21, Def Ex D).

Evidence as to accused's previous performance of duty and character was adduced by witnesses in court and by stipulated testimony. First Lieutenant Manuel P. Lara of the same organization as accused, and his roommate, stated that accused had performed his duties in a superior manner. Mr. Mason L. Eubanks, Educational Adviser for the Marianas-Bonins Command, had known accused in his capacity as Information and Education Officer of the Quartermaster Group. Accused performed his duties "in a very acceptable manner" and was in the forefront of Information and Education officers (R 14,15).

According to Captain W. J. Lynge, formerly Personnel Officer of the 55th Quartermaster Group, accused was "very conscientious, capable, highly intelligent, and most attentive in handling his duties". Lieutenant Colonel E. H. Strickland, Troop Information and Education Officer, stated that accused's record as Group Information and Education Officer, was a credit to him and to the Army. Accused was always ready and willing to give helpful assistance. His counsel was frequently sought; his judgments and comments found to be of inestimable value. Chaplain Paul J.

Schmid said accused was "a soldier and a Christian gentleman." His influence had been outstanding. His help in organizing a religious society was untiring (R 16,17; Def Exs A,B,C).

5. Discussion

After accused had pleaded guilty to all charges and specifications the law member fully explained to him the meaning and effect of his plea and suggested that he consult with both of his counsel before making a definite decision. After consultation accused asserted that he desired his plea to stand. The law member, speaking for the court, stated that he was satisfied that accused understood the nature and effect of his plea.

The Specification to Charge I is in proper form, alleging that at the time and place and under the circumstances alleged accused did feloniously steal the described money of the ownership alleged. Former distinctions between larceny and embezzlement have been abolished and it is immaterial whether accused's unlawful appropriation of the money was by trespass or through breach of trust (MCM, 1949, par 180g, p 239). When the offense of larceny has been committed a return of the property or payment therefor is not a defense but such circumstance is admissible for such consideration as the court or appellate authorities may deem appropriate.

The offense of making a false official statement is sufficiently pleaded in the Specification to Charge II. The last clause in the specification, viz., "had converted the said monies to his own use" although seemingly inconsistent with the larceny specification under Charge I, is not injurious to accused's substantial rights for the aforementioned reason that the technical distinctions between larceny and embezzlement have been abolished.

6. Records of the Department of the Army show that accused is 33 years of age, married and has two children. He graduated from Nueva Ecija High School in 1934 and attended the Philippine Law School (night). He was a soldier in the Philippine Army at the time of the Japanese occupation of the Islands. He was commissioned second lieutenant, AUS, in July 1946 and has served with various Quartermaster units. His adjectival efficiency ratings average "Very Satisfactory."

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

conviction of a violation of Article of War 93 or 96.

Lebastus B. Gilmer, J.A.G.C.

Louis E. Shull, J.A.G.C.

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

(12)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 336065

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

In the foregoing case of First Lieutenant Sergio A. Nono (O-1896439), Quartermaster Corps, Headquarters and Headquarters Company, 55th Quartermaster Base Depot, APO 246, the sentence is confirmed and will be carried into execution upon the concurrence of The Judge Advocate General. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

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

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

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

24 May 1949

I concur in the foregoing action.

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

27 May 1949

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

CSJAGN-CM 336072

27 MAY 1949

U N I T E D S T A T E S	2D INFANTRY DIVISION
v.	Trial by G.C.M., convened at Fort Lewis, Washington, 3 March 1949. Dishonorable discharge and confinement for four (4) years. Disciplinary Barracks.
Recruit BERYLE E. CROSS (RA 6957511), Headquarters Detachment, 6006 Area Service Unit (Post Operating Company), Fort Lewis, Washington.	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Recruit Beryle E. Cross, Headquarters Detachment, 6006 Area Service Unit, (Post Operating Company), Fort Lewis, Washington, then Private in Battery C, 76th Field Artillery Battalion, Camp Roberts, California, did, at Camp Roberts California, on or about 27 September 1943, desert the service of the United States, and did remain absent in desertion until he was apprehended at Florence, Oregon, on or about 30 December 1948.

The accused pleaded not guilty to the Charge and Specification and was found guilty except for the words "was apprehended at Florence, Oregon", substituting therefor the words "returned to military control," and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten years. The reviewing authority approved the sentence but reduced the period of confinement to four years, designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement and, pursuant to Article of War 50e, withheld the order directing execution of the sentence.

3. The record of trial is legally sufficient to support the findings of guilty. The only question for consideration is the legality of the sentence insofar as it relates to forfeitures.

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

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

The accused was tried on 3 March 1949. Executive Order No. 10020, promulgating the Manual for Courts-Martial, 1949, provides that it shall be in force and effect on and after 1 February 1949 with respect to all court-martial processes taken on or after that date. Paragraph 115, page 126, Manual for Courts-Martial, 1949, citing Article of War 16, provides that no accused shall, prior to the order directing the execution of the approved sentence, be made subject to any penalties other than confinement. Paragraph 116g, page 130, thereof, provides that a forfeiture becomes legally effective on the date the sentence adjudging it is promulgated. The prescribed forms of sentences to forfeitures are worded "to become due after the date of the order directing execution of the sentence" (Forms 8, 9b, 17 and 20, App. 9, MCM, 1949, pp. 364, 365). There is no authority in the Articles of War or in the implementing provisions of the Manual for the forfeiture of pay and allowances which are due at the time the sentence is adjudged or which become due on or before the date of the order promulgating the sentence (CM 335803, Berry, decided 11 May 1949). To the extent that the forfeiture imposed in this case exceeds forfeiture of pay and allowances "to become due after the date of the order directing execution of the sentence," it is illegal.

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

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

On leave, J. A. G. C.

J. R. Sumner, J. A. G. C.

CSJAGN-CM 336072 1st Ind JUN 4 1945
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, 2d Infantry Division, Fort Lewis, Washington.

1. In the case of Recruit Beryle E. Cross (RA 6957511), Headquarters Detachment, 6006 Area Service Unit (Post Operating Company), Fort Lewis, Washington, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Specification and Charge, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for four years. Under Article of War 50e(3) this holding and my concurrence vacate so much of the sentence relative to forfeitures as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence. Under Article of War 50 you now have authority to order execution of the sentence modified in accordance with this holding. It is recommended that the general court-martial order include an appropriate statement indicating the portion of the sentence thus vacated.

2. When copies of the published order in this case are forwarded to this office, together with the record of trial, they should be accompanied by the foregoing holding and this indorsement. For 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 336072).

1 Incl
Record of Trial

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

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

JUL 20 1949

CSJAGH CM 336240

U N I T E D S T A T E S	NEW YORK PORT OF EMBARKATION
v.	Trial by G.C.M., convened at Brooklyn, New York, 2,3,4,7, 8 and 9 March 1949. Dismissal.
Captain JOHN F. ARNOLD, 0302074, Transportation Corps, 9201 Technical Service Unit, Transportation Corps, Ships Complement Detachment, New York Port of Embarkation, Brooklyn, New York.	

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

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

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

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

Specification 1: In that Captain John F. Arnold, Transportation Corps, 9201 Technical Service Unit Transportation Corps, Ships' Complement Detachment, New York Port of Embarkation, Brooklyn, New York, did, aboard the United States Army Transport Private Elden H. Johnson, at sea, on or about 24 November 1948, with intent to deceive Major Howard A. Klinetop, the then Transport Commander of the United States Army Transport Private Elden H. Johnson, officially state to the said Major Howard A. Klinetop that the duplicating process stencil presented for his approval did list the official prices for each item and that it listed all items as then approved by the Vessel Warehouse Exchange, New York Port of Embarkation, Brooklyn, New York, which statement was known by the said Captain John F. Arnold to be untrue in that certain prices listed on the duplicating process stencil were not the official prices authorized by the Vessel Warehouse Exchange, New York Port of Embarkation, Brooklyn, New York.

Incl #3

Specification 2: In that Captain John F. Arnold, Transportation Corps, 9201 Technical Service Unit Transportation Corps, Ships' Complement Detachment, New York Port of Embarkation, Brooklyn, New York, did, aboard the United States Army Transport Private Elden H. Johnson, at sea, on or about 1 December 1948 with intent to deceive a Board of Officers and Major Howard A. Klinetop, the then Transport Commander, officially state to the said Board of Officers and to the said Major Howard A. Klinetop that the Transport Exchange documents, to wit: copy of the Transport Exchange Closing Inventory, dated 12 November 1948; the New York Port of Embarkation Vessel Warehouse Exchange Price Adjustment Memorandum, dated 15 November 1948; Requisition-Receipt document Requisition C-630, 15 November 1948 were destroyed; which statement was known by said Captain John F. Arnold to be untrue in that the said documents were then and there, with the full knowledge and belief of the said Captain John F. Arnold available to him.

Specification 3: In that Captain John F. Arnold, Transportation Corps, 9201 Technical Service Unit Transportation Corps, Ships' Complement Detachment, New York Port of Embarkation, Brooklyn, New York, with intent to defraud purchasers of Transport Exchange sales items did, aboard the United States Army Transport Private Elden H. Johnson, at sea, from on or about 24 November 1948 to on or about 9 December 1948, unlawfully pretend to said purchasers of Transport Exchange items that the published and posted prices were the authorized prices of the Vessel Warehouse Exchange, New York Port of Embarkation, Brooklyn, New York, well knowing that said pretenses were false.

CHARGE II: Violation of the 96th Article of War.
(Finding of not guilty)

Specifications 1 and 2: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications, and was found not guilty of Charge II and the Specifications thereunder, but guilty of Charge I and its 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. The evidence pertinent to the findings of guilty shows that the accused, a member of the military service, was assigned as Assistant Transport Commander, Transport Exchange Officer and Transport Service Officer on the U. S. Army Transport Elden H. Johnson on 8 September 1948 (R 12,92,274,280,284,290,293; Pros Ex 2). When accused initially reported aboard the USAT Johnson and assumed the duties of Exchange Officer, he relieved First Lieutenant Arnold A. Cohen who had served as exchange officer on several prior voyages (R 279,280). According to Lieutenant Cohen, a complete physical inventory of post exchange items was taken in the presence of the accused at the time the relief was effected (R 280-283). Corporal Kenneth J. Riskey, the post exchange assistant to both Lieutenant Cohen and the accused, first testified that the accused was present when he checked item for item and that the transfer of accountability from Lieutenant Cohen to accused took place in the latter's stateroom (R 274,275,280,283). Upon recall, however, Corporal Riskey stated that a complete physical inventory was not taken (R 369).

The accused first functioned as Vessel Exchange Officer on the USAT Johnson on a trip identified as "Voyage 12" (R 274). Thereafter, on 14 October 1948, Major Howard A. Klinetop was assigned and assumed the duties of Transport Commander of the USAT Johnson (R 11,12; Pros Ex 1). While serving as Assistant Transport Commander and Exchange Officer under Major Klinetop, the accused completed a trip from New York to Bremerhaven, Germany, and return, between the dates of 18 October 1948 and 12 November 1948 (R 26,27). This trip was known as "Voyage 13" of the USAT Johnson (R 26,27,293).

At the conclusion of Voyage 13, when the accused was making his accounting for the exchange receipts to authorities of the New York Port of Embarkation, it developed that there was a shortage in his accounts as Vessel Exchange Officer. This shortage was occasioned by the fact that the accused's records on the Transport showed a starting inventory of $11,144.99, whereas the records of the New York Port reflected the proper amount to be $11,279.07 (R 297,298,299). In an effort to forestall an investigation of the shortage existing at the conclusion of Voyage 13 thereby reducing the amount of the shortage to about $44.00 or approximately .0056 per cent of the receipts for the voyage, an amount and a percentage within the 1% allowable shortage, the accused made payment from his personal funds of from $150 to $170 during the accounting (R 141,142,143,300,301,347; Pros Exs 31,32).

Voyage 14 of the USAT Johnson was similarly from New York to Bremerhaven, and return, and took place between 23 November 1948

(20)

and 17 or 18 December 1948 (R 13,194,198,199). Passengers on this voyage included about 500 military personnel, a number of authorized civilians, and the dependents of both categories (R 14,22). On this voyage, Major Klinetop was likewise the Transport Commander and the accused was the Assistant Transport Commander and the Vessel Exchange Officer as well as Adjutant, Summary Court Officer and Billeting Officer (R 26,27,91,92). Corporal Riskey continued to serve as the non-commissioned officer in charge of the transport exchanges aboard the USAT Johnson (R 27,28).

At the commencement of each voyage, it was required that a new list of prices for exchange items be prepared and posted by the Transport Exchange Officer. In order to ascertain the proper price for each item on the price list, it was necessary to make a computation from the closing inventory of the previous voyage, the requisition for the trip next scheduled, and the "price change memoranda" furnished by the New York Port of Embarkation. According to the auditor of the New York Port, "* * Those three documents together will give the authorized selling price" (R 49,262; Pros Exs 6,7).

At the outset of Voyage 14 on 23 November 1948 the Vessel Exchange price list had not been prepared or posted (R 14,28). On that date, the accused gave Corporal Riskey a "copy written in longhand of the items that were to appear on the price list" (R 28). The price list then given Corporal Riskey included generally all of the items that were carried for sale in the transport exchange (R 28). A stencil of this list was prepared for the signature of accused and Major Klinetop, the Transport Commander (R 15,29). When the list was presented to the latter for signature, he found it complete in every respect, except for the omission therefrom of muskrat fur caps (R 15). Major Klinetop sent the list back to the exchange service to have that item entered. The list was amended to include muskrat fur caps and the price thereof and was returned to Major Klinetop the same evening. The following morning Major Klinetop personally took the price list for Voyage 14 to the accused and asked him if the list then included all items (R 15,16). The accused assured Major Klinetop that the list was complete whereupon Major Klinetop asked accused: "Are these the correct prices now?" to which the accused responded, "These are right" (R 16,21). Major Klinetop had no reason to believe the prices were not correct so he approved the price list by placing his signature on the mimeograph stencil and left it with the accused for publication and posting (R 16,21,28; Pros Ex 3). The accused placed his signature on the stencil and Corporal Riskey mimeographed the price list (R 16,29; Pros Ex 3).

Before the exchanges aboard the USAT Johnson were opened for sales on 24 November 1948, copies of price lists were posted on the bulletin

boards outside of the two sales rooms, in all troop compartments, and in the first class passengers' area (R 16,29; Pros Ex 3). The price lists remained posted until 9 December 1948 (R 215).

From 24 November 1948 until shortly before reaching Bremerhaven on 3 December 1948, many exchange items were sold at the prices recited on the price list for the voyage prepared by the accused (R 30,32; Pros Ex 3). These included "* * Cigarettes, Camels, Luckies, Chesterfields, Candies, love nest, peaks, nestles, milky ways, chocolate mints, hard candies, Planters peanuts, cashew peanuts; Cookies, Hydrox; Soap, Lux; Shaving Cream, lather." (R 32). The prices at which some of the above-named items were listed by accused and at which they were sold during Voyage 14 are contrasted with the authorized prices therefor as follows:

Item	Unit	Price	Auth Price
"Candy Hard Mixed	bx	.50	.40
Peanut Planters	cn 8 oz	.35	.30
Nuts Cashew	cn 4 oz	.35	.30
Cookies Hydrox	bx	.16	.15
*	*	*	*
Cream Shave lather	tu	.30	.25
*	*	*	*
Soap Lux	ck	.13	.10" (Pros Ex 5)

After leaving Bremerhaven on the return voyage to New York, the accused admitted to Major Klinetop that the price list he had prepared at the outset of the voyage contained raised or "inflated" prices for some of the items (R 115,119,135,216,221; Pros Ex 31). According to Major Klinetop, this came about on 8 December 1948 in connection with the preparation of an answer to a radiogram of 30 November 1948 received from New York. Their conversation was as follows:

> "* * 'Well, Major Klinetop, this has been something I [the accused] have been wanting to talk to you about. Do you have a few minutes?'. I said, 'Yes, certainly'. 'Well', he says, 'Can we step inside here?'. I says, 'Yes, we can go to my stateroom.'. Inside my stateroom Captain Arnold says, 'I guess you know I have been selling things in the PX with inflated prices. I just haven't been able to get to you before to tell you about it.' * * I said, 'Do you mean that the prices you're using are not the official prices?'. He says, 'Yes, but', he says, 'I've got a new price list already worked up'. * *." (R 115)

It was subsequently determined by Mr. Samuel Kaplan, Office Manager and Auditor for the Port Warehouse Exchange, New York Port of Embarkation, that the prices of numerous items on the price list prepared by the accused and in effect between 24 November and 9 December 1948 were higher than the prices authorized (R 47-51,221; Pros Exs 3,5,31). This determination was made by Mr. Kaplan and one of his clerks on the basis of accused's closing inventory for Voyage 13, the requisition for Voyage 14 and the price change or adjustment memoranda, dated 15 November 1948, furnished by the New York Port of Embarkation for Voyage 14 of the USAT Johnson (R 49,50,51,57,64,117, 120; Pros Exs 6,7,8). A copy of this price adjustment memoranda had been receipted for by the accused (R 55; Pros Ex 6).

On the morning of 30 November 1948, Major Klinetop appointed a board of disinterested officers from passengers aboard the USAT Johnson to accomplish a stock and cash receipt inventory and to prepare a balance statement for the Transport Exchange Service (R 90,91,94,95; Pros Exs 13,14). At the same time, Major Klinetop closed the Vessel Exchanges for the purpose of this inventory and accounting (R 91). At a meeting of the board of officers on the following morning, at which the three members, Major Campisi, Major Griffith, and Captain Armstrong, as well as Major Klinetop were present, the accused stated that the inventory for Voyage 13, the record of new sales items brought aboard for Voyage 14, except for candy and tobacco items, and the price change memos from the New York Exchange Service had been lost (R 99,100,104; Pros Ex 15). According to Major Klinetop, the accused's account of events at this meeting was as follows:

> "* * Captain Arnold stated that about the evening of the storm a few days prior, Corporal Riskey had been using his exchange papers which I have just mentioned, down in my office for the preparation of exchange work sheets. Captain Arnold told us that Corporal Riskey worked in the office until about 9 o'clock in the evening, when the motion of the ship had become so rough that the typewriter would no longer work well and that Corporal Riskey had left these papers, together with the price change memos from the New York Exchange Service, in the file basket on the desk at which he had been working. Captain Arnold stated that when he went back, Captain Arnold, the next morning to get the papers, he found that my enlisted men had cleaned up off of the office floor, papers that had been spilled on the floor during the night and that they had all been destroyed. I asked Captain Arnold if there was any possibility that he might have any other copies available of the items he had listed on his requisition to the Transport Exchange at the Port. Captain

> Arnold said, 'No', that requisition was made out in just the number of copies to be turned into the Port and that he kept none. I asked him if he had any other papers or copies whatsoever that the board might use in preparing a statement of the amount and value of supplies we had on the ship at the start of the voyage. Captain Arnold said, 'No'." (R 99,100)

The accused further emphasized that these records were not available anywhere on the ship (R 100).

On the basis of accused's price list, the Board of Officers found and reported a shortage of approximately $80.00 of which amount, about $7.97 was unexplained (R 144,145; Pros Ex 15). On 9 December 1948, after the departure of the USAT Johnson from Bremerhaven, the accused informed Major Klinetop that these records had not been lost or destroyed and that he knew this on 30 November. In the words of Major Klinetop, this conversation with the accused was as follows:

> "You mean you told us you didn't have them and you had them?' He [the accused] says, 'Yes, I admit I lied to you'. I [Major Klinetop] says, 'And you had them all the time?'. He says 'Yes, that's right, Major Klinetop.'" (R 116)

The accused thereafter gave Major Klinetop the inventory report from Voyage 13, the requisition-receipt documents showing items listed with prices shown, and price adjustment memos together with other stencil sheets and dray receipts (R 117-119).

On 10 December 1948, Major Klinetop again closed the exchanges aboard the USAT Johnson and appointed Captain Earl E. Bennetts as "inventorying officer" for the purpose of having him make an inventory of all stocks and cash on hand as of the close of business on 9 December (R 123,128; Pros Ex 17). Captain Bennetts was also to observe the transfer of exchange supplies from the storeroom to the sales room and all other pertinent exchange activities (R 123). Between 10 and 12 December while the exchanges remained closed, the accused, using a copy of the inventory report for Voyage 13, the price adjustment memo of the New York Port dated 15 November 1948, the requisition receipt for the instant voyage of the same date, and delivery tickets for various items, prepared a correct price list (R 122,123). Merchandise was sold at the exchanges at these prices until the USAT Johnson reached New York on 17 December. At the conclusion of Voyage 14, a physical inventory of all exchange stocks was taken by Captain Bennetts (R 277) and on 20 December 1948 a Board of Officers was appointed to investigate all aspects of the exchange activities on that voyage (R 200,228; Pros Exs 28-39). The accused, while testifying before

that Board of Officers, in answer to a question relative to his reasons for preparing the incorrect price list, stated in pertinent part:

> "* * Because I raised them intentionally in order to recoup losses which I suffered on the previous voyage because of a shortage, which I made up myself." (Pros Ex 31)

Accused obtained treasury checks in the amounts of $4,780.91 and $728.29 (Pros Ex 27) to accomplish his final accounting at the termination of Voyage 14. In this accounting, full settlement was made by him for all amounts determined to be owing (R 66; Pros Ex 10).

4. Evidence for the defense.

Captain Algirdas M. Rudis, TC, the Transport Exchange Officer for the New York Port of Embarkation, was recalled as a witness for the defense and testified that the radio message dispatched to the Vessel Exchange Officer through the Transport Commander of the USAT Johnson by the New York Port, requesting a value stock inventory and an accounting of cash on hand as of 30 November 1948, was also dispatched to all other transports at sea under the control of the New York Port of Embarkation (R 233,234; Pros Ex 20). Captain Rudis further stated that the 30 November message was the first of its kind but such radiograms were now regularly sent as a matter of policy (R 236).

Mr. Samuel Kaplan, similarly recalled as a witness for the defense, testified that in his experience only one United States Treasury check was turned in by the Vessel Exchange Officer at the conclusion of any given voyage (R 236,237). There were normally separate checks turned in, however, to cover "juke box" or "Pepsi Cola" receipts when machines of such character were aboard a vessel (R 238).

Miss Victoria Favilla, Assistant Bookkeeper, employed by the Vessel Warehouse Exchange of the New York Port of Embarkation, testified as to the discrepancy in accused's accounts at the conclusion of Voyage 13 and identified his "Voyage Sales Accountability Report" for that trip (R 238-243; Def Ex E). Accused brought Miss Favilla a check to cover all but $38.76 of this discrepancy on the following day (R 242,243,246). Sue Adamick, also employed at the New York Port, testified that accused presented treasury checks dated 15 November 1948 for $6,789.82 and $120.00 at the conclusion of Voyage 13 and that only one such check was usually received (R 249,250).

Captain Rexton M. Reed, TC, Water Division Ships' Complement Branch of the New York Port, identified certain papers which were returned to

the accused in the presence of Major Klinetop at the conclusion of Voyage 14, and testified that accused deposited $5,509.20 in his final accounting and further that Captain Bennetts' ending inventory totaled $3,897.40 (R 251-254; Pros Exs 4,6,7,11; Def Exs G,H,J,K,L). Captain Solomon C. Edwards and Lieutenant Colonel George A. Bachman of the New York Port also testified for the defense as to accused's limited instruction in exchange procedures prior to his assignment to the USAT Johnson on 8 September 1948 (R 264-269).

Corporal Riskey, as a defense witness, testified that he had been exchange NCO on five voyages on the USAT Johnson and that when the accused relieved Lieutenant Cohen at the end of Voyage 12, only a brief physical inventory was taken (R 273,274,369). Also that on the return from Bremerhaven to New York on Voyage 14 a "running inventory" was maintained (R 276), and that another officer was appointed to assist in the exchange prior to Captain Bennetts' appointment (R 277). The latter was sick almost every day and his predecessor was too sick to appear at the exchange (R 277,278).

As a witness for the defense, Lieutenant Cohen insisted that a physical inventory had been taken in the accused's presence at the conclusion of Voyage 12 (R 279-283).

After having been fully advised of his rights, the accused elected to testify in his own behalf (R 283,284). He was commissioned originally in the Infantry Reserve in 1930 after graduating from LaSalle Military Academy. For 52 months during World War II he served on active duty at the New York Port, Sub-Port of Boston, Camp Miles Standish, and in the Aleutians. In civilian life he was Assistant Manager, General Motors Division in New Jersey, and he was in the real estate business in New York. He was recalled to extended active duty on 23 August 1948. Accused's average ratings during the war were 4.0 and he was promoted to major on separation.

On the afternoon of 8 September 1948 he was assigned to the USAT Johnson where he relieved Lieutenant Cohen as Vessel Exchange Officer (R 290). The transfer of accounts took place in Lieutenant Cohen's stateroom which was subsequently occupied by him. He accepted Lieutenant Cohen's word as to the inventory of exchange supplies then on the USAT Johnson (R 292,339,341). Supplies for the next trip, Voyage 12, were requisitioned by Lieutenant Cohen (R 293). On Voyage 12, the Transport Commander did not sign the price list (R 294). Accused prepared and posted the price list for Voyage 13 and the Transport Commander did not sign this price list (R 294). There was no physical inventory taken on Voyage 13 (R 295). At the conclusion of Voyage 13, the accused

determined there was a shortage according to the records maintained on the USAT Johnson (R 295). Accused thereupon put "$40 or $50" of his own money with that of the receipts of the Vessel Exchange, bringing the shortage on the "Voyage Sales Accountability Report" he submitted to a Miss Favilla of the New York Port down to $24.68. The latter determined that a greater shortage existed because of a difference of $134.08 in the starting inventory shown on the records of the New York Port over the starting inventory reflected in accused's records (R 296,297). Accused returned to the ship and, upon rechecking, learned that Miss Favilla's records at the New York Port were correct (R 298). Accused thereupon, with his personal funds, procured another treasury check for $120.00 bringing the official shortage down to $38.76 or .0056% of the sales for the voyage. This brought the shortage within the 1% allowable, thereby dispensing with the need for an investigation (R 299,300). The accounting at the end of Voyage 13 cost the accused $150.00 to $170.00 of his own funds (R 301).

At the outset of Voyage 14, the accused requisitioned vessel exchange supplies for the trip (R 301). Thereafter according to the accused:

> "* * the thought came to me that I could raise the prices here and there and make up the money I had put in as a loss on the previous voyage, and so I checked over the items, the ones that were fast sellers, and raised certain prices in order to approximate a return of somewhere between $100. and $150., which would reimburse me pretty well, considering what I had put in." (R 301)

Accused had previously during his Army service heard other Vessel and Post Exchange Officers "* * mention that shortages could be made up very easily without anyone noticing them, to protect yourself * *." (R 301). Concerning his determination of the items on which to raise the prices, the accused stated:

> "* * from my experience with the stock, that is, my two previous trips, the items that moved the fastest and the approximate amount of sales we'd make of each of those items, I picked certain ones as a result and raised the prices in order to recoup approximately that much, keeping under the amount I actually put in in order that in case there was an extra flurry of sales I still would not be taking more than I actually put in." (R 304)

Major Klinetop desired to sign the price list for Voyage 14 so Corporal Riskey retyped the list. Thereafter, Major Klinetop asked

accused if all items were on the price list, after the muskrat caps had been included, but he did not ask the accused if the prices on the list were the official prices (R 306). Accused did not present the price list to Major Klinetop for signature (R 307). Corporal Riskey had been suspected of "black market" activities by the CID and this was brought to the accused's attention (R 308). The USAT Johnson sailed on 23 November 1948 (R 309), and an inventory was taken by a board of officers on 30 November 1948 (R 313). For this inventory, the forms provided contained the prices the accused had raised (R 313). Accused assisted the board of officers in taking the inventory which reflected a $70 to $80 shortage. After making allowances for the indebtedness of the crew to the Vessel Exchange, this amount was reduced to $6 or $7 (R 315). Accused did not want to disclose the fact that he had raised the prices until after leaving Bremerhaven in order to avoid adverse publicity there (R 316). Accused had previously, on 30 November or 1 December, explained to Major Klinetop and the Board of Officers that the papers were lost (R 317,318), whereas the papers were actually still in his possession (R 319). He was notified on 3 December by Major Klinetop of the radiogram requesting the inventory, and he received a copy thereof on 8 December. Accused made a full disclosure to Major Klinetop of the exchange irregularities (R 322-324). The exchange was immediately closed and, on 10 December, Captain Bennetts took an inventory in accordance with orders issued by Major Klinetop (R 324,325). Accused turned over the "lost" papers to Major Klinetop at the time of making full disclosure to him concerning the price list and the papers (R 325). The accused had prepared a correct price list to be used during the final days of Voyage 14, after the exchanges were reopened, and a running inventory was maintained during the same period (R 325,327,328). The Vessel Exchange aboard the USAT Johnson was closed on 15 December 1948 and on 22 December 1948, accused obtained a treasury check for $728.29 representing cash on hand at the end of the voyage (R 333). For security reasons a treasury check had been procured previously in Bremerhaven (R 336).

Upon cross-examination accused stated that he did not make up the entire shortage for Voyage 13 and that he calculated the increases on the price list he prepared for Voyage 14 on the basis of his experience on Voyages 12 and 13 (R 347,348). Accused admitted that the copies of the closing inventory for Voyage 13, the requisition receipt for Voyage 14 and the price change memoranda for Voyage 14 were not in the troop office during the storm previously mentioned (R 353). Also, accused did not want to make these documents available to the Board of Officers because "naturally" they might have been able to determine therefrom that he had increased the prices (R 355,356). The accused did not prepare an answer to the radiogram (R 356). Accused identified Prosecution Exhibit 4 as the price list used on Voyage 14 (R 359).

5. The accused has been found guilty of making a false official statement to Major Howard A. Klinetop, the Transport Commander, aboard the USAT Johnson at sea, on or about 24 November 1948, to the effect that the price list presented for Major Klinetop's approval listed the official prices for each item and that it listed all of the items as then approved by the Vessel Warehouse Exchange, New York Port of Embarkation; of making a false official statement, aboard the USAT Johnson at sea, on or about 1 December 1948, to a Board of Officers and Major Klinetop, the Transport Commander, to the effect that certain Transport Exchange documents were destroyed; and of unlawfully pretending to the purchasers of Transport Exchange items, aboard the USAT Johnson at sea, between about 24 November 1948 and 9 December 1948, that the published and posted prices were the authorized prices of the Vessel Warehouse Exchange, New York Port of Embarkation, with intent to defraud, well knowing that said pretenses were false; all offenses being in violation of Article of War 95.

In connection with the first two of the above offenses, it is clear from the express allegations recited in these Specifications that the false statements charged were official in character and were made by the accused with the intent to deceive. It is thus apparent that the offenses as pleaded allege violations of Article of War 95 and not offenses of lesser culpability in violation of Article of War 96 (Par 151, MCM 1928, p 186 and Par 182, MCM 1949, p 254; CM 202027, McElroy, 5 BR 347; CM 275353, Garris, 48 BR 42; CM 334635, Simpson (9 February 1949).

With respect to the proof of the first offense, alleged in Specification 1 of Charge I, the evidence clearly shows that the accused prepared a list of prices for items to be sold in the Vessel Exchange on Voyage 14 of the USAT Johnson, and that about 24 November 1948 a stencil of this price list was submitted to Major Klinetop, the Transport Commander, for his approval and signature. Competently established also is the fact that the accused stated officially to Major Klinetop that the prices contained on this list were the correct and authorized prices for the items listed. Corroborative evidence of accused's false verbal statement as to the correctness of the list is found in the subsequent approval and signing of the price list stencil by Major Klinetop. The uncontradicted evidence and the judicial admissions of the accused establish the falsity of the price list and the deceitful pattern or design manifest from so marked a departure from the authorized prices for many items and, consequently, the falseness of accused's statement to Major Klinetop that the prices shown on the list were the prices authorized. Accused's intent to deceive Major Klinetop in making such statement is likewise clearly shown and admitted by the accused.

Specification 2, similarly, is supported by clear and convincing evidence showing that accused falsely stated to a Board of Officers and Major Klinetop that the closing inventory for Voyage 13, the requisition-receipts for Voyage 14, and price adjustment memoranda for Voyage 14, had been destroyed or lost during a storm at sea when these documents were, in fact, then in accused's possession. With regard to this offense, as well as that alleged in Specification 1, it is clear that the statements of the accused were of official character, made in connection with vessel exchange activities aboard a United States Army Transport at sea, and were clearly within the scope, and wholly consistent with, the requirements of the accused's military assignment as Vessel Exchange Officer. We find the record to contain uncontradicted evidence establishing the false character of the accused's statement that these documents were destroyed or lost, and the requisite intent to deceive. This evidence includes the physical production of the documents in question by accused approximately nine days after his account of their destruction, and accused's contemporaneous admissions to Major Klinetop as to the false character of his statement with respect to these documents. In his own defense, also, the accused judicially admitted the making of the statement, its falsity, and the fact that the documents in issue were in his possession at that time and until he turned them over to Major Klinetop on 9 December 1948.

With reference to the third offense of which accused has been found guilty, namely that contained in Specification 3 of Charge I, it is noted that the defense, following accused's arraignment, moved to dismiss on the ground that it failed to state an offense. This motion, which was renewed subsequently in the course of the trial, was overruled by the court and we think, properly. Considering in detail the offense alleged, it is clear that the accused was specifically charged under Article of War 95 with a well defined and unlawful course of conduct, unbecoming an officer and a gentleman. We are unable to discern from the pleadings set forth that the theory or gravaman of the offense upon which arraignment was had was that of obtaining property by false pretenses and we disagree with the proposition that the failure to allege the obtaining of money by virtue of the false pretenses alleged necessitates a conclusion that no offense was charged. It is not necessary in order to denounce as criminal the acts of a person in the military service, to denominate his acts as an offense specifically denounced in the Articles of War. It is sufficient, as in this case, to denounce accused's acts for what they constitute, namely conduct unbecoming an officer and a gentleman (Dynes v. Hoover, 61 U.S. 65,82). The absence in Specification 3, Charge I, of an allegation that the accused obtained money or other property as a result of his false pretenses does not, in our opinion,

nullify either the pleading or the proof of the element, "with intent to defraud," since such intent coupled with the preparing and posting of the spurious price list constitutes, if proved, the gravamen of the military offense charged in violation of Article of War 95. With regard to this aspect, the instant offense is considered distinguishable from offenses charging the making and uttering of worthless checks, with intent to defraud. Our conclusion is predicated upon the premise that accused's intent to defraud herein was completely manifested and executed for the purposes of the specification when the price list was prepared and posted for the benefit of purchasers aboard the USAT Johnson. There was no dependence upon a subsequent course of events or the intent inferential therefrom such as there might be in the making and uttering of a check, worthless when issued, but which the maker fully intended to have covered at the time it reached the drawee bank for payment. Further, in the present case there is no question of past or executed consideration negativing the accused's intent to defraud, as there could conceivably be in the check cases, for herein it is clear from the pleadings and the proof that there was no background of prior financial dealings between accused and the passenger group on Voyage 14.

From the record, also, there is no substantial question but that accused was fairly apprized of the nature of the offense and was given ample opportunity to defend against its allegations. Nor can it logically be contended that any of the provisions of Specification 3 were in fact misleading. In no instance was the accused required to defend against the element of fraudulently obtaining property or money by virtue of such representations. The offense, as pleaded, was actually committed at the first instant any one of the purchasers aboard the USAT Johnson read the fraudulent price list and noted the spurious prices recited thereon. The evidence that sales were made at the rates prescribed in the price list is but evidence of the communication of the unauthorized prices promulgated by the accused to these purchasers.

The offense, as we have indicated, appears to us to be one of a military nature. In the military service it has long been established that commissioned officers acting in an official capacity must speak and represent truthfully, and abstain from "* * acts of fraud or gross falsity, cheats, or other corrupt conduct * *" at the peril of their very commissions (Winthrop's Military Law and Precedents, Volumes 1 and 2, Second Edition, pp.710-718; Par 151 MCM 1928, pp 186,187; Par 182 MCM 1949, p 254). It cannot be questioned that historically, and from the standpoint of precedent too well established to require discussion, all persons in or officially connected with the Army have

a fundamental and inherent right to truthfulness and complete reliance upon any pretenses or statements expressed by an officer acting in his official capacity. To be specific, all persons authorized to make purchases at the Vessel Exchange on the USAT Johnson had an unqualified right to rely upon the correctness of the prices published and posted in the usual manner. From about 24 November 1948 to about 9 December 1948, the accused, in the instant case, most reprehensibly and unlawfully, denied this right to the authorized purchaser group on the vessel on which he was assigned and serving as Exchange Officer.

Evidence of the unlawful pretenses is found in the inherent falsity of the spurious price list prepared by the accused, published in due course and posted throughout the USAT Johnson from about 24 November 1948 to about 9 December. Although the necessary element that such pretenses were made to purchasers is dependent upon circumstantial evidence, we find this evidence equally competent and convincing. In view of the sales of certain named exchange items at the "inflated" and false prices contained in the price list posted for the benefit of customers during the period indicated, it can only be inferred the persons making these purchases received and relied upon the accused's unlawful pretenses, as the accused obviously intended. While these representations were made to the group aboard the USAT Johnson as a whole, proof showing that some of the group, in fact, received the representations and responded, is sufficient to establish publication or communication of the unlawful pretenses to the purchasers as a class.

The record of trial contains several instances wherein comment seems warranted as to the voluntary nature of the statements made by the accused. The first appears to have been accused's statement to Major Klinetop to the effect the prices were correct and, in the second, accused's statement to the Board of Officers and Major Klinetop that certain official papers had been destroyed or lost. In neither instance does it appear that the accused was advised of his rights under Article of War 24. It should be noted, however, that a formal warning was not necessary in either case, since evidence of these statements was introduced primarily for the purpose of showing that the statements were in fact made. Neither was introduced as proof of an antecedent offense or offenses (CM 336558, Armstrong (10 June 1949)). The third place where comment is believed merited concerns the statements made by the accused to Major Klinetop which in effect amount to confessions of the offenses alleged in Specifications 1 and 2 of Charge I. The record shows as to these, however, that the accused asked to speak to Major Klinetop and that the statements were made spontaneously by the accused, without urging or request. In connection with these statements, also, it follows that no substantial question is presented as to their voluntary character (Par 127 MCM 1949, p 157).

6. All of the seven members of the court-martial, in signed clemency petitions attached to the record of trial, recommended that the sentence be suspended, the accused placed on probation for a period of one year and that he be officially reprimanded. All seven members likewise recommend that a fine be imposed, as one of the conditions of accused's probation, varying in the amount from $1200.00 by one member, $1000.00 by three members, $750.00 by one member and $500.00 by the remaining two members of the court-martial.

Consideration has been given to a brief filed on behalf of the accused by Marks and Marks, Counsellors at Law, New York, New York.

7. Records on file in the Department of the Army show that the accused is 37 years of age and married. He was graduated from the LaSalle Military Academy, Oakdale, Long Island, New York, in 1931 and, upon attaining the age of 21 in December of 1932 he was commissioned a Second Lieutenant, Infantry-Reserve. In civilian life accused was employed by the International Nickel Company, Equitable Life Assurance Society, National Biscuit Company and General Motors Corporation. He was ordered to extended active duty on 27 January 1942, promoted to First Lieutenant on 22 May 1942, and to Captain on 21 April 1943. On 14 February 1946 he was appointed to the grade of Major in the Officers' Reserve Corps, Army of the United States. Accused served during the war at the Boston Port of Embarkation, Camp Miles Standish, New York Port of Embarkation, and overseas in the Aleutians and Alaska from 26 June 1945 until 31 January 1946. He is entitled to wear the American Theater Medal, the Asiatic-Pacific Theater Medal and the World War II Victory Medal. Accused was separated from active service on 11 May 1946 and recalled to active duty on 6 August 1948. His efficiency ratings include two of "Very Satisfactory"; twelve of "Excellent"; and four of "Superior."

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. 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 an offense or offenses in violation of Article of War 95.

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

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

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

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Captain John F. Arnold (O-302074), Transportation Corps, 9201 Technical Service Unit, Transportation Corps, Ships Complement Detachment, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Franklin P. Shaw, Brig Gen, JAGC

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

E. M. Brannon, Brig Gen, JAGC
Chairman

26 September 1949

I concur in the foregoing action.

THOMAS H. GREEN
Major General
The Judge Advocate General

3 October 1949

(CCMO 57, 7 Oct 1949).

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

CSJAGN-CM 336269

12 MAY 1949

U N I T E D S T A T E S	)	SAN FRANCISCO PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at Camp Stoneman, California, 18 April 1949. Bad conduct discharge and confinement for six (6) months. Post Stockade.
	)	
Recruit GEORGE D. KNIGHT (RA 1189861), 9206 Technical Service Unit, Transportation Corps (Operating), Military Police Detachment, Camp Stoneman, California.	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Recruit George D. Knight, 9206 Technical Service Unit, Transportation Corps (OPERATING), Military Police Detachment, Camp Stoneman, California, then Private George D. Knight, Detachment Medical Department, Service Command Unit, 1987 DeWitt General Hospital, Auburn, California, did at Auburn, California, on or about 2 April 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Sacramento, California, on or about 6 February 1949.

At the first hearing, 23 March 1949, he pleaded not guilty, was found guilty as charged, and was sentenced to bad conduct discharge, total forfeitures and one year's confinement. Because of a failure of proof, the reviewing authority disapproved that sentence and ordered rehearing. At the re-hearing, 18 April 1949, accused pleaded not guilty to the Charge and specification and was found guilty, by exceptions and

substitutions, of absence without leave in violation of Article of War 61. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for six months. The court recommended unanimously that execution of the bad conduct discharge be suspended during the period of confinement. The reviewing authority approved the sentence, designated the Post Stockade, Camp Stoneman, California, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50(e).

3. In this case, the offense was committed on 2 April 1945, absence without leave not being a continuing offense (par. 67, MCM, 1949, p. 62). The period of limitation on all prosecutions for violating Article of War 61 then was two years (AW 39, MCM, 1928). As to accused's offense, that two-year period ran before there was any change in Article of War 39 and before he was arraigned, which fact could have been asserted in bar of punishment.

4. The Manual for Courts-Martial, 1949, provides:

> "If by exceptions and substitutions an accused is found guilty of a lesser included offense against which it appears that the statute of limitations (A.W. 39) has run, the court will advise him in open court of his right to avail himself of the statute in bar of punishment if he so desires" (par. 78a, p. 75).

The court did not so advise the accused in this case. That omission was fatal error (CM 313593, Sawyer, 63 BR 185; CM 319604, Davis, 69 BR 9; CM 335583, Draper, decided 8 April 1949).

5. The Board of Review holds the record of trial legally insufficient to support the findings and sentence.

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

J. M. Sitter, J. A. G. C.

J. A. Guinard, J. A. G. C.

MAY 27 1949

CSJAGN-CM 336269 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, San Francisco Port of Embarkation, Fort Mason, California.

1. In the case of Recruit George D. Knight (RA 1189861), 9206 Technical Service Unit, Transportation Corps (Operating), Military Police Detachment, Camp Stoneman, California, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under the provisions of Article of War 50e(3) this holding and my concurrence therein vacate the findings of guilty and the sentence.

2. When copies of the published order in this case are forwarded to this office together with the record of this trial, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference 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 336269).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

CSJAGK - CM 336350

29 JUN 1949

U N I T E D S T A T E S	TRIESTE UNITED STATES TROOPS
v.	Trial by G.C.M., convened at Trieste, Free Territory of Trieste, 14 and 15 April 1949. Dismissal, total forfeitures and confinement for three (3) years.
First Lieutenant DAVID FRANKLIN HOOVER (O-38537), Medical Detachment, 351st Infantry.	

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

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

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

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

Specification 1: In that First Lieutenant David F. Hoover, Medical Detachment, 351st Infantry, did, at Trieste, Free Territory of Trieste, on or about 31 December 1948, feloniously steal Military Payment Certificates, value about $500.00, the property of Sergeant Joseph Torricello.

Specification 2: In that First Lieutenant David F. Hoover, ***, did, at Trieste, Free Territory of Trieste, on or about 31 January 1949, feloniously steal Military Payment Certificates, value about $50.00, the property of Private First Class Robert M. Kipp.

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

Specification 1: In that First Lieutenant David F. Hoover, ***, did, at Trieste, Free Territory of Trieste, on or about 11 February 1949, feloniously steal Military Payment Certificates, value about $61.85, the property of the United States.

Specification 2: In that First Lieutenant David F. Hoover, ***, did, at Trieste, Free Territory of Trieste, on or about 28 February 1949, feloniously steal Military Payment Certificates, value about $606.00, the property of the United States.

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

Specification 1: (Finding of not guilty).

Specification 2: In that First Lieutenant David F. Hoover, ***, did, at Trieste, Free Territory of Trieste, on or about 1 March 1949, wrongfully gamble with Corporal Carl E. Andrus, an enlisted man.

CHARGE IV and its Specification: (Dismissed on motion of defense).

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

Specification: In that First Lieutenant David F. Hoover, ***, did, without proper leave, absent himself from his detachment from about 0800, 3 March 1949, to about 1830, 3 March 1949.

He pleaded not guilty to all of the charges and specifications. At the conclusion of the prosecution's case the court granted a defense motion to dismiss Charge IV and its specification. Accused was found guilty of all of the remaining specifications and charges except Specification 1 of Charge III and Charge III, but as to the latter he was found guilty of a violation of the 96th Article of War. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority might direct for three (3) years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

Sergeant Joseph Torricello testified that on 31 December 1948 he received his pay from the accused at the "pro station" in Trieste and that, at that time, he gave the accused $500 in Military Payment Certificates as a deposit in the "Soldiers' Saving Fund" /Soldiers' Deposit Account/, receiving a hand receipt (Pros Ex 1) therefor from the accused. The last previous such deposit made by the witness had been one of $400 or $500 on 15 June 1948. The witness has since examined his account and while it includes a record of a $60 deposit on 9 December 1948 which he did not make, there is no record of the $500 paid to the accused on 31 December 1948 (R 9-14).

Corporal Henry D. Tarbell testified that he was present on 31 December 1948 when Sergeant Torricello gave the accused $500 as a deposit in his "Soldiers' Deposit" and the accused gave the sergeant a receipt (Pros Ex 1)

which the witness identified (R 15-16).

Private First Class Robert M. Kipp testified that on 31 January 1949 he received his pay from the accused at the Army Control Facility in Trieste and that, at that time, he gave the accused $50 as a deposit in his "Soldiers' Deposit," receiving a hand receipt (Pros Ex 2) therefor. The witness has since examined his account and it contains no record of a $50 deposit subsequent to 31 January 1949, nor has he received the money back from the accused (R 17-20).

Chief Warrant Officer William R. Thorn testified that he was the Personnel Officer of the 351st Infantry and that his duties entailed the maintenance and supervision of the official records of the personnel of the regiment, including soldiers' pay and deposit records. The normal operating procedure for the handling of Soldiers' Deposits is for the agent officer to collect the money from the individual soldiers, giving receipts therefor, and then to turn the total collections over to the witness with a list setting forth the data as to each separate deposit. The witness issues a receipt to the agent officer for the gross amount of cash. Entries are then made in the individual Soldiers' Deposit books in accordance with the data contained on the list prepared by the agent officer and the books and the cash are processed through the Finance Office where each entry is checked and initialed by the Finance Officer. Thereafter an entry corresponding to the one made in the Soldiers' Deposit book is made in the appropriate section of the soldier's Service Record and initialed by the witness (R 20-23).

Mr. Thorn stated that he is the custodian of the service records of Sergeant Torricello and Private Kipp. The Soldiers' Deposit section of Sergeant Torricello's Service Record (Pros Ex 3) includes a $400 deposit on 15 June 1948, a $60 deposit on 9 December 1948, and no subsequent entry. The sergeant's Soldiers' Deposit book (Pros Ex 4) contains entries to the same effect. The Soldiers' Deposit section of Private Kipp's Service Record (Pros Ex 5) reveals that the last entry thereon is a $40 deposit made on 20 November 1948. His Soldiers' Deposit book (Pros Ex 6) is to the same effect. Mr. Thorn stated that the $60 entry in Sergeant Torricello's account was erroneous and that it had resulted from the fact that in turning over some collections to the witness, Major Ross (the Commanding Officer of the Medical Detachment of the 351st Infantry) had incorrectly listed Sergeant Torricello as one of the depositors. Such an error in listing by agent officers has occurred on five or six occasions during the three years that the witness has been handling the records (R 23-28).

Major Leon S. Barwick, Finance Officer of TRUST, testified that the procedure followed in the payment of troops was that on pay day agent officers would be given the money to meet the payrolls. The accused was designated as a class A agent officer for January 1949 (Pros Exs 9 and

10) and February 1949 (Pros Ex 11). There was then received in evidence the January 1949 supplemental pay roll for Special Units, 351st Infantry (R 35, Pros Ex 13); the February 1949 pay roll for the 537th Medical Service Detachment, TRUST (R 35, Pros Ex 14); and the February 1949 pay roll for the Medical Detachment, 351st Infantry (R 35, Pros Ex 15). To each of these pay rolls there is attached a "turn-back" slip on which the agent officer has indicated the persons on the pay roll who have not been paid (R 31-35).

With regard to the pay roll, Prosecution Exhibit 13, Major Barwick testified that the accused received $2413.95, of which $61.85 was not paid to troops. With regard to the pay roll, Prosecution Exhibit 14, the accused received $1,722, of which $246.15 was not paid to troops. And with regard to the pay roll, Prosecution Exhibit 15, the accused received $8,877.45, of which $359.85 was not paid to troops. Neither the unpaid balance of $61.85 from the January 1949 pay roll, nor the unpaid balance of $606 ($246.15 plus $359.85) from the two February pay rolls has been returned to the Finance Office which carries the aggregate amount of $667.85 in its current account as a "Loss of Funds" (R 35-39).

Corporal Carl E. Andrus testified that on 1 March 1948 he had met the accused at the Mexico Club and that during the course of a conversation they had made a bet on the outcome of a basketball game between the Military Police Company and the "351st Medics." The odds were two to one in favor of the Military Police and the witness put up $60 while the accused put up $30. The money was given to Corporal Richmond to hold (R 52-53).

Corporal James E. Richmond testified that he had witnessed the bet between the accused and Corporal Andrus and had been asked to act as stakeholder, which he did, receiving $30 from the accused and $60 from Corporal Andrus, all in Military Payment Certificates (R 54).

Major Richard H. Ross testified that from December 1948 to March 1949 he had been the accused's commanding officer. On 28 February 1949 he acted as witnessing officer for the payment of part of the February pay rolls of the Medical Detachment, 351st Infantry, and of the 537th Medical Service Detachment. Accused was the agent officer and it was necessary for him to visit a number of satellite stations to pay the men of the detachments who were stationed there. Accused did not complete the payments on 28 February 1949, but continued to make payments on the following day, 1 March 1949 (R 39-40).

From October 1947 to 21 March 1949 Major Ross was quartered in the Regimental BOQ. Accused joined his organization on 18 December 1948 and was assigned to share the Major's room. He did not see the accused on the night of 2-3 March 1949 and the latter was not present for duty during the official duty hours on 3 March 1949. This fact was reported

to the Regimental Adjutant. The witness next saw the accused at 1830 hours on 3 March 1949 in their quarters at the BOQ. There was received in evidence, without objection, an extract copy of the morning report of the Medical Detachment, 351st Infantry, TRUST, establishing the accused's absence as aforementioned. The accused was not authorized to be absent during the period in question (R 46, Pros Ex 7).

When the accused came to their quarters on the evening of 3 March 1949 he appeared agitated. He told the witness that "the payroll money was missing. I asked him what had happened to it and he stated to me that he had spent it." On the morning of 4 March 1949 the witness and the accused went to the Regimental Personnel Section to have the file copies of the pay roll "extended." They then took the pay rolls to the Finance Section of TRUST where a "tape run" was made on the figures which disclosed a certain amount of non-payment on each pay roll. The Finance Officer asked the accused if he had the money and the accused said, "No, I don't have it" (R 42,45).

No witnesses were presented by the defense and the accused, having been advised of his rights, elected to remain silent.

4. Discussion

Upon the trial the defense objected to any testimony by Major Ross concerning his conversation with the accused when the latter returned to their jointly occupied quarters on the evening of 3 March 1949, the objection being based upon the fact that Major Ross, accused's military superior, had not first warned accused of his rights under Article of War 24. What transpired on that occasion is substantially covered in the following testimony of Major Ross:

"Q Going back to the time when you first saw Lieutenant Hoover at 1830 hours, Major Ross, tell the court exactly what transpired when you saw Lieutenant Hoover?

"A Lieutenant Hoover presented himself at the door of our quarters. He looked considerably agitated. I told him to come in, and at the time it was my opinion that --

LAW MEMBER: Just a minute, Major. Let us not give the court your opinion. Just tell us what happened.

THE WITNESS (continuing): Because of his agitation I felt that he needed some special handling. I told him that he could talk to me if he desired but I thought he should get what he had on his mind off his chest. I was acting more in a therapeutic manner than searching for any information. I told him he could talk to me if he desired. He said he would in due time.

QUESTIONS BY PROSECUTION:

"Q Then your conversation went on that purely personal

basis level?

"A It was on a personal basis completely.

"Q Did you at any time warn the accused of anything -- that anything he said might be used against him?

"A Not formally. I told him that he could speak to me, he could talk to me or not as he desired. That is the nearest I came to any formal warning of his rights.

"Q Then were his conversations with you on a purely voluntary basis?

"A Yes, sir." (R 42)

* * *

"Q The question was, did he give you any reason for his actions.

"A Yes. He stated the payroll money was missing. I asked him what had happened to it and he stated to me that he had spent it.

"Q Did he make any other statement?

"A After that I was considerably surprised. I said, 'Surely that is not sufficient to make you go off like this.' He said, 'Well, there are other troubles.' He said some such words like that and I said, 'What other troubles?' He said, 'Well, you know what has come up recently.' Some such statement as that.

At that point I ceased to question him about his anxiety and reported his return to the Regimental Duty Officer, who was Lieutenant Neidinger." (R 45)

* * *

"Q Major, at the time the accused made the statement were you speaking to him as his commanding officer or his roommate? You testified that you roomed with him.

"A As I stated before, at that particular time I was moved by his apparent agitation and felt that I should converse with the man in order to get him out of his state of agitation. At that time I had no suspicion that I was unearthing anything by my questioning. I had no reason to suspect that any loss of money might be involved or any other trouble.

"Q At the time you spoke to him all you knew was that he hadn't been on duty that day, is that correct?

"A I was concerned about that particularly." (R 48)

It is apparent that when accused impulsively burst out with the statement that "the payroll money was missing *** that he had spent it," the relationship of the two parties to the conversation was not, and could not possibly have been, that of a military superior conducting an inquisition of a subordinate, since the military superior did not know, nor even suspect, that any violation of the Articles of War, other than

the comparatively minor one of accused's unauthorized absence during that day's office hours, had occurred.

While it has long been a rule of law that because of the unusual relationship existing between a military superior and his subordinate, a confession made by the latter to the former must, to be admissible in evidence, be clearly established as having been voluntarily made (Winthrop, Mil. Law and Prec., 2d Ed., 1920 Reprint, p.329; MCM, 1921, par. 225b; MCM, 1928, par. 114a), a confession or admission voluntarily or spontaneously made to such a superior will be admissible even though no warning, as required by Article of War 24, is given. Certainly it would be absurd to require an officer to preface every conversation with a person of inferior rank, whether official or casual, with such a warning lest the latter make some inculpatory statement.

In CM 255162, Lucero, 36 BR 47, an enlisted man and another soldier appeared at the company orderly room where the latter informed the company commander, a captain, that accused had said that he had shot a man and had asked to be taken to the orderly room. Accused told the captain that he was sorry and the captain asked him what had happened. The accused then confessed. He had not been advised of his right to remain silent and no promises or threats were made. The Board of Review held that the confession was voluntary and had been properly admitted.

In CM 288872, Clark, 1 BR (POA) 89, the accused, a private first class, became missing while his unit was advancing under enemy fire. Some months later he reported to his company first sergeant who, believing that accused had been in a hospital, asked him for copies of his orders. Accused stated that he had none and, when the first sergeant then inquired where he had been, he stated that he had been "on the beach," that he "was scared and that he didn't want to come back to the company." When the first sergeant left the office a staff sergeant, accused's platoon guide, asked accused why he had not tried to find "the outfit" and accused stated that he "didn't want to find the outfit" and that he "was afraid of combat." He was subsequently charged with misbehavior before the enemy. In holding admissible the statement made by accused to the first sergeant and to the staff sergeant, the Board of Review said (at page 97):

> " *** a confession made by a subordinate to a military superior has been held admissible where it affirmatively appeared that the confession was made spontaneously upon the initiative of the subordinate although the latter had not been warned as to his rights (CM 255162, Lucero, 36 BR 47; CM 233611, Eckman, 20 BR 29; see also CM 224549 Sykes, 14 BR 159).
>
> * * *
>
> "From the foregoing authorities it appears that when there

is offered in evidence a confession of a soldier made to a military superior without any previous warning to the soldier of his rights concerning self-incrimination it is the duty of the trial court to see that further inquiry is made into the attendant circumstances. If no such inquiry is had and the record is silent as to the circumstances it will be presumed that the confession was not voluntary. If further inquiry is conducted and the record shows the circumstances under which the confession was made, then it will be determined from such circumstances and with due regard for the relationship existing between the parties whether the confession was voluntary, namely, whether it was induced or materially influenced by promises, assurances, threats, harsh treatment, fear or hope of benefit or the like. The confession will be regarded by the Board of Review as admissible, if the circumstances are such as to support an inference that it was voluntary.

"In the instant case the circumstances concerning the making of the confession are fully shown in the record. At the time he made it the accused was not under arrest or investigation or suspected of the commission of any offense. Inasmuch as he was not in custody it fairly may be assumed that he voluntarily returned to his company after his long absence. First Sergeant Briggs thought that accused had been in a hospital and in the routine pursuit of his military duties asked accused for a copy of the orders assigning him back to the company. There was absolutely no call for Sergeant Briggs to make any statement to accused regarding the latter's rights as the revelation that accused had committed an offense was wholly unexpected. Briggs was not in any respect derelict in the performance of his duties and he did not employ any trick, false promise, or duress. The confession came out incidentally as an unforeseen development in the course of a conversation concerning a different subject. There was no 'grilling' or prolonged questioning of accused and the statements made by him were not influenced in the least by any threat or promise. There is not the slightest indication in the record that they may not be true. Their spontaneous and voluntary character is further shown by the fact that when the first sergeant left the room accused readily made some of the same incriminating admissions to another sergeant. In the opinion of the Board of Review the confession was voluntary and was properly admitted in evidence."

And in CM 324725, Blakeley, 73 BR 307, the accused, a second lieutenant, made statements to a number of superior officers, including a captain in the Finance Section and another in the Judge Advocate Section, in which he admitted having been absent without leave. Concerning the admissibility of the testimony of these two officers, the Board of Review held (at page 320):

"*** Where the person to whom accused relates the evidence of his guilt, although he may be accused's superior in rank, grade or station, has not in any manner assumed the role of official inquisitor, where such person does not actively interrogate accused but merely has the incriminatory admission thrust upon him or where the damning statement is but an incident of a general conversation which accused has initiated for reasons of his own, the confession of accused so made must be considered voluntary and under these circumstances no showing that accused was informed of, or even understood, his right not to incriminate himself is required. Article of War 24, as well as the 5th Amendment to the Constitution, protects an accused against self-incrimination only as a result of official compulsion, express or implied, not against a merely unwise or ill-advised disclosure of his unlawful activities (CM 289978, Redmond, 3 BR (ETO) 349, 354; CM 288872, Clark, 1 BR (POA) 89,92). It is clear, then, that accused's statements to Captain Young and Captain Graham are admissible as confessions, ***."

We conclude that when Major Ross engaged the accused in conversation upon the latter's appearance in their quarters in a patently distraught condition, and at a time when the major had no knowledge, or even suspicion, that the accused was unable to account for the pay roll money, the situation was not such as imposed upon him the duty of first warning the accused under Article of War 24, and that the admissions made to him by the accused during the course of that conversation were properly received in evidence.

Charge I and its Specifications

"Larceny, or stealing, is the unlawful appropriation of personal property which the thief knows to belong *** 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 specifications of Charge I properly alleged that the accused did "feloniously steal" the moneys involved (MCM, 1949, App. 4, Form 92). In his capacity as a class A agent officer the accused received money from two enlisted men to be credited to their Soldiers' Deposit Accounts. Up to the time of the trial neither of the sums so received by him had been turned in or credited to the respective Accounts. The failure of the accused to account for the money so received by him constituted a breach of his fiduciary obligations, a breach of trust, and a violation

of Article of War 93 (CM 269707, Wolfsie, 45 BR 81,95).

Charge II and its Specifications

The evidence discloses that the accused, a class A agent officer, was intrusted with public funds for the purpose of disbursing certain pay rolls and that he failed to fully account for such funds. Paragraph 10a, Army Regulations 35-320, 5 February 1945, provides as follows:

> "Class A agent officers will make the necessary returns to the accountable disbursing officer within 24 hours after completion of the particular payments for which designated. This includes amounts not paid to enlisted personnel whose names are red-lined on pay rolls."

The accused received the funds for the payment of the first pay roll on 11 February 1949 and for the payment of the other two pay rolls on 28 February 1949. On 1 March 1949 he completed making payments except for a few soldiers who were red-lined (Pros Exs 13,14 and 15). On 4 March 1949 when asked by the Finance Officer whether he had the unused balance of the money he replied in the negative (R 45). And up to the time of trial (14 April 1949) he had not made the necessary returns to the accountable disbursing officer as required by the quoted Regulations (R 37). In CM 317655, Warmenhoven, 67 BR 1, 9, the Board of Review stated:

> "Moneys received by a Class 'A' Agent Finance Officer for the payment of troops are property of the United States and remain the property of the United States until disbursed to the proper parties in accordance with existing regulations. Moneys not paid to the troops must be returned to the proper disbursing office (CM 269707, Wolfsie, 45 BR 94). In retaining money entrusted to him for payment of enlisted men the accused exercised a wrongful dominion over it and he thereby committed a wrongful conversion of the money (CM 271265, Weed, 46 BR 86). ***"

And in CM 316347, Fever, 65 BR 305,307, it was held that:

> "Accused received the money in question and when the pay roll had been paid he failed to return the balance on hand to the proper authority. When demand was made therefor he could not deliver the money because, as he stated, he did not have it. According to the evidence, he never made restitution of the shortage. The proof offered by the prosecution therefore established a prima facie case of embezzlement. The specific facts constituting the actual conversion to his own use are peculiarly within accused's own knowledge and it was

his duty, upon the establishment of a prima facie case by the prosecution, to go forward with the evidence. Failing to make an explanation, a conviction of guilt may rest upon the facts of possession, absence of accounting or delivery and the presumption arising from same (CM ETO 1302, Splain; CM 205621, Curtis, 8 BR 207,227)."

We conclude that the evidence adduced upon the trial clearly established a conversion, by breach of trust, of money which was the property of the United States. But the Specifications of this Charge do not allege that such money was "furnished or intended for the military service," and, therefore, they do not allege violations of Article of War 94. However, the larceny of property of the United States in violation of Article of War 93 is included in the offense of larceny in violation of Article of War 94 (CM 319858, Correlle, 69 BR 183,200; CM 316193, Holstein, 65 BR 271,276). Accordingly, the record of trial is not legally sufficient to sustain the finding of guilty of Charge II but is legally sufficient to sustain the findings of guilty of the Specifications of Charge II and of a violation of Article of War 93.

Charge III and its Specification

There is no valid dispute to the allegation that the accused, an officer, made a wager with an enlisted man on the outcome of an athletic event. Winthrop lists gambling with soldiers as one example of how an officer may demean himself with his military inferiors (Winthrop, op. cit. supra, at page 716). And in CM 260737, Lillis, 39 BR 395,406, the Board of Review held:

"Gambling by an officer with enlisted men contains the same inherent vices as drinking with, or borrowing from, enlisted men. All three offenses tend to weaken respect for authority. They bring the commissioned officer into contempt and expose him to the secret jeers of his subordinates. The victim of drink, financial stringency, or the gambling passion is exposed in a moment of weakness to those to whom he should be an exemplar of all soldierly virtues. The human foibles in which enlisted men themselves indulge or which they may freely tolerate in other enlisted men cannot be forgiven in an officer.

"This is not the only characteristic evil of the offense alleged. Gambling with enlisted men, like borrowing from them, may be the means of coercing them into an involuntary disposition of their funds. The subordinate who is requested to lend or to gamble by his superior may hesitate to decline for fear of discrimination or reprisal. The prohibition against gambling with enlisted men is essential to the adequate protection of the subordinate."

To the same effect see: CM 307028, Morris, 60 BR 49,57; CM 286548, Welch, 56 BR 233,239; and CM 283457, Stallworth, 55 BR 97,101.

Under the circumstances the court properly found the accused guilty of the specification and of a violation of Article of War 96.

Charge V and its Specification

The accused's absence without leave during duty hours on 3 March 1949 was established both by the extract from the morning report, Prosecution Exhibit 7, and by the testimony of Major Ross (R 41). Although his absence under the circumstances, while he wrestled with the personal problem created by his peculations, is understandable, this may be considered only in extenuation of, and not as an excuse for, the violation of Article of War 61.

5. Records of the Department of the Army disclose that the accused is approximately 30 years old, married, and has two children. He is separated from his wife. He served as an enlisted man from 13 January 1941 to 27 November 1941, and from 24 January 1942 to 4 August 1943, on which latter date he completed Officer Candidate School and was commissioned a second lieutenant in the Medical Administrative Corps. On 1 September 1944 he was promoted to first lieutenant. He was relieved from active duty on 13 January 1946. On 11 March 1946 he enlisted in the Air Corps as a master sergeant, serving in that capacity until 15 August 1946, on which date he accepted a Regular Army commission as a second lieutenant in the Pharmacy Corps. He was promoted to first lieutenant in the Regular Army on 1 October 1946.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charges I, III, and V, and the Specifications thereof, but legally sufficient to support only so much of the findings of guilty of the Specifications of Charge II as involves findings of guilty of these Specifications in violation of Article of War 93, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93, 96 or 61.

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

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

Roger Tr. Cunier, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 336350

THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant David Franklin Hoover (O-38537), Medical Detachment, 351st Infantry, upon the concurrence of The Judge Advocate General, only so much of the findings of guilty of Charge II and the specifications thereof is approved as involves findings of guilty of these specifications in violation of Article of War 93. The sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

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

18 July 1949

E. M. Brannon, Brig Gen, JAGC
Chairman

(GCMO 47, 19 July 1949).

I concur in the foregoing action.

THOMAS H. GREEN
Major General
The Judge Advocate General

19 July 1949.

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

CSJAGN-CM 336362

18 MAY 1949

U N I T E D S T A T E S	)	82D AIRBORNE DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, 31 March 1949. Bad conduct discharge and confinement for one (1) year. Disciplinary Barracks.
	)	
Recruit SYLVESTER HALL (RA 33311658), Battery A, 98th Field Artillery Battalion.	)	

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

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

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

CHARGE I: Violation of the 65th Article of War.

Specification: In that Recruit Sylvester Hall, Battery "A", 98th Field Artillery Battalion, having received a lawful order from Corporal Emory Jones, a noncommissioned officer who was then in the execution, of his office, to take his hand out of his pocket, did, at Fort Bragg, North Carolina, on or about 26 February 1949, willfully disobey the same.

CHARGE II: Violation of the 64th Article of War.

Specification: In that Recruit Sylvester Hall, Battery "A", 98th Field Artillery Battalion, having received a lawful command from Captain Willie A. Mayo,

his superior officer, to report to the Battery Charge of Quarters at "A" Battery Orderly Room, 98th Field Artillery Battalion, at 1400 hours 26 February 1949, did, at Fort Bragg, North Carolina, on or about 26 February 1949, willfully disobey the same.

CHARGE III: Violation of the 69th Article of War.

Specification: In that Recruit Sylvester Hall, Battery "A", 98th Field Artillery Battalion, having been duly placed in arrest at Fort Bragg, North Carolina, on or about 1230 hours, 26 February 1949, did, at Fort Bragg, North Carolina, on or about 26 February 1949, break his said arrest before he was set at liberty by proper authority.

He pleaded guilty to the Specification of Charge III and Charge III, and not guilty to all other Charges and Specifications. He was found guilty of all Specifications and Charges, and was sentenced to be discharged from the service with a bad conduct discharge, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor for one year. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50e.

3. The only question raised by the record concerns the legality of the findings and sentence in so far as applied to the alleged willful disobedience in violation of Article of War 64 and breach of arrest in violation of Article of War 69. The record shows that accused received the following direct order from Captain Willie A. Mayo: "I am placing you under arrest and I want you to report to the Charge of Quarters of 'A' Battery, in the orderly room at two o'clock P.M. to-day, and to sign in at the orderly room every two hours starting at 14:00 hours, till ten o'clock that night" (R. 11). Accused stated that he did not think he would comply with the order unless confined, after which Captain Mayo remarked, "Well, if you understand my order, I have nothing further to say to you, except that I am placing you under arrest." Upon cross-examination he further testified that he ordered accused to report to the Charge of Quarters rather than confine him, with a view to "assuring * * * that he would remain in the area." The order to report every two hours was "part of the arrest" (R. 12,13). Thereafter the accused in fact did go beyond the prescribed limits imposed by the arrest. He did not report to the orderly room (R. 16,19).

4. It is fundamental that an unreasonable multiplication of

charges based on what is substantially one transaction will not be countenanced (CM 231487, Campbell, 18 BR 225; CM 243535, Gordon, 28 BR 1; CM 249636, Williams, 32 BR 143; par. 27, p. 20, MCM, 1949); and where the offenses are substantially one transaction and concurrent they are construed together and punished only in their most serious aspect (CM 313544, Carson, 63 BR 137; CM 323305, Raabe, 72 BR 205). It may be conceded that frequently the circumstances surrounding the willful disobedience of an order will give rise to another offense so closely related as to seem concurrent, but in such cases the order has always entailed an act separate, distinct and removed from the ensuing absence without leave or mutiny, such as was the case in CM 263480, Griffith, 41 BR 265 or CM 266173, Britton, 43 BR 149. In the instant case, in giving the accused the order and placing him in arrest the officer himself believed that the order was a mere "part of the arrest." There can be no question but that the two alleged offenses were concurrent and substantially the same transaction. Construed in their most important aspect, that of the willful disobedience of the order of a superior officer, for that offense alone, dishonorable discharge, total forfeitures and confinement at hard labor for five years would seem to be authorized (par. 117c, p. 135, MCM, 1949). Such a view however ignores the true purport of the incidents here involved. 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 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.

5. For the reasons stated the Board of Review holds that the evidence is legally insufficient to support the findings of guilty of Charge II and the Specification thereof; legally sufficient to support the findings of guilty of the Specification of Charge I and Charge I and the Specification of Charge III and Charge III; and legally sufficient to support only so much of the sentence as involves bad conduct discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for nine (9) months.

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

J. M. Sidger, J. A. G. C.

J. F. Redmond, J. A. G. C.

CSJAGN-CM 336362 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, 82D Airborne Division, Camp Mackall, North Carolina.

1. In the case of Recruit Sylvester Hall (RA 33311658), Battery A, 98th Field Artillery Battalion, I concur in the holding by the Board of Review that the record of trial is legally sufficient to support the finding of guilty of Charge I and Charge III, and the Specification under each, legally insufficient to support the finding of guilty of Charge II and the Specification thereunder, and legally sufficient to support only so much of the sentence as involves bad conduct discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for nine (9) months. Under Article of War 50e(3) this holding and my concurrence vacate the findings of guilty of Charge II and the Specification thereunder, and vacate so much of the sentence as is in excess of bad conduct discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for nine (9) months. Under Article of War 50 you now have authority to order execution of the sentence modified in accurdance with this holding. It is recommended that appropriate statement be included in the general court-martial order indicating the findings and sentence thus vacated.

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

(CM 336362).

1 Incl
Record of Trial

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

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

JUN 8 1949

CSJAGV CM 336368

U N I T E D S T A T E S)	THE ARTILLERY CENTER
)	
v.)	Trial by G.C.M., convened at
Recruit HOMER K. McELROY)	Fort Sill, Oklahoma, 10 March
(38058244), Enlisted)	1949 and 31 March 1949.
Detachment, 4011th Area)	Dishonorable discharge
Service Unit, Station)	(suspended) and confinement
Complement, Fort Sill,)	for three (3) years.
Oklahoma)	Disciplinary Barracks.

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

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

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

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

Specification: In that Recruit Homer K. McElroy, Enlisted Detachment, 4011th Area Service Unit, Station Complement, Fort Sill, Oklahoma, did, at Fort George G. Meade, Maryland, on or about 9 March 1945, desert the service of the United States and did remain absent in desertion until he was apprehended at Shawnee, Oklahoma, on or about 28 July 1948.

CHARGE II: Violation of the 69th Article of War.

Specification: In that Recruit Homer K. McElroy, Enlisted Detachment, 4011th Area Service Unit, Station Complement, Fort Sill, Oklahoma, having been duly placed in confinement in the Post Guardhouse, Fort Sill, Oklahoma, on or about 29 July 1948, did, at Fort Sill, Oklahoma, on or about 15 September 1948, escape from said confinement before he was set at liberty by proper authority.

ADDITIONAL CHARGES

CHARGE: Violation of the 96th Article of War.

Specification: In that Recruit Homer K. McElroy, Enlisted Detachment, 4011th Army Service Unit, Station Complement,

Fort Sill, Oklahoma, having been placed in confinement in the Post Guard House, Fort Sill, Oklahoma, on or about 28 July 1948, did, at Fort Sill, Oklahoma, on or about 27 October 1948, attempt to escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to all Charges and Specifications. He was found guilty, by exceptions and substitutions, of absence without leave, in violation of Article of War 61, as a lesser included offense under Charge I and its Specification, guilty of Charge II and the Specification thereunder, and guilty of the Additional Charge and the Specification thereunder. 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 five (5) years. The reviewing authority approved the findings and sentence but remitted two (2) years of the confinement at hard labor. As thus modified, the reviewing authority ordered the sentence executed, but suspended execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, or elsewhere as the Secretary of the Army may direct, as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 92, Headquarters, The Artillery Center, Fort Sill, Oklahoma, 2 May 1949.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge II and its Specification and of the Additional Charge and its Specification. The only questions presented and which will be considered by the Board of Review are the legality of so much of the findings as pertains to Charge I and the Specification thereunder, and the legality of the sentence.

4. Accused was arraigned and tried in March 1949 for desertion alleged to have begun on or about 9 March 1945 and alleged to have been terminated on or about 28 July 1948, under Charge I and its Specification. He was found guilty of the lesser included offense of absence without leave for the same period, in violation of Article of War 61. The evidence sustains the findings of the court that accused was absent without leave from his station for the period alleged. It does not appear that the court advised the accused of his right to raise the defense of the statute of limitations in bar of the offense of which he was found guilty. No facts appear to indicate that the running of the statute had been tolled.

5. It remains to be decided whether the accused may be found guilty of a lesser included offense, against which the limitation imposed by Article of War 39 has run, without having been advised of his right to plead the statute in bar thereof.

6. Since absence without leave, not being a continuing offense for the purpose of computing the time under the statute of limitations, is

committed on the date the accused initially absented himself, it is apparent from the face of the record in the case under consideration that the statute of limitations could have been successfully asserted in bar of trial (AW 39; par. 67, MCM, 1949)(CM 335583, Draper, decided April 1949).

Article of War 39, Manual for Courts-Martial, U. S. Army, 1928, before it was amended by Title II, Public Law 759, 80th Congress, provided in part as follows:

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

The cited amendment exempted from the operation of the statute absence without leave committed in time of war, but since in the instant case the statute had run before the amendment went into effect on 1 February 1949 it is of no effect here (CM 336269, Knight, decided May 1949). A statute cannot operate to revive offenses which were barred at the time of its enactment since it would in such case be ex post facto. (United States v. Fraidin, 63 Federal Supplement 271).

Paragraph 78a, page 75 of the Manual for Courts-Martial, 1949, states:

> "If by exceptions and substitutions an accused is found guilty of a lesser included offense against which it appears that the statute of limitations (AW 39) has run, the court will advise him in open court of his right to avail himself of the statute in bar of punishment if he so desires." (Underscoring supplied)

In the Draper case, supra, the Board of Review held that the foregoing language is mandatory, as was the corresponding provision of the 1921 Manual for Courts-Martial, and as distinguished from the permissive language of the 1928 Manual for Courts-Martial. Although the Board of Review in CM 313593, Sawyer, 63 B.R. 185, held that this permissive language of the 1928 Manual did not preclude its holding that a particular record of trial was legally insufficient because of the court's failure to comply therewith, the Board of Review rests its decision herein upon the clear mandatory language of the 1949 Manual cited above.

The court did not advise the accused of his right to plead the statute as a bar to his trial. No question of a waiver of such right is presented. That omission was fatal error (CM 336269, Knight and cases cited therein.).

CSJAGV CM 336368

7. The maximum imposable sentence for the offense of escaping from confinement and for the offense of attempting to escape from confinement, of which accused has legally been found guilty is dishonorable discharge, forfeiture of all pay and allowances due after the date of the order directing execution of the sentence, and confinement at hard labor for one and one-half years. (Paragraph 117c, MCM, 1949).

8. For the foregoing reasons, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of the Specification of Charge I and Charge I, legally sufficient to support the findings of guilty of the remaining Specifications and Charges, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for one year and six months.

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

CSJAGV CM 336368 1st Ind.

JAGO, Department of the Army, Washington 25, D. C. JUN 29 1949

To: Commanding General, The Artillery Center, Fort Sill, Oklahoma.

1. In the case of Recruit Homer K. McElroy (38058244), Enlisted Detachment, 4011th Area Service Unit, Station Complement, Fort Sill, Oklahoma, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of the Specification of Charge I and Charge I, legally sufficient to support the findings of guilty of the remaining Specifications and Charges, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for one and one-half years. Under Article of War 50 this holding and my concurrence vacate the findings of guilty of the Specification of Charge I and Charge I, and so much of the sentence relating to confinement only as is in excess of confinement at hard labor for one and one-half years.

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

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

(CM 336368).

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

Incls:
Record of trial
Draft of GCMO

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

JUN 9 1949

CSJAGV CM 336376

U N I T E D S T A T E S)	NEW YORK PORT OF EMBARKATION
)	
v.)	Trial by G.C.M., convened at
Private ALLEN W. KLING)	Headquarters New York Port of
(RA 16276840), 9206)	Embarkation, Brooklyn Army
Technical Service Unit-)	Base, Brooklyn, New York,
Transportation Corps,)	20 April 1949. Bad conduct
Ships Complement Detach-)	discharge and confinement
ment, Fort Mason,)	for two (2) years. Disciplinary
California.)	Barracks.

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

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

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

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

Specification: In that Private Allen W. Kling, 9206 Technical Service Unit Transportation Corps, Ships Complement Detachment, San Francisco Port of Embarkation, Fort Mason, California, while on temporary duty aboard the United States Army Transport General William O. Darby tied up at Staten Island Terminal, New York Port of Embarkation, Brooklyn, New York did without proper leave absent himself from his organization from on or about 4 February 1949 to on or about 11 February 1949.

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

Specification: In that Private Allen W. Kling, 9206 Technical Service Unit Transportation Corps, Ships Complement Detachment, San Francisco Port of Embarkation, Fort Mason, California, while on temporary duty aboard the United States Army Transport General William O. Darby tied up at the Staten Island Terminal, New York Port of Embarkation, Brooklyn, New York did, at Baltimore, Maryland, on or about 4 February 1949, wrongfully and unlawfully have carnal knowledge of Alice Kaufman, a female child under the age of sixteen years.

He pleaded not guilty to both Charges and Specifications. He was found guilty of Charge I and its Specification. He was found guilty of Charge II and its Specification except the words "have carnal knowledge of", substituting therefor the words "commit indecent acts with" and adding the words "by jointly occupying a bed in a hotel room with her, with intent of the accused to arouse or gratify the lust or passion or sexual desires of the accused or the child", of the excepted words not guilty, of the substituted and additional words, guilty. No evidence of previous conviction was introduced. Accused was sentenced to be discharged the service with a bad conduct discharge, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor, at such place as proper authority may direct for two years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, or elsewhere as the Secretary of the Army may direct, as the place of confinement and forwarded the record of trial for action under Article of War 50e.

3. The Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and its Specification. The only questions presented and which will be considered by the Board of Review are the legality of the court's findings as they pertain to the Specification of Charge II and Charge II and the legality of the sentence.

4. The court determined that the evidence was insufficient to sustain that portion of the allegation of the Specification of Charge II that accused did "have carnal knowledge of" the person described and substituted therefor the words "commit indecent acts with" and added the words "by jointly occupying a bed in a hotel room with her with intent of the accused to arouse or gratify the lust or passion or sexual desires of the accused or the child".

The only question presented is whether the findings under the Specification of Charge II, as modified by the court by its exceptions, substitutions and additions, constitutes a lesser included offense of the offense alleged in the Specification. The test of whether the offense of which an accused is found guilty may be supported as a lesser included offense of the offense charged is stated in paragraph 78c of the Manual for Courts-Martial, U.S. Army, 1949, as follows:

"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 the elements of the offense found."

CSJAGV CM 336376

When a court by exceptions and substitutions finds an accused not guilty of the offense alleged but guilty of an offense not necessarily included therein the court has found the accused guilty of an offense with which he was not charged and for which he was not brought to trial. It is fundamental that such action is illegal and that such a finding can afford no basis for a legal sentence (CM 199063, Martin 3 B. R. 323; CM 317562, Staffieri, 66 B. R. 383; CM 323728, Wester, 72 B. R. 383, 384 and CM 334409, Hunt, decided 28 February 1949).

In the instant case the findings of the court as they pertained to the Specification of Charge II contain elements not essential to proof of the offense charged in the Specification upon which accused was arraigned. Elements necessary to prove "wrongful and unlawful indecent acts" are not necessarily required in proof of wrongful carnal knowledge.

In order to establish proof of wrongful carnal knowledge it is not necessary to prove that indecent acts were committed, or that the persons involved occupied a bed in a hotel room, or that an intent existed on the part of the accused to arouse or gratify lust or passion or sexual desires. Such elements, not being essential in the proof of wrongful carnal knowledge, establish that the offense of which accused has been found guilty is not a lesser included offense. These facts bring this finding of the court within the purview of the principle set out by the Board of Review in CM 323728, Wester, 72 B. R. 383, 384, wherein the Board stated:

> "From this case may be derived the rule that the particular offense found in order to be properly considered a lesser included offense of that charged must not only contain at least one of the elements necessary to be proved in the offense charged but must also necessarily exclude any element not contained in such offense. It is not within the power of either the court or the reviewing authority to find an accused guilty of an offense which is any way open to an interpretation that it may decry acts with which he was not confronted upon his arraignment (MCM, 1928, par. 78c)."

The maximum sentence for absence without leave for not more than sixty days, for each day or fraction of a day of absence is confinement at hard labor not to exceed three days and forfeiture of pay not to exceed two days. Accused was found guilty under Specification of Charge I and Charge I of absence without proper leave from on or about 4 February 1949 to on or about 11 February 1949 or seven days. Consequently the maximum sentence for the offense of which accused was found guilty is confinement at hard labor for twenty-one (21) days and forfeiture of two-thirds (2/3) pay for a like period.

5. For the foregoing reasons, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of the Specification of Charge II and Charge II, legally sufficient to support the findings of guilty of the Specification of Charge I and Charge I, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for twenty-one (21) days and forfeiture of two-thirds (2/3) pay for a like period.

J.A.G.C.

J.A.G.C.

J.A.G.C.

CSJAGV CM 336376 1st Ind. 27 JUN 1949

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

To: Commanding Officer, New York Port of Embarkation, Brooklyn, New York.

1. In the case of Private Allen W. Kling (RA 16276840), 9206 Technical Service Unit-Transportation Corps, Ships Complement Detachment, Fort Mason, California, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, but 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 confinement at hard labor for twenty-one (21) days and forfeiture of fourteen (14) days' pay. Under Article of War 50e(3) this holding and my concurrence vacate the findings of guilty of Charge II and its Specification and so much of the sentence as is in excess of confinement at hard labor for twenty-one (21) days and forfeiture of fourteen (14) days' pay.

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 336376).

THOMAS H. GREEN
Major General
The Judge Advocate General.

1 Incl:
Record of trial

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

MAY 27 1949

CSJAGH CM 336405

U N I T E D S T A T E S	)	RYUKYUS COMMAND
	)	
v.	)	Trial by G.C.M., convened at
	)	Headquarters, Ryukyus Command, APO
Private First Class PEDRO	)	331, 17 March 1949. Dishonorable
JONSON, PS 10314881, 697th	)	discharge and confinement for life.
Engineer Petroleum Distri-	)	United States Penitentiary, McNeil
bution Company (PS).	)	Island, Steilacoon, Washington.

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

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private First Class Pedro Jonson, 697th Engineer Petroleum Distribution Company (Philippine Scouts) did, at Naha, Okinawa, APO 331, on or about 14 November 1948, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Recruit Carlos Rosales, a human being, by shooting him with a carbine.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Steilacoon, Washington, or such other place as the Secretary of the Army may direct, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50.

3. Evidence for the prosecution.

At about 0730 hours on Sunday morning, 14 November 1948, the

accused entered the mess hall of the 697th Engineer Petroleum Distribution Company (PS) located at Naha, Okinawa, APO 331, where an estimated 15 to 75 men of the organization were having their breakfast (R 8,11, 19,25,26,35). He entered by way of the rear door, adjacent to the kitchen and was carrying a carbine in his right hand, muzzle down, with one finger inside the trigger guard; the sling was on his right shoulder (R 8-12). His left hand was at his side, and according to witnesses he carried neither a breakfast tray nor anything else in this hand (R 9,11,23). Recruit Carlos Rosales was one of those eating breakfast at that time (R 10,15,19,21). He was seated at the second from the last table in the far end of the mess hall, and was facing in the direction of the door through which the accused had entered (R 9,18). The accused, who was the only one in the mess hall carrying a carbine, walked down the aisle toward the front door of the mess hall (R 9,13, 14,19,24,26). He walked past the table at which Rosales was sitting, but neither addressed, nor was addressed by Recruit Rosales (R 15,21, 25). When he reached a point in the aisle opposite the table next beyond the one at which Rosales was seated, he stopped, turned toward the left, raised his carbine, and fired it from the waist directly into Rosales' back (R 14,17,18,19,21,22,27). Only one shot was fired (R 14,16,25). The accused, still in possession of the carbine, then ran from the mess hall by way of the front door, past the guard at Stationary Post No. 1, and out of the company area (R 9,22,23,25,28).

Recruit Rosales cried out in pain following the shot and then slumped to the floor, bleeding (R 9,10,17,19,25). Shortly thereafter Rosales was examined and pronounced dead (R 7,31). The immediate cause of death was a perforating wound in the right and left ventricles of the heart (R 7).

Immediately after the shooting, an agent of the CID found a .30 caliber carbine cartridge case at the scene, and a carbine bullet was extracted from the table at which the deceased was seated (R 32,33; Pros Exs 2,3).

Following the incident, the accused fled to Tsuboya, where he hid the carbine in a hole. He stayed at Tsuboya until late in the afternoon, when he became hungry. Thereupon, he hailed a weapons carrier on the highway nearby and was given a ride. Upon arrival at a road block set up by the military police, the accused showed them his class "A" pass, and stated that he was "JONSON" (R 37; Pros Ex 5). The day after the shooting, the accused accompanied an agent of the CID to an area northeast of the 697th Petroleum Distribution Company, and "pointed out the carbine in a hole about 6 feet long and 3 feet wide and about 4 feet deep." (R 33) The agent recovered the weapon which was received in evidence over defense objection (R 34; Pros Ex 4).

In a statement made to Agent Zentz and sworn to before Major Joseph H. Collins, both of the CID, the accused stated:

"At 11:0'clock P.M., 13 November 1948, I was sleeping on my bunk when ROSALEZ, CULGARA, VELONTA and PERIDA woke me up and asked me what I would like to say before I was killed. ROSALEZ and CULGARA grabbed me by the front of the shirt and held me. All four of these men had knives - two of them were jungle knives and the other kind I do not know. I don't know who had the two jungle knives. They were going to kill me because they said that I was responsible for their being caught by the MPs two months before. I broke away from them and fled. I went outside and hid until they left my quonset. Then I went inside my quonset again and sat down on my bunk until time for me to go on guard. I went on guard at Post #1 at 0200 hours 14 November 1948, and came off at 0600 hours 14 November 1948, at which time I gave the pistol which I had been using on guard to the guard relieving me. I then went to the shower to wash my face. When I came out of the shower room I found one (1) carbine cartridge lying on the ground outside the shower. I went over to my quonset and picked up my carbine. Then I went over to the kitchen. I walked in the front door, walked down the aisle between the tables without speaking to anybody and walked up behind ROSALEZ who was eating chow and shot him in the back with the carbine held at my hip. After I shot him I ran out of the mess hall and passed the flag pole near the front gate and down the steps to the road outside the area. The sentry at the gate did not say anything to me as I went past but he did see me. Then I went over to Tsuboya and hid the rifle immediately in a big hole. I hid on the top of a hill on the outskirts of Tsuboya.

"I did not have anything to eat all day so later that afternoon I went to the highway in search of the MPs. I hitch hiked on a weapons carrier and when we came to a road block the MPs stopped the weapons carrier and asked me for a pass and I showed them my Class 'A' pass and said that I was JONSON.

"On Saturday night when I was fleeing from the four (4) men who had attacked me I did not say anything about killing them. I just thought to myself that I would kill him, but I did not have the intention to kill all four of them. I did not tell anybody that I was going to kill them. I killed ROSALEZ so that the other three who had attacked me Saturday night would remember me." (R 35,36,47; Pros Ex 5).

4. Evidence for the defense.

The accused, after being advised of his rights by the law member,

took the witness stand and made an unsworn statement to the effect that several months prior to the shooting the deceased had been apprehended by the military police for having had a girl with him while on guard duty. Deceased, who had been a T-5 at that time "got busted," and thereafter always suspected that the accused had reported him to the military police. Deceased and his friends Cagara, Perida and Belonde seemed to harbor considerable resentment toward the accused (i.e. "At that time Rosales got busted they are always in groups, these four guys are always following me. They treat me like I am a mad dog anywhere I go * *." (R 55)) These same four sometimes followed the accused after dark (R 56).

At about 2300 hours on the Saturday night immediately preceding the incident, and at a time when the accused had a girl in his bunk with him, he was approached by the deceased and his friends, Cagara, Belonde and Perida. Perida reportedly remained by the light switch, and the deceased, together with Cagara, pulled accused up by the front of the shirt, and "told me [accused] what will I say before I die." (R 56; Pros Ex 5). All four were armed with knives, two of them having jungle knives. In the scuffle which ensued the accused was wounded on the arm by the knife of either the deceased or Cagara. Accused managed to push them away, leave his bunk, and run out of the hut. After he fled, the deceased and his friends left. The accused then returned to his bunk "and wait at two o'clock to go on my [accused's] post." (R 56,57; Pros Ex 5).

The accused came off duty at 0600 hours on the Sunday morning of the shooting. He turned over the pistol, which he had used on duty, to his relief and proceeded to the shower to wash his face. As he was leaving the shower, he found a single .30 caliber carbine cartridge lying on the ground. He returned to his quonset hut and picked up his carbine. Being desirous of getting some food for the girl who had spent the night with him, the accused, carbine still in hand, proceeded to the mess hall. While carrying the food in his hand, he walked along the aisle and passed the table where the deceased was having breakfast and talking with friends. After passing this table, he pointed his carbine to the left, and fired "at the floor." He had "no intention of hitting anyone." (R 57).

First Lieutenant Eduardo A. Tronqued, 697th Engineer Petroleum Distribution Company, recalled as a witness for the defense, testified that the accused was always "* * a very good soldier", possessed "* * good moral qualities" and was never before in trouble (R 50,51). Cross-examination of Corporal Vincente Cinco similarly disclosed that the accused was considered "* * a good soldier" (R 19).

5. The accused has been found guilty of a specification alleging that he did, at the time and place indicated, "* * with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Recruit Carlos Rosales, a human being, by shooting him with a carbine."

Murder is "the unlawful killing of a human being with malice aforethought." By "unlawful" is meant without legal justification or excuse (Par 179, MCM 1949, p.230).

Malice has been defined as:

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

"It is none the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed: it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought,' in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denotes purpose and design in contradistinction to accident and mischance." (Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711).

"Malice may be presumed when a homicide is caused by the use of a deadly weapon in a manner likely to result in death." (MCM 1949, Par 125, p.151)

"It /malice aforethought/ may mean any one * * of the following states of mind preceding or coexisting with the act or omission by which death is caused: * * * knowledge that the act which causes death will probably cause the death of, or grievious bodily harm to, any person, whether such person is the person actually killed or not, * * even though such knowledge be accompanied by indifference whether death or great bodily harm is caused, or by a wish that it may not be caused * *." (MCM 1949, Par 179, p.231)

"Premeditation and deliberation, as an element of murder, consist on the exercise of the judgment in weighing and considering and forming and determining the intent or design to kill. In this connection the word 'premeditation' means simply entertainment by the mind of an intent or design to kill." (Sec 420, Wharton's Criminal Law, 12th Ed.) "It involves a prior intention to do the act in question. It is not necessary, however, that this intention should have been conceived for any particular period of time. It is as much premeditation if it entered into the mind of the guilty agent a moment before the act, as if it entered ten years before." (Sec 507, Wharton's Criminal Law, supra). 'Premeditation imports substantial, although brief, deliberation or design." (MCM 1949, par 179, p.231)

The elements of proof of the offense are as follows:

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

In considering the above precedents and requisites of legal proof, we are particularly impressed by the undisputed evidence in the instant case showing that the accused, using a weapon designed primarily to kill, fired his carbine at close quarter into the back of Recruit Rosales, while the latter was eating breakfast and utterly defenseless, killing him almost instantly. Clearly there was no legal justification or excuse for the act, and nothing in the record shows provocation in any degree approaching that regarded by the law as adequate to reduce the seriousness of the offense. Quite to the contrary, the accused's several accounts of previous difficulties with the deceased, even when considered in the light most favorable to accused, only serve to belie his statement that he had fired the carbine "* * at the floor * *" and had "* * no intention of hitting anyone." It is thus undisputed that the shot was fired intentionally and not accidentally. The physical facts in the case independently established clearly show that the deceased was the object of the accused's aim. It follows that the evidence unquestionably compels the conclusion of accused's legal and moral guilt of premeditated homicide perpetrated with malice aforethought.

No substantial question of prejudicial error is presented by the record of trial. It is of no material consequence that the case was

initially referred to Captain Charles E. Baxter as Trial Judge Advocate of the General Court-Martial appointed by paragraph 14, Special Orders No. 291, dated 16 December 1948, and was ultimately brought to trial by Captain Baxter, as Trial Judge Advocate of another General Court-Martial appointed by paragraph 6 of Special Orders No. 28, dated 3 February 1949, without express provision in the order appointing the second court to try the cases referred to the first (CM 290889, Caton, 1 BR (ETO) 325,336, and precedents therein cited).

Similarly, the record presents no substantial legal issue in connection with the admissions or the confession of the accused, and contains no error with respect thereto. Assuming that duress could have been implied in the eliciting of admissions from accused without expressly warning him of his rights under Article of War 24, it is still doubtful if this circumstance would have been of such character as to have affected the voluntary character of his subsequent confession and thus have rendered it inadmissible (CM 324725, Blakeley, 73 BR 307; United States v. Baer, 331 U.S. 532). Passing from this assumption of implied duress and considering the case as we find the record from an appellate standpoint, we observe that the record shows that there was, in fact, no force, duress or coercion involved, either at the time of accused's initial interview, or subsequently when his confession was obtained, although the circumstances in each instance were fully presented for the record. In view of the foregoing, and in view of the overwhelming evidence showing accused's guilt independent of his admissions or confession, had error been present, it would not have been of such a character as to require that the conviction be disturbed (cf CM 328584, Yakavonis, 77 BR 131; CM 329162, Sliger, 77 BR 361).

6. The accused is 21 years of age, and has completed the sixth grade in school as his formal education. He is the third of eleven children born to a Filipino farm family in Batangas. He had worked on the family farm prior to entering the service. There is no record of any past difficulties with civilian authorities. He had no prior service. He enlisted on 1 June 1946 to serve three years in the Philippine Scouts. He enjoyed a good reputation prior to the offense, and was rated high by the officers and men of his unit.

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

of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Sections 273 and 275, Criminal Code of the United States (18 USC 452,454).

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

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

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

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 336405

THE JUDICIAL COUNCIL

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

In the foregoing case of Private First Class Pedro Jonson, PS 10314881, 697th Engineer Petroleum Distribution Company (PS), with the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. A United States Penitentiary is designated as the place of confinement.

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

20 June 1949

E. M. Brannon, Brig Gen, JAGC
Chairman

(GCMO 42, 6 July 1949).

I concur in the foregoing action.

THOMAS H. GREEN
Major General
The Judge Advocate General

June 24, 1949

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

CSJAGI CM 336409

MAY 24 1949

U N I T E D S T A T E S	)	SECOND INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Lewis, Washington, 10 March
Recruit FREDERICK J. HART	)	1949. Dishonorable discharge
(RA 39469002), Company B,	)	(suspended) and confinement for
5th Engineer Combat Battalion,	)	six (6) months. Post Stockade.
Fort Lewis, Washington.	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Recruit, then Private, Frederick J. Hart, Company B, 5th Engineer Combat Battalion, did, at Fort Lewis, Washington, on or about 8 July 1948, desert the service of the United States and did remain absent in desertion until he was apprehended at Kooskia, Idaho, on or about 11 February 1949.

He pleaded not guilty to the Charge and Specification and was found guilty of the specification except the words "desert" and "in desertion", substituting therefor respectively the words "absent himself without leave from" and "without leave", of the excepted words, not guilty, of the substituted words, guilty, and not guilty of the Charge but guilty of a violation of Article of War 61. Evidence of two previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for six months. The

reviewing authority approved the sentence and ordered it executed, but suspended the execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Post Stockade, Fort Lewis, Washington, as the place of confinement. The results of trial were promulgated in General Court-Martial Orders No. 72, Headquarters 2d Infantry Division, Fort Lewis, Washington, dated 28 April 1949.

3. The record of trial is legally sufficient to support the findings of guilty and legally sufficient to support the sentence in part. The only question for consideration is the legality of the sentence with respect to the effective date of the forfeiture.

4. The offense of which accused was found guilty was committed prior to 1 February 1949, but he was tried and sentenced after that date on 10 March 1949. Section 245, Public Law 759, 80th Congress, provides that all offenses committed and all penalties, forfeitures, fines or liabilities incurred prior to 1 February 1949 may be prosecuted, punished and enforced in the same manner and with the same effect as if the new law had not been passed. This provision, however, must be considered along with Article of War 16 as implemented and interpreted by Executive Order 10020 and the Manual for Courts-Martial, 1949.

Article of War 16 prohibits any punishment or penalties, other than confinement, during the time an accused is waiting trial and prior to sentence on charges against him. This prohibition is expressed in the Manual for Courts-Martial, 1949, in the words: "nor shall any accused, prior to the order directing execution of the approved sentence, be made subject to any punishment or penalties other than confinement" (par. 115, MCM 1949). With respect to the effective date of forfeitures, it is stated in paragraph 116g, Manual for Courts-Martial, 1949, that "a forfeiture * * * becomes legally effective on the date the sentence adjudging it is promulgated." Appendix 9, Manual for Courts-Martial, 1949, at Item 8, provides that the sentence to total forfeitures should read:

> "* * * to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, * * *." (Underscoring supplied).

Executive Order Number 10020 prescribes that the Manual for Courts-Martial, 1949, "shall be in full force and effect * * * on and after February 1, 1949, with respect to all court-martial processes taken on or after February 1, 1949 * * *."

The only reasonable interpretation of that part of the sentence adjudged against accused which reads "to forfeit all pay and allowances due or to become due" would effect a forfeiture of all pay and allowances due or to become due at the date the sentence was adjudged.

In view of Article of War 16 and the provisions of the Executive Order and Manual for Courts-Martial cited above, even though the offense was committed prior to 1 February 1949, the court was authorized to impose a sentence with respect to forfeitures of only pay and allowances to become due after the date of the order promulgating the sentence. That part of the sentence adjudging forfeiture in excess thereof is clearly excessive and cannot be sustained.

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

_____, J.A.G.C.

_____, J.A.G.C.

_____, J.A.G.C.

CSJAGI CM 336409 1st Ind

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

TO: Commanding General, 2d Infantry Division, Fort Lewis, Washington

1. In the case of Recruit Frederick J. Hart (RA 39469002), Company B, 5th Engineer Combat Battalion, Fort Lewis, Washington, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the modified Specification and the Charge and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for six months. Under Article of War 50e, this holding and my concurrence vacate so much of the sentence relating to forfeitures as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence.

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

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

(CM 336409).

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

THOMAS H. GREEN
Major General
The Judge Advocate General

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

JUL 1 1949

CSJAGH CM 336417

U N I T E D S T A T E S	)	UNITED STATES ARMY, EUROPE
	)	
v.	)	Trial by G.C.M., convened at
	)	Heidelberg, Germany, 29,30,31
Captain BERNARD JOSEPH LILLIE, 0349010, 34th Labor Supervision Company	)	March, 1 April 1949. Dismissal and total forfeitures.

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

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

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

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

Specification 1: In that Captain Bernard J. Lillie, Cavalry, 34th Labor Supervision Company, did, at Rheinau, Germany, on or about 5 July 1948, knowingly and willfully misappropriate by selling to Otto Werbick, about two tons of coal of the value of about $27.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Captain Bernard J. Lillie, Cavalry, 34th Labor Supervision Company, did, at Rheinau, Germany, on or about 15 July 1948, knowingly and willfully misappropriate by selling to Ludwig Greiss, about two tons of coal of the value of about $27.00, property of the United States, furnished and intended for the military service thereof.

Specification 3: In that Captain Bernard J. Lillie, Cavalry, 34th Labor Supervision Company, did, at Rheinau, Germany,

on or about 15 July 1948, knowingly and willfully misappropriate by selling to Hermann Frey, about two tons of coal of the value of about $27.00, property of the United States, furnished and intended for the military service thereof.

Specification 4: In that Captain Bernard J. Lillie, Cavalry, 34th Labor Supervision Company, did, at Rheinau, Germany, on or about 18 August 1948, knowingly and willfully misappropriate by selling to Rudolf Hessle, about six and one half tons of coal of the value of about $81.00, property of the United States, furnished and intended for the military service thereof.

Specification 5: In that Captain Bernard J. Lillie, Cavalry, 34th Labor Supervision Company, did, at Rheinau, Germany, on or about 27 October 1948, knowingly and willfully misappropriate by selling to the Firm of Modehaus Neugebauer, about three and one half tons of coal of the value of about $40.50, property of the United States, furnished and intended for the military service thereof.

Specification 6: In that Captain Bernard J. Lillie, Cavalry, 34th Labor Supervision Company, did, at Rheinau, Germany, on or about 23 October 1948, knowingly and willfully misappropriate by selling to Rudolf Hessle, about five tons of coal of the value of about $67.50, property of the United States, furnished and intended for the military service thereof.

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

Specification: In that Captain Bernard J. Lillie, Cavalry, 34th Labor Supervision Company, did, at Lampertheim, Germany, on or about 10 November 1948, in violation of Circular 38, Headquarters European Command, 27 May 1947, as amended, deliver $100.00 in Military Payment Certificates to Karl Wagner, a German National, to exchange for about 1500.00 Deutsche Marks, with a person unknown in Lampertheim.

He pleaded not guilty to all Charges and Specifications. He was found guilty of all Charges and Specifications, excepting however, the words "two tons" and the figures "$27.00" in Specification 1 of Charge I, substituting therefor the words, "one ton," and the words and figures, "less than $20.00," respectively. 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 "only so much of the findings of guilty of Specifications 2, 3, and 5 with respect to value as finds some value not in excess of $20.and "only so much of the findings of guilty of Specification 4 and 6 with respect to value as finds a value of more than $20 and not more than $50." He approved the sentence and recommended that it be commuted to forfeiture of $100 of his pay per month for six months, in "consideration of this officer's excellent combat record," and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

Accused is a person subject to military law, and during the period June through November 1948 was commanding officer of the 34th Labor Supervision Company, a small unit charged with supervision of the 5th German Industrial Police Company. The latter unit was located in Mannheim at 98 Relaisstrasse. There was a Polish Industrial Police Company in the same vicinity which drew its coal through the 34th Labor Supervision Company.

During the period of June through November 1948, when a unit desired fuel it submitted a Property Issue Slip to the Supply Officer of the Solid Fuels Section, Mannheim Sub-Post area, where it was checked against the authorized allocation which had been figured in the section. If the unit was entitled to that fuel, the Property Issue Slip was approved and the unit took the slip to the coal yard and drew the fuel which was issued on a Tally-Out (R 10-11). Captain Lillie signed all of the Property Issue Slips for the 34th Labor Supervision Company for the period June through November 1948 (R 12). Nineteen Property Issue Slips showing coal requested by the 34th Labor Supervision Company were marked for identification as Prosecution Exhibit 1 and were received in evidence. These Issue Slips covered the period of time from 21 June 1948 through 24 November 1948 and represented the issuance of 182 tons of coal, 118 tons of which were briquettes and 64 tons of which were hard coal. Thirty-three Tally-Out Sheets, showing the issuance of 63 tons of hard coal and 178 tons of briquettes to the 34th Labor Supervision Company during the period 21 June 1948 through 26 November 1948, were marked for identification as Prosecution Exhibit 2 and were received in evidence.

Captain Donald A. Curry, the Solid Fuels Officer for the Mannehim Sub-Post Area, testified that all of the coal issued by his section

was property of the United States Government (R 13-14). The Area dump was located in Rheinau and coal received there was supplied by EUCOM Coal Point No. 1 on a War Department Shipping Document (R 16, 18). Two types of coal were issued by these dumps, namely, briquettes and hard coal. Briquettes were often issued when hard coal had been requisitioned. Briquettes were valued at $5.97 per ton, and hard coal at $13.80 per ton (R 15).

The billets at 98 Relaisstrasse were in extreme disrepair (R 24, 42). Materials to accomplish their repair were requisitioned but the quantities of materials obtained were insufficient (R 42). In the Spring of 1948, members of the 5th Industrial Police Company agreed to have pay roll deductions made in order to obtain the needed materials, but after the currency reform in June 1948, refused to allow further deductions (R 100,199,200). Repairs, nevertheless, continued after the date of the currency reform and a new mess hall was constructed (R 100-101). Money was owed for materials which had been obtained and Ludwig Greiss, Otto Ott, and Karl Wagner, supervisory personnel of the Company, met to devise ways and means of obtaining money to pay the outstanding bills. Among other methods, they discussed the sale of coal from their company allocation (R 102,103). Wagner testified that in a pretrial statement he had admitted that he had broached this scheme to accused (R 107).

In the early part of July 1948, Captain Lillie called Ludwig Greiss, Supply Manager for the 5th Industrial Police Company, to his office, gave him a requisition for eight tons of coal, and told him through Mr. Haug, an interpreter, to sell two tons of it (R 27). Thereafter, on the 5th or 6th of July, a load of coal which had been issued to the 34th Labor Supervision Company, came to the company at 98 Relaisstrasse and was half unloaded. The truck was an American truck and carried four tons. The remaining half-load of coal, accompanied by Inspector Schroeder of the 5th IP Company, was delivered to the superintendent's assistant, Otto Werbick, who had agreed to buy the coal (R 30-31,66). Werbick gave Greiss 160 Marks and complained that he had received a little over a ton only. Werbick did not weigh the coal but measured it in sacks (R 65-66). Greiss took the 160 Marks to the accused (R 31).

Later in July, Greiss, himself, purchased two tons of coal which accused had told him to sell (R 31). This coal had also come to the company dump on a truck carrying four tons. Two tons were unloaded at the company and the remaining two tons were taken to Greiss' house (R 32). Greiss did not weigh the coal (R 52). The accused received 160 Marks from Greiss for this coal (R 32).

On or about 20 July 1948, Greiss sold two tons of coal to Herman Frey who paid 150 Marks for them (R 32,70). The coal was brought to the company from the Sub-Post Area dump on an American truck and was half unloaded. The remaining half-load was taken to Mr. Frey's house (R 32-33,73). Inspector Roesch of the 5th Industrial Police Company went with the truck (R 70,72).

Greiss sold coal three times (R 33). Each time he sold the coal upon instructions from Captain Lillie. At no time did he sell coal on his own authority (R 34). The accused told him to do it on each of the three occasions (R 57).

In July 1948, accused told Karl Wagner (administrative clerk for the company) to sell coal (R 87). In pursuance of these instructions, Wagner agreed to sell Rudolf Hessle, a Mannheim merchant, five tons of coal. Hessle asked Captain Lillie if he could buy the coal and Captain Lillie replied, "Make the details with Mr. Wagner, Mr. Wagner will fix it" (R 74,76). Wagner then sold six tons to Hessle for which Hessle paid 400 Marks (R 77,88). The money was given to Captain Lillie (R 88).

Again in September, accused instructed Wagner to sell a load of coal. Accused had told Wagner several times to sell coal in order to cover the money which accused owed to the canteen for purchases made by him on credit. When Wagner mentioned to accused that accused's canteen bill exceeded 600 Marks, accused directed Wagner to sell coal until enough money to pay the canteen bill was obtained (R 89-90). Thereupon, in the month of October 1948, seven tons and 500 weight of coal were sold and delivered by Wagner to a firm in Mannheim known as Modehaus Neugebauer. Emil Emmering was employed by Wagner to haul this coal and he hauled two loads of three tons each to Modehaus Neugebauer and unloaded it. The weight was estimated by looking at the truck spring (R 131-135). Wagner received approximately 495 Marks for these two loads of coal. Part of the money was turned in to the canteen and part of it was given to a member of the company by order of Captain Lillie (R 91-93).

Wagner sold Hessle approximately five tons of coal in October 1948 and received approximately 500 Marks therefor. Part of this money was given to the canteen and part of it was given to members of the company upon Captain Lillie's order (R 94).

Wagner testified that he never had sold coal without authority from Captain Lillie (R 94). He admitted, however, that he had stated prior to trial that the accused originally had authorized him to sell

only three and one half tons of briquettes. In fact he had sold a total of about 75 tons of coal (R 107).

With money realized from coal sales, Wagner paid in to the canteen twenty-five hundred Marks to be applied to accused's debt (R 154,167). Wagner further testified that from these coal transactions, he personally benefited to the extent of his expenses, receiving between 250 and 300 Marks (R 94,122).

Heinrich Rothenhoefer was the manager of the canteen of the 5th Industrial Police Company (R 151). He testified that accused bought drinks on credit and that accused and Wagner paid the bills (R 152,181, 177). He corroborated Wagner's testimony that accused's canteen bill was 600 Marks in September 1948 (R 153). He further testified that Karl Arndtz and Richard Demel were bartenders in the canteen (R 160).

On cross-examination Rothenhoefer was asked if he knew of "many occasions when drinks were charged to Captain Lillie's bill when he wasn't even there?", and he answered that "it is possible that they /Arndtz and Demel/ might charge him where one or two packages of cigarettes were bought, which Mr. Wagner bought" (R 166).

Karl Arndtz testified that several people drank on accused's account (R 167,179). On cross-examination he testified that he had never seen Captain Lillie drink and that either Wagner or Greiss ordered the costs of "Sergeant Minnery's" party placed on accused's account (R 180,182). He stated that he had told Captain Lillie of this (R 183).

Captain Lillie entered the office of the canteen manager in November and removed something from a desk drawer (R 169-170). The day following, the manager returned to his office to find three credit books were missing (R 158).

On 9 November 1948, Captain Lillie gave Wagner ten script bills of ten dollar denominations to exchange for German money. Together, they went in accused's car to Lampertheim, on the way to Worms, and Wagner went into a house where a woman exchanged the script for 1500 Deutsche Marks (R 206-208). Accused and Wagner went to a photo shop in Worms operated by Elsie Branner for the purpose of buying a Leica camera. Wagner counted out 1500 Marks on the counter and the accused counted out 200 Marks. The camera was purchased for the 1700 Marks (R 141-144,209). The camera was purchased for a third person (R 209).

In November 1948, accused asked Walter Leister, an interpreter, to translate to Wagner that "he has nothing to worry about and nobody

is going to get punished in this case, and if anybody would get punished it would be him, because he gave him the orders to sell coal" (R 84). About three weeks later, in the beginning of December 1948, Leister was again asked to translate for Captain Lillie, Greiss, and Wagner. The testimony of Leister continued in part as follows:

"Q We want to keep all quotes as best you can tell the Court as to the conversation at that time, using quotations as far as you can.
A Captain Lillie asked Mr. Wagner if it was possible for Mr. Wagner to go away to another Zone and disappear six or seven months, and Mr. Wagner said something about he did have relatives -- I don't know which Zone he said he had relatives in, and Captain Lillie said if it was possible for him to go away he would notify his relatives and would inform his relatives in the States to send Mrs. Wagner $10.00 each month." (R 86).

Greiss, one of the purported auditors of this conversation, in his direct testimony, corroborated the version of the conversation set forth above. On cross-examination, however, he explained his knowledge of the conversation as follows:

"Q * * Mr. Greiss, you made two statements to the CID, one on 22 November 1948 and one on 28 December 1948, did you not?
A I did not mention anything about this in my statements.

Q Now as a matter of fact, the first time you thought of this was after a discussion with Mr. Wagner about this case, wasn't it?
A Mr. Wagner called me, and he said it was like this, and he was present." (R 50)

In a conversation with Warrant Officer Robert F. Merrick of the CID on 23 November 1948, accused stated that he had authorized Wagner to sell coal and that he was as "guilty as hell" (R 216). Part of the money had been spent in repairing 98 Relaisstrasse and part was used for the payment of debts (R 217).

4. Evidence for the defense.

The accused, after having been duly apprised of his rights, elected to testify in his own behalf (R 235,241). In substance he testified that in July 1947, he was assigned to the 1072d Labor

Supervision Company which was subsequently redesignated the 34th Labor Supervision Company. In the same month, the building at 98 Relaisstrasse was acquired for this unit. The building was overrun with bed bugs, cockroaches and mice. The windows were all broken out, much of the plaster was off, and the plumbing and lighting fixtures were unserviceable. Requisitions for supplies to repair the building were submitted and were "back-ordered." Prior to November 1948, the unit had acquired only 100 pounds of cement and a small amount of nails through normal supply channels (R 242).

In the Spring of 1948 the building was inspected by Officers of the Inspector General's Department and found to be in a very unsatisfactory condition. An inspecting officer remarked that accused should be ashamed of himself "even to have men in the building" (R 243). After much complaint by the German police who occupied the building, accused called Mr. Otto Ott, the German superintendent, and told him to acquire material from the German Economy (R 243). The men agreed to pay for these materials by donating a certain amount of money from their pay each month. The plan was put into effect but the pay roll deductions were insufficient to meet the bills. The men discontinued the donations at the time of the currency reform (June 1948) (R 244). Creditors were demanding payment for their services and materials (R 245). The total amount of the bills was never known to accused (R 248).

Greiss and Wagner came to accused with a plan to sell enough coal to pay the bills (R 245). He told them that he was not very enthusiastic about selling coal but together they checked the area and found a small amount "excess." Wagner stated that the sale of three to five tons of coal would "clean the bills up." Accused told Wagner and Greiss to go ahead and sell the coal and to pay the bills but told them not to touch the Polish coal in any way and to make sure that there was plenty of coal on hand for their company's facilities. He did not "order" anyone to sell coal (R 248).

Sometime thereafter, Wagner gave accused 238 Marks which accused gave to Greiss to pay on the bills (R 249). Accused then noticed that the creditors had stopped coming to the company and he asked Wagner if the bills had been paid. Wagner replied that the bills had been paid and that 7.2 tons of coal had been sold.

In August or September 1948, accused learned that there was outstanding a bill for cement used in the mess hall. Wagner informed him that one German truck load of coal would pay this bill and also secure lumber needed for the mess hall. Accused then consented to the sale of one truck load of coal. He did not authorize the sale of any more coal after this instance (R 251,253).

During the period June through November 1948, the 34th Labor Supervision Company received 178 tons of coal but retained less than one half, the remainder being given to Captain Deines' unit (R 246). About 15 or 16 tons of coal were used in the kitchen for the months of June, July and August. In September the amount increased and in October 17½ or 18 tons were used. In November coal consumption was considerably higher; 15 tons were used in the kitchen and mess hall and 15 or 20 tons were used for heating the building. The building was not heated centrally but each room had an individual stove (R 247). There was little coal left after kitchen and barrack needs were met (R 248).

The accused denied that he had ever authorized Greiss to sell coal or that he had ever talked to Greiss about the sale of coal (R 270). He knew that Wagner had sold coal but did not know that Greiss had (R 280). He denied that he had told Merrick that he was "guilty as hell" (R 279). He did not recall meeting Mr. Hessle (R 273). He did not at any time see any coal being shovelled into a civilian truck in the company area (R 278). Accused did not advise Wagner to leave town and did not agree to support Wagner's wife (R 256-257).

Captain Lillie admitted telling the German personnel that he would accept the blame for selling the coal but that at that time he believed that only 7.2 tons plus the load to pay for the concrete and lumber had been sold (R 256-257).

Accused frequently bought beer or cognac at the canteen. When he had money with him he paid cash for his drinks and when he did not have money with him he had them charged to his account. When he bought on credit, he would return to the canteen when he had Marks and pay all of his bill. He did not authorize any person to charge drinks to his account. He did not authorize any equipment or other expenses charged to his account (R 253). Mr. Rothenhoefer never brought any bills to accused (R 276).

Accused admitted entering Rothenhoefer's office to obtain menus to have them posted in the mess hall for monthly inspection the following day. The menus were required to be posted (R 254). He did not take any credit books or any other canteen records (R 255).

During the presentation of the prosecution's case, superintendent Ott was examined as a witness for the defense. He stated that the building in which the 5th Industrial Police Company was billeted at 98 Relaisstrasse was in a terrible condition (R 198). German firms

were hired to make repairs. The men agreed to a certain percentage of pay roll deductions to pay for this work and the plan was put into operation but was discontinued after the currency reform when the men no longer consented to the deductions. He denied that Wagner had ever discussed these repair bills with him, but corroborated Wagner's statement that Greiss had spoken with him about the repair bills due the German contractors (R 199). According to the witness, Greiss had suggested that coal be sold to pay these bills and he reiterated that the company always had enough coal (R 200). From the period July 1948 to the beginning of October 1948, approximately five tons of coal were used for heating the quarters at 98 Relaisstrasse and in November, four tons were not sufficient for the house and the kitchen for one week. The men carried coal with them to their guard posts on cold days, and from July to November 1948, approximately one and one half tons were used for this purpose (R 202-203).

Sergeant Willard E. Hall, called as a witness for the defense, testified that he was supply sergeant and acting first sergeant of the 34th Labor Supervision Company (R 224). The building at 98 Relaisstrasse was in very poor condition. It needed painting very badly, there were no windows and the toilets were not working. Labor and supplies were requisitioned from American Army sources to repair the building and were "back-ordered." Repairs were made by German contractors and German individuals (R 227).

Half of the coal drawn was allotted to the 55th Industrial Police Company and if the 55th Company needed more, it received two-thirds of the coal (R 229).

Major Samuel Stern testified that he did not know the accused but that he saw accused's name on a priority list for a Leica camera. In November 1948 he called accused on the telephone and asked him if he intended to pick up the camera. Accused replied that he did and that he planned to keep it for himself. The next day the accused called Major Stern and told him that he could get him a Leica. Major Stern agreed to pay $100.00 for it. The following day Major Stern received the camera. Captain Lillie owed Major Stern no favors (R 231-233).

Captain David E. Deines was commanding officer of the 55th Industrial Police Company. He testified that he always felt his company was getting its share of coal and that his company was never short of coal until after November or December, the cold months (R 236-237).

Johannas Beyer, a German national, and stoker for the unit, testified that seven to eight hundredweight of coal was used daily

in the kitchen in the months of June through September 1948 and that the kitchen used twelve to fourteen hundredweight daily during the months of October and November 1948. He was never short of coal for the kitchen during the period June through November 1948 (R 239).

Mrs. Lucille A. Lillie, wife of the accused, testified that she and accused had been married 13 years and had two children, a girl 9 and a boy 2. They lived together prior to the war and again since the war but were separated by the war for seven years. Their marital relations had always been very good. Accused had always supported his family in the best manner in which he was capable, and had always been a dutiful husband and father (R 285). Her husband's reputation for truth and veracity had always been very good and she would believe her husband under oath (R 286).

Major James F. Hooper testified that he was a neighbor of accused and has known him for one year (R 286). Accused had a good reputation in the neighborhood. The witness would believe accused under oath and if accused were serving under him, he would trust him (R 287).

5. Accused has been found guilty of the misappropriation, on six occasions, of coal, property of the United States furnished and intended for the military service in violation of Article of War 94. The elements of the offense of misappropriation are as follows:

> "(a) That the accused misappropriated * * certain property in the manner alleged; (b) that such property belonged to the United States and that it was furnished or intended for the military service thereof, as alleged; (c) the facts and circumstances of the case indicating that the act of the accused was willfully and knowingly done; and (d) the value of the property, as specified." (Par 150i, MCM 1928).

Misappropriation, a devotion to an unauthorized use, may be accomplished by sale (CM 328416, Pierce, 77 BR 71). The evidence shows that at the times and place alleged, accused, acting through German employees of a unit under his command, sold coal of the amount and value set forth in the approved findings of guilty. That accused, in fact, on some of the occasions found, authorized the sale of coal is not in dispute, the issue created by the defense being merely one of degree and purpose. Thus, accused admitted authorizing the sale of coal of an amount somewhat in excess of 7.2 tons for the purpose of accomplishing needed repairs on the billets of the unit under his command. The coal which was sold was procured by the unit which accused commanded from an Army installation which in turn obtained the coal through Army channels. These proven circumstances compel the conclusion that the coal in question was property of the United States furnished and intended for

the military service. We are of the opinion that the findings of guilty of the Specifications of Charge I and Charge I as approved by the reviewing authority are supported by the record of trial.

The record of trial shows that the great majority of conversations between accused and his accomplices were carried on through the medium of interpreters and that the conversations so conducted were related to the court by the accomplices or other non-English speaking auditors without judicial authentication by the interpreters. On each such occasion, however, the circumstances dictate the conclusion that the person acting as interpreter was the agent of accused and that his selection and employment was a matter of accused's personal choice. In such case the testimony of the auditors as to the language communicated to them by the interpreter in the presence of accused is not objectionable as hearsay, but is competent as testimony of admissions by the accused (Pierce, supra, p 86,87).

The record of trial also shows that Greiss and Wagner were accomplices of accused in the various misappropriations of which he was found guilty. In the course of trial, there was testimony of statements made by the accomplices not in the presence of accused but which were made during and in furtherance of the unlawful transactions in which the accomplices and accused were united as conspirators. The testimony to which we have reference was competent. "When several persons have combined for some unlawful purpose or have acted in concert in the commission of an offense, the acts and statements of one conspirator or co-actor done or made in pursuance of the common design or act are admissible in evidence against the others or any of them in a prosecution for the unlawful combination or for the offense." (Par 127b, MCM 1949, p 159) The circumstances that a conspiracy was not charged, that conspirators were not named in the Charges and Specifications, and that the law member did not rule that a conspiracy had been established do not render the statements incompetent when as in the instant case, a conspiracy has in fact been shown by competent evidence (CM 275547, Garret, 48 BR 77,79; U. S. v. Pugliese, 153 F2d 497,500).

Accused was found guilty of delivering $100.00 in military payment certificates to a German national to exchange for 1500.00 Deutsche Marks, with a person unknown, in violation of Circular 38, Headquarters European Command, 27 May 1947, as amended.

Paragraph 3, Circular 38, supra, provides that among the purposes of the circular is the following:

> "a. To establish Cir 256, WD, 23 Aug 1946 as the governing directive in this command insofar as Military Payment Certificates are concerned."

Section II, paragraph 4, Circular 256, War Department, 23 August 1946, effectually excludes enemy nationals from the category of persons authorized to utilize Military Payment Certificates.

Other provisions of Circular 38, supra, which are pertinent to the factual situation of the case are as follows:

> "7. b. Needed foreign currencies indigenous to the occupied zones (AM marks and AM schillings) will be purchased by authorized individuals, activities, agencies, etc, including commercial licensees accredited to the US occupational forces, from US Army or Navy finance facilities with Military Payment Certificates or other acceptable dollar instruments. * *.
>
> "8. a. Military Payment Certificates are not to be used or expended in the local economy or otherwise disposed of except as provided in Cir 256, WD, 1946."

We are not aware of any amendments to Circular 38 which affect the provisions thereof set forth above, and although Circular 256, supra, has been rescinded by Circular 247, War Department 1947, the rescission is not reflected by any amendments to Circular 38. Hence, the provisions of Circular 256, supra, are still effective within the European Command.

Circular 38, supra, is a directive of a general nature having the force of law, issued by the headquarters of an overseas department, and is, therefore, binding upon accused without a showing of his knowledge thereof, either actual or constructive (Par 140a, MCM 1949).

The uncontradicted evidence shows that at the time and place alleged accused gave to Wagner, a German national, $100.00 in Military Payment Certificates to exchange for 1500.00 Deutsche Marks, and that the latter effected the exchange with a person whose name to the record is unknown. We find that the factual situation thus evidenced establishes that accused violated Circular 38 in that he made available Military Payment Certificates to an enemy national and in that by effecting the exchange of the Military Payment Certificates in other than official channels as provided for in Paragraph 7a, supra, he actually expended the certificates in the German economy. The offense alleged constitutes a violation of a standing order and is thus conduct to the prejudice of good order and military discipline and, hence, violative of the 96th Article of War. The findings of guilty of Charge II and its Specification are warranted by the evidence.

6. Department of the Army records show that accused is 36 years of age, married, and has two minor children. He is a high school graduate and in civilian life was employed as a moulder. He was commissioned Second Lieutenant in the Army of the United States (ORC) on 27 October 1936. He entered upon extended active duty on 25 September 1940, was promoted to First Lieutenant on 2 February 1942 and to Captain on 4 April 1945. He had foreign service in the Pacific Area from 20 October 1942 to 22 June 1945, and his present tour in the European Theater extends from 13 March 1947. He has been awarded the Silver Star and is entitled to wear the Asiatic-Pacific Theater Ribbon with three Bronze Stars, the American Defense Medal and the Philippine Liberation Medal with Bronze Star. His efficiency ratings of record are as follows: "Superior" (5); "Excellent" (5); "Very Satisfactory" (2).

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 as approved by the reviewing authority and the sentence and to warrant confirmation of the sentence. A sentence to dismissal and forfeiture of all pay and allowances due after the date of the order directing execution of the sentence is authorized upon conviction of violations of Articles of War 94 and 96.

(On temporary duty), J.A.G.C.

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

Jos. V. Lynch, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 336417

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

In the foregoing case of Captain Bernard Joseph Lillie (0-349010), 34th Labor Supervision Company, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

E. M. Brannon, Brig Gen, JAGC
Chairman

Franklin P. Shaw, Brig Gen, JAGC

26 September 1949

Brigadier General J. L. Harbaugh, Jr., having acted as Staff Judge Advocate to the reviewing authority, took no part in the consideration and action in this case by the Judicial Council.

I concur in the foregoing action but, in view of the recommendation of the reviewing authority based upon the excellent combat record of accused, so much of the sentence as is in excess of forfeiture of one hundred dollars ($100.00) pay per month for six months after the date of the order directing the execution of the sentence, is remitted.

THOMAS H. GREEN
Major General
The Judge Advocate General

(GCMO 56, 3 Oct. 1949).
27 September 49.

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

(99)

CSJAGK - CM 336418

9 JUN 1949

U N I T E D S T A T E S	THE INFANTRY CENTER
v.	Trial by G.C.M., convened at Fort Benning, Georgia, 7 April 1949.
Second Lieutenant ROBERTSON J. RINARD (O-1686601), Student Training Regiment, The Infantry School, Fort Benning, Georgia.	Dismissal.

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

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

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

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

Specification: In that Second Lieutenant Robertson J. Rinard, Student Training Regiment, The Infantry School, was, at Columbus, Georgia, on or about 6 January 1949, drunk in uniform in a public place, to wit: Pearl Harbor Cafe.

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

Specification: In that Second Lieutenant Robertson J. Rinard, Student Training Regiment, The Infantry School, did, at Fort Benning, Georgia, on or about 1 February 1949, without proper leave, go from the properly appointed place of duty as a student, Associate Basic Course Number 2, The Infantry School, after having repaired thereto for the performance of said duty.

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 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, remitted the

forfeitures and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

At about 0200 hours on 6 January 1949 Private First Class William R. Nelkamp was seated in a booth at the Pearl Harbor Cafe, Columbus, Georgia, talking to an unidentified girl he had "picked up." Accused, who was in uniform, approached and engaged the girl in conversation. The girl remarked that she did not want accused to take her home, whereupon Nelkamp asked accused to leave. Accused told him to sit down and shut up. Nelkamp threatened to call the "M.P.s" and accused told him he would get him in deep water if he did. Private Nelkamp then called the military police (R 17).

Captain Clifford B. Shaw, Assistant Provost Marshal, Fort Benning, Georgia, in charge of military police operations in Columbus and Phenix City, received a call early in the morning of 6 January 1949 to proceed to the Pearl Harbor Cafe, Columbus, Georgia. He arrived at the cafe at about 0200 and observed about thirty persons present, half of whom were enlisted men. He saw accused in a "drunken condition" holding on to the back of a chair. He was unsteady on his feet, his speech was thick, eyes bloodshot and the odor of alcohol was on his breath. He was not disorderly in any way. Accused was arrested, taken to the police station, and a short time later taken to his quarters (R 19-23).

On the morning of 1 February 1949 Captain Shelton G. Scott was a student squad leader in Basic Class Number Two, The Infantry School. Accused was a member of his squad and was present at the regularly scheduled class formation at 0730 hours on that date (R 6,7).

Captain Elmer G. Navarre, Company Commander of the First Company, Student Training Regiment, The Infantry School, together with his executive officer, Lieutenant Magyar, made an inspection of student officer quarters of his company between 0800 and 0830 hours on the morning of 1 February 1949. They heard coughing in one officer's room and knocked on the door. When nothing occurred, they started to walk away, whereupon accused stepped out into the hall (R 9,41,42). Captain Navarre asked accused why he was not in class and accused replied that he was ill. When asked if he had gone on sick call he replied that he had overslept (R 9-11). The Captain then ordered accused to report to his classes immediately as he did not consider him "*** sick enough to remain out of class" (R 16).

b. For the Defense

First Lieutenant Charles C. Magyar, Executive Officer, First Company, Student Training Regiment, The Infantry School, testified that every morning he checked the student officer quarters for officers who might be in the buildings. If an officer is found he is taken to the dispensary, if ill, or turned over to the company commander with instructions to explain his actions if he is not ill (R 38-40).

Accused, after being advised of his rights as a witness by the president of the court, elected to be sworn and testify in his own behalf.

Summarized, his testimony as to the Specification of Charge I is that on the evening of 5 January 1949 he proceeded from his company at Fort Benning, Georgia, to the Pearl Harbor Cafe in Columbus, Georgia. He had a few beers, went to the Plaza Cafe to eat, then returned to the Pearl Harbor Cafe for more beer and some whiskey. He did not recall where he was or what occurred at 0200 hours 6 January 1949 (R 25,32). His first knowledge of his whereabouts on the latter date was about 0330 hours when he found himself being driven to his quarters by military policemen (R 26).

As to the Specification of Charge II, accused testified that the night of 31 January - 1 February 1949 he had gone to some night clubs in Phenix City and on his way back to Fort Benning he stopped in a cafe in Columbus where he consumed some raw oysters. Upon his return to the Post, he changed clothes, attended the morning formation, but, upon feeling ill, left the formation, ran to his quarters and vomited. Although his company proceeded to class, accused did not rejoin his unit, but went to his room to lie down (R 26,27,35,37). Later he heard a knock on the door, went to the hall and was met by Captain Navarre. He replied in the negative to questions put by the Captain as to whether or not he had gone to class or reported for sick call (R 27). Upon questioning by the court, he stated that he had been out all night on previous occasions and nevertheless had been able to perform duty the next day (R 38).

Following his testimony as to the matters alleged, accused discussed his seven and one-half years good record of service in the Army and Marine Corps (R 28-30).

4. Discussion

The uncontroverted evidence clearly shows that the accused was drunk in uniform in a public place, a violation of Article of War 96 (CM 315403, Drilling, 64 BR 405). The testimony indicating that he was not disorderly in a public place or elsewhere has no bearing on the question of drunkenness.

Competent evidence, including the testimony of the accused himself, establishes that he was a student in Associate Basic Class Number Two, The Infantry School, and that he was present at the regularly scheduled class formation at 0730 hours on 1 February 1949; that when the class moved out to the instruction area, accused left without permission and was found in his quarters less than an hour later. Testimony of the accused to the effect that he was so ill that he had to leave the class is rebutted by evidence that within about thirty minutes after the incident he was in such physical condition as to be able to perform his duties. A clear violation of the 61st Article of War is established. The court was not bound to accept the statement of accused as to his sickness nor does that evidence operate to vitiate the offense, particularly since there was no showing that the illness rendered him unable to report that fact to proper authority or unable to return to class (CM 257615, Lee, 37 BR 189; CM 262294, Fisher, 41 BR 33; CM 313648, Shaw, 63 BR 207). Accused being found in his room negatives the thought that he had any intent to return to his class.

5. Department of the Army records reveal that accused is 28 years of age, married and has one child. After his graduation from high school he enlisted in the Marine Corps in which he served until 1946 when he was honorably discharged in the grade of platoon sergeant. From July 1946 to November 1947 he worked as a truck assembly man, electrician and express foreman. He enlisted in the Regular Army as a staff sergeant in November 1947 and was commissioned a second lieutenant of Infantry (AUS) on 17 December 1948 upon graduation from Officer Candidate School. No record is available regarding efficiency ratings.

6. The court was legally constituted and had jurisdiction over the person and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal is authorized upon conviction of violations of either the 61st or 96th Articles of War.

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

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

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

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 336418

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

In the foregoing case of Second Lieutenant Robertson J. Rinard (O-1686601), Student Training Regiment, The Infantry School, Fort Benning, Georgia, upon the concurrence of The Judge Advocate General the sentence is confirmed but commuted to a reprimand and forfeiture of One Hundred Dollars ($100.00) pay per month for two months. As thus commuted, the sentence will be carried into execution.

Franklin P. Shaw, Brig Gen, JAGC

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

E. M. Brannon, Brig Gen, JAGC
Chairman

8 August 1949

I concur in the foregoing action.

THOMAS H. GREEN
Major General
The Judge Advocate General

8 August 1949.

(GCMO 53, 17 Aug 1949).

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

CSJAGN-CM 336493

26 MAY 1949

UNITED STATES	HEADQUARTERS AND SERVICE GROUP GENERAL HEADQUARTERS, FAR EAST COMMAND
v.	Trial by G.C.M., convened at Tokyo, Japan, 22 April 1949. Dishonorable discharge (suspended) and confinement for twelve (12) months. Disciplinary Barracks.
Corporal T. C. FRY, JR.(alias Theodore C. Fry, Jr.), (RA 38788819), 23rd Criminal Investigation Detachment, APO 500, Provost Marshal Office, Tokyo, Japan.	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Corporal Theodore C. Fry Jr., 23rd Criminal Investigation Detachment, alias Lynn Y. Abernathy, did, at Tokyo, Japan, on various days in the months of September, October and November 1948, wrongfully and unlawfully, and in violation of Circular Number 26, General Headquarters, Far East Command, dated 10 March 1947, cause American goods to be transported into and within Japan in excess of an amount reasonably necessary for his personal use by ordering American goods to be shipped by divers persons and business firms in the United States of America to him, the said Corporal Theodore C. Fry Jr., in Japan, through use of the United States

Mails. The approximate dates on which said orders were made, the names of the persons and firms to which said orders were directed, and the approximate amounts and description of the American goods ordered to be so transported, and consequently transported as aforesaid, are more particularly specified as follows, to wit:

21 September, Frody Sales Company, New York City, New York, 100 pairs of nylon stockings;
1 October, Frody Sales Company, New York City, New York, 200 pairs of nylon stockings;
12 October, Brown & Williamson Tobacco Corporation, Louisville, Kentucky, 250 cartons of cigarettes;
19 October, Brown & Williamson Tobacco Corporation, Louisville, Kentucky, 250 cartons of cigarettes;
26 October, Brown & Williamson Tobacco Corporation, Louisville, Kentucky, 1,250 cartons of cigarettes;
9 November, Brown & Williamson Tobacco Corporation, Louisville, Kentucky, 200 cartons of cigarettes;
12 November, Brown & Williamson Tobacco Corporation, Louisville, Kentucky, 300 cartons of cigarettes; and
19 November, Brown & Williamson Tobacco Corporation, Louisville, Kentucky, 300 cartons of cigarettes.

Specification 2: In that Corporal Theodore C. Fry Jr., 23rd Criminal Investigation Detachment, alias Lynn Y. Abernathy, did, at Tokyo, Japan, during the months of September and December 1948, wrongfully and unlawfully dispose of American goods in violation of Circular Number 26, General Headquarters, Far East Command, dated 10 March 1947, by delivering said American goods to Shozo Shimbori, a Japanese National, who was not authorized to receive or possess said American goods. The approximate dates on which such deliveries were made, the amounts and description of said American goods so delivered are more particularly specified as follows, to wit:

15 September, 250 cartons (5 cases) of cigarettes; and
5 December, 250 cartons (5 cases) of cigarettes.

Specification 3: Nolle prosequi.

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

Specification: In that Corporal Theodore C. Fry, Jr., 23rd Criminal Investigation Detachment, alias Ralph C. Scroggins, did at Tokyo, Japan, various days in the

months April, June, July, and November 1948 wrongfully and unlawfully and in violation of Circular 26, GHQ, FEC, dated 10 March 1947, cause American goods to be transported into and within Japan in excess of an amount reasonably necessary for his personal use by ordering American goods to be shipped by divers persons and business firms within the United States of America to him, the said Corporal Theodore C. Fry, in Japan through use of the United States Mail. The approximate dates on which said orders were made, the names of the persons and firms to which said orders were directed, and the approximate amounts and descriptions of the American ordered goods to be so transported, and consequently transported as aforesaid, are more particularly specified as follows, to wit:

12 April, Fraser, Morris, and Company, Inc, New York, New York, 200 cartons of cigarettes;
28 June, Fraser, Morris, and Company, Inc, New York, New York, 2, 550 cartons of cigarettes;
28 July, Fraser, Morris, and Company, Inc, New York, New York, 2,000 cartons of cigarettes;
19 November, Fraser, Morris, and Company, Inc, New York, New York, 500 vials of penicillin of 200,000 units per vial, 40 bottles Santonin of 1 ounce per bottle, and 100 vials of streptomycin of 1 gram per bottle.

He pleaded not guilty to Specification 3 of the Charge and guilty to all other Specifications and both Charges. By direction of the appointing authority, a nolle prosequi was then entered as to Specification 3 of the Charge. Accused was found guilty of all remaining Specifications and both Charges, and was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due and to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for eighteen months. The reviewing authority approved only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence and confinement at hard labor for twelve months, and ordered so much of the sentence executed, but suspended that portion of the sentence adjudging dishonorable discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement.

3. Accused was convicted of three Specifications under Article of War 96, each of which alleged transactions "in violation of Circular 26, General Headquarters, Far East Command, dated 10 March 1947." These offenses amounted to no more than three violations of standing orders,

the punishment for each one of which is limited by the Table of Maximum Punishments, Manual for Courts-Martial, 1949, to six months confinement and partial forfeitures for six months (par. 117c, page 142, MCM, 1949). Since accused was convicted of three such violations, the sentence may include a bad conduct discharge and total forfeitures (par. 117c, page 143, MCM, 1949). The dishonorable discharge was not authorized (E.O. 10020, 7 Dec 1948).

4. For the reasons stated the Board of Review holds that the record is legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as involves bad conduct discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for twelve months.

Thos. C. Young, J. A. G. C.

On leave, J. A. G. C.

J. H. Guilmond, J. A. G. C.

CSJAGN-CM 336493 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, Headquarters and Service Group, General Headquarters, Far East Command, APO 500, c/o Postmaster, San Francisco, California.

1. In the case of Corporal T. C. Fry, Jr. (alias Theodore C. Fry, Jr.), (RA 38788819), 23rd Criminal Investigation Detachment, APO 500, Provost Marshal Office, Tokyo, Japan, 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 insufficient to support so much of the sentence as is in excess of a bad conduct discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for 12 months. Under Article of War 50e this holding and my concurrence vacate so much of the sentence as is in excess of a bad conduct discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for 12 months.

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

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

(CM 336493).

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

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

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

AUG 26 1949

CSJAGV CM 336510

U N I T E D S T A T E S)	9TH INFANTRY DIVISION
)	
v.)	Trial by G.C.M., convened at
Recruit JAMES M. DOMINGUEZ)	Fort Dix, New Jersey, 8 March
(RA 12301936), Company F,)	1949. DOMINGUEZ and BROWN -
and Recruit DEWEY S. BROWN)	Dishonorable discharge, total
(RA 11179423), Company G,)	forfeitures after promulgation
both of the 47th Infantry)	and confinement for two (2)
Regiment.)	years. Disciplinary Barracks.

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

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

2. The accused were tried at a common trial upon the following Charges and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Recruit James M. Dominguez, Company F, 47th Infantry Regiment, 9th Infantry Division, did, at Fort Dix, New Jersey, on or about 4 December 1948, feloniously steal one (1) automobile, of a value of more than fifty ($50) dollars, the property of 1st Lieutenant Henry J. MacAllister, Company "M", 60th Infantry Regiment, Fort Dix, New Jersey.

CHARGE: Violation of the 93rd Article of War.

Specification: In that Recruit Dewey S. Brown, Company G, 47th Infantry Regiment, 9th Infantry Division, Fort Dix, New Jersey did, at Fort Dix, New Jersey, on or about 4 December 1948, feloniously steal a 1946 Oldsmobile automobile of a value of more than $50.00 the property of 1st Lieutenant Henry J. MacAllister.

Each accused pleaded guilty to the Specification and Charge applicable to him, except the words "feloniously steal" substituting therefor respectively

CM 336510

the words "wrongfully and without the consent of the owner, take and use"; of the excepted words not guilty of the substituted words guilty, and not guilty to the Charge but guilty of a violation of the 96th Article of War. Each accused was found guilty except the words "feloniously steal", substituting therefor the words "wrongfully and without authority, take and use", and not guilty of a violation of the 93rd Article of War, but guilty of a violation of the 96th Article of War. Evidence of two previous convictions was considered as to each accused. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for two (2) years. The reviewing authority approved only so much of the sentence as to each accused as provided for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence and confinement at hard labor for two (2) years, designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, or elsewhere as the Secretary of the Army may direct, as the place of confinement and forwarded the record of trial for action under Article of War 50e.

3. Only two questions are presented which require discussion herein: Whether a wrongful taking and using of an automobile is a lesser included offense of that charged, feloniously stealing an automobile, and whether the sentence imposed is legal.

4. In a recent holding CM 336639, Cole (August, 1949) the Judicial Council held that "wrongfully with the intent to deprive the owner temporarily of his property and without consent of the owner take and use" was a lesser included offense where it was charged that accused did "feloniously steal" the property involved. This decision of the Judicial Council is determinative of the lesser included offense question presented in the instant case.

Prior to 1 February 1949, the effective date of the Manual for Courts-Martial, U.S. Army, 1949, the offense of wrongfully taking and using a motor vehicle without the consent of the owner was considered to constitute the offense of a disorder under such circumstances as to bring discredit upon the military service, for which the maximum authorized imposable punishment was confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period (par. 104c, MCM, 1928; CM 329200, Staley-Bone, 78 BR 1; CM 332882, Allen, 81 BR 241 and cases cited thereunder). The offense here considered was committed on 4 December 1948, prior to the effective date of the law granting authority to impose a greater punishment. Notwithstanding the fact that the accused were arraigned and tried on 8 March 1949, the permissible punishment authorized by Section A, paragraph 117c, Manual

CM 336510

for Courts-Martial, U.S. Army, 1949, could not be invoked as it would constitute an ex post facto application of the law within the meaning of Article I, Section 9, Clause 3, Constitution of the United States (SpCM 9, McNeely; Medley, Petitioner, 134 U.S. 160, 171; Thompson v. Utah, 170 U.S. 343, 351).

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as to each accused as provides for confinement at hard labor for four months and forfeiture of two-thirds pay per month for four months.

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

Laurel L. Chandler J.A.G.C.

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

(114)

CSJAGV CM 336510 1st Ind

JAGO, Dept. of the Army, Washington 25, D. C. 15 SEP 1949

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

1. In the case of Recruits James M. Dominguez (RA 12301936), Company F, and Dewey S. Brown (RA 11179423), Company G, both of the 47th Infantry Regiment, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as to each accused as provides for confinement at hard labor for four months and forfeiture of two-thirds pay per month for four months. Under Article of War 50e(3) this holding and my concurrence vacate so much of the sentence as to each accused as is in excess of confinement at hard labor for four months and forfeiture of two-thirds pay per month for four months. Under the provisions of Article of War 50 you now have authority to order the execution of the sentences as modified in accordance with the foregoing holding. The Post Stockade should be designated as the place of confinement.

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

(CM 336510).

1 Incl
Record of trial

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

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

CSJAGK CM 336615

6 JUN 1949

UNITED STATES	THE INFANTRY CENTER
v.	Trial by G.C.M., convened at Fort Benning, Georgia, 23 March 1949. Dismissal.
Captain WISDOM H. STEWART (O-405378), Headquarters & Headquarters Company, Student Training Regiment, The Infantry School.	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Captain Wisdom H. Stewart, Headquarters and Headquarters Company, Student Training Regiment, The Infantry School, did, at Phenix City, Alabama, on or about 4 December 1948, with intent to defraud, wrongfully and unlawfully make and utter to Charles R. Garrett of the 241 Club, Phenix City, Alabama, a certain check in words and figures as follows, to wit:

10th St Phenix City, Ala., 4 Dec., 1948

Columbus Bank & Trust Co BANK

CITY Columbus, Ga
PAY TO THE
ORDER OF Cash $1500.00

Fifteen hundred & no/00 ----------DOLLARS

Address _____ /s/ W. H. Stewart
Capt., Inf.

he the said Captain Wisdom H. Stewart, then well knowing

that he did not have sufficient funds in the Columbus Bank & Trust Company, Columbus, Georgia, for the payment of said check.

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

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. The reviewing authority disapproved the finding of guilty of Specification 2 of the Charge and approved only so much of the finding of guilty of Specification 1 of the Charge as "finds the accused Guilty of making and uttering the check described therein, at the time and place, and to the person alleged, and wrongfully failing to maintain sufficient funds in the drawee bank alleged to provide for payment of said check when presented for payment in due course, in violation of Article of War 96"; approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution

During the evening of 4 December 1948 the accused was at the 241 Club, Phenix City, Alabama. The 241 Club was a "regular night club, floor show, food" and "gambling." The gambling was conducted in the club room just off the main room. Several gambling games were conducted including "Blackjack and regular field lay-out craps" (R 16). The "field lay-out craps" was operated so as to give the club 3-1/2 percent "on Bar Ace-Deuce back line" (R 16,17).

Charles R. Garrett, the manager of the club, testified that the games were operated strictly according to percentage and that the games were "honest" (R 26). The accused participated in the dice game and lost. Sometime after 11:30 p.m. on 4 December 1948 the accused approached Captain Paul R. Behnke, who was also gambling, and asked if it was possible to get chips on credit as he had lost what money he had with him. Captain Behnke introduced the accused to Mr. Garrett and returned to the gambling table (R 29,30). Mr. Garrett also testified that Captain Behnke introduced the accused and stated "that Captain Stewart wished to cash a $100 check, and that he knew him and would personally vouch for it." Mr. Garrett replied that he recognized Captain Stewart, that he would be glad to cash the check, and it would not be necessary for Captain Behnke to vouch for the check. He then asked the accused if he wanted cash or chips and the accused replied that he would take chips. They went to the dice table where the accused was given $100 in chips. Garrett further testified,

"Captain Stewart continued to lose until he reached the amount of $1200. At that time I asked Captain Stewart how far he wanted to go that evening, and he said, 'Stop me at $1500.' So I gave him $300 at that time, making a total of $1500." (R 7)

The club closed at about 4:00 a.m. on 5 December 1948, at which time the accused started to leave without paying his losses. Mr. Garrett asked the accused if he would write him a check for $1500 and the accused replied that Captain Behnke owed the money. Mr. Garrett stated that Captain Behnke had not incurred the indebtedness and that the accused would have to settle it himself. The accused thereupon made and delivered to Mr. Garrett a check upon the Columbus Bank and Trust Company, Columbus, Georgia, dated 4 December 1948, payable to cash in the sum of $1500.00 (R 8, Pros Ex 1). This check was delivered to Mr. Bush, the "head gambler" at the club. On Monday, 6 December 1948, Mr. Bush returned the check to Mr. Garrett who called the accused and told him that payment of the check had been refused by the bank. The accused stated that "his wife evidently hadn't got to the bank and that it would be good the next day" (R 11). On 7 December Mr. Garrett presented the check to the drawee bank and payment was refused. Prior to the time the check was presented to the bank on 7 December 1948 the accused called Mr. Garrett and stated that the check would not be good, that his wife was angry because he "had already dropped $2500 previously, and she wouldn't put the money in the bank to cover the check." The accused stated that he could not pay the check within two weeks but that he had $400 due him on the first of the month and that he would apply part of this sum to the payment of the check. The accused also said that he was not going to beat Mr. Garrett out of the money and gave him the names of "a couple of people" to call in Columbus, Georgia, and they would assure him that he would get the money. Mr. Garrett told the accused that his suggestions were unsatisfactory. Mr. Garrett took the check to the drawee bank where the teller marked it "Insufficient funds." He then took the check to Colonel Ferris, the provost marshal at Fort Benning, Georgia, and registered a complaint (R 13,14). The check was never paid and the 241 Club has written it off as a bad debt (R 25).

Mr. Garrett also testified that credit was extended to the accused because he was an Army officer and Army officers had always paid their gambling debts. Gambling is illegal in Alabama and credit was not extended to civilians (R 15,16). Prior to the trial the Alabama authorities closed the 241 Club and other gambling establishments in the State (R 18).

George Brown, assistant cashier and teller at the Fort Benning Branch of the Columbus Bank and Trust Company, testified that the accused had an account in the Columbus Bank and Trust Company and on the morning of 4 December 1948 his balance was $359.66. Between 4 December 1948 and 11 December 1948 the account showed the following changes:

Old Balance	Date	Checks	New Balance	
$359.66	4 Dec.	$270.00	$89.66	
89.66	7 Dec.	50.00	39.66	
39.66	9 Dec.	7.73	31.93	
31.93	11 Dec.	1.37	30.56	(R 41-43, Pros Ex 2)

A pretrial statement made by the accused was shown to have been voluntarily made and was thereupon received in evidence without objection by the defense as Prosecution Exhibit 4. In this statement the accused said that on Sunday morning, 5 December 1948, he was playing dice at the 241 Club, Phenix City, Alabama. While at the dice table he was approached three times by Captain Behnke who asked him if he wanted credit. Later he ran out of cash and asked Captain Behnke to get him $100 worth of chips. Captain Behnke secured the chips and while Captain Behnke was at the dice table he secured for the accused a total of $600 in chips. Before Captain Behnke left the table he told Mr. Garrett to let the accused have anything he wanted up to $1,000.00. After Captain Behnke left the accused received an additional $900 in chips, making a total of $1500 received by the accused. After losing the $1500 he started to leave the club. While in the parking lot outside the club he was stopped by Mr. Garrett who said that he would have to have payment for the chips. The accused told Mr. Garrett that he had done his business through Captain Behnke and, inasmuch as credit had been extended by him (Mr. Garrett) only in reliance upon Captain Behnke, the club's claim was on Captain Behnke and the accused's responsibility was to Captain Behnke. Mr. Garrett insisted that he had to have something to show for the $1500. The accused did not desire to sign a check because he did not have sufficient funds in the bank to cover such a check. He explained this to Mr. Garrett and also told him that he had funds which would be available within a short period to cover the obligation. Mr. Garrett stated that they were always willing to accommodate Army people with extensions of time when necessary and that all he wanted was a signed check which would be visible evidence of the debt. The accused then re-entered the club and signed a check for $1500. On Monday Mr. Garrett called and informed him that the check had not been honored by the bank. The following day he called Mr. Garrett and explained to him that the money was not immediately available and that the check would not be good within a week but it would be good within a very short time thereafter. Mr. Garrett seemed satisfied with the assurances that he would get his money. Two days later the accused was called to the office of Colonel Ferris, the provost marshal, and confronted with the check. The accused explained to the Colonel that he had fully intended to pay the check and was taking the necessary steps to make the check good, but, because Mr. Garrett had taken advantage of his former connection with the military police to bring official pressure to bear, he would not honor the check at any time (Pros Ex 4).

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 61,62).

5. Discussion

In Specification 1 of the Charge it was alleged that on or about 4 December 1948 the accused with intent to defraud wrongfully and unlawfully made and uttered to Charles R. Garrett of the 241 Club, Phenix City, Alabama, a certain check drawn upon the Columbus Bank and Trust Company in the sum of $1500, well knowing that he did not have sufficient funds in said bank for the payment of said check in violation of Article of War 95. He was found guilty of this specification. The reviewing authority approved only so much of this specification and charge as finds the accused guilty of making and uttering the check described therein, at the time and place and to the person alleged, and wrongfully failing to maintain sufficient funds in the drawee bank to provide for the payment of said check when presented for payment in due course, in violation of Article of War 96.

In charging an accused with an offense of this nature it is customary to draft the specification so that it reads as follows:

"In that _____ did, at _____, on or about _____ 19____ with intent to defraud wrongfully make and utter to _____, a certain check, in words and figures as follows, to wit: _____, and by means thereof did fraudulently obtain from _____ _____ $____, he, the said _____ then well knowing that he did not have and not intending that he should have sufficient funds in the _____ bank for payment of said check."

Under such a specification the Boards of Review with the concurrence of The Judge Advocate General have consistently held that a wrongful failure on the part of the accused to maintain sufficient funds in the drawee bank to pay the check described in the specification is a lesser included offense of the offense charged and a violation of Article of War 96 (CM 237741, Ralph, 24 BR 103,107; CM 249993, Yates, 32 BR 255,261; 260073, Gross, 39 BR 133,138; CM 258377, Cantrell, 38 BR 7,9,13; CM 260446, Miller, 39 BR 251, 258-259; CM 262189, Amidei, 40 BR 395, 399; CM 267843, Bonar, 44 BR 129, 140-141; CM 269689, Storm, 45 BR 55,56,63; CM 270641, Smith, 45 BR 329,342; CM 271153, Karsanoff, 46 BR 61,66,67,69; CM 271991, Boyd, 46 BR 227,230; CM 273089, Kaempfer, 46 BR 375,378; CM 273874, Miller, 47 BR 85,90,91; CM 274930, Curley, 47 BR 375,382; CM 275309, Sappington, 48 BR 21,26,29; CM 276285, Lucas, 48 BR 265,271,273,274; CM 329082, Rees, 77 BR 347,348, 350; CM 278891, Bacon, 52 BR 25; CM 280882, Hofferber, 53 BR 391; CM 282335, McCarthy, 54 BR 363; CM 283726, Bowles, 55 BR 125; CM 284149, Brown, 55 BR 261; CM 285445, Canavan, 56 BR 73; CM 288599, Dartez, 56 BR 403; CM 294637, Silva, 57 BR 381; CM 298601, Schippers, 58 BR 301; CM 318727, Hoffman, 68 BR 1; CM 320578, Himes, 70 BR 31; CM 321734, Creighton, 70 BR 355; CM 322067, Fears, 71 BR 37; CM 323108, Rockett, 72 BR 83).

It is noted that the specification in the instant case differs from the model specification set out above in that it does not contain the following allegations: "and by means thereof did fraudulently obtain from" and "not intending that he should have." Under such circumstances it is necessary to determine the gravamen of the offense commonly referred to as making a check with insufficient funds with intent to defraud.

In CM 226219, Richards, 15 BR 27,36; CM 307125, Keller, 60 BR 345; CM 283726, Bowles, supra; CM 237741, Ralph, supra; and CM 276285, Lucas, 48 BR 265,273, each accused was charged with making and uttering with intent to defraud certain checks, and of obtaining money and/or property thereby, well knowing that he did not have and not intending that he should have sufficient funds in the drawee bank to pay the checks. In CM 226219, Richards, supra, the Board of Review said:

> "The uncontradicted evidence, *** thus shows that at or near the places alleged and at about the times alleged in Specifications 1 to 7, inclusive, and in Specification 9, Charge II, accused made and uttered the checks described in these Specifications and thereby obtained the amounts of the checks in cash or in services. Accused did not have an account with the drawee bank at the time he made and cashed the checks. ***"
>
> "*** Accused stated that he had given checks to 'Charlie Wing'. It does not appear that V. H. Wing was the identical person referred to as Charlie Wing. The evidence does not in any way establish the identity of the persons to whom the checks described in Specifications 5, 7 and 9, Charge II, were uttered or the identity of the persons from whom the proceeds of the checks were fraudulently obtained. *** Inasmuch as the gravamen of the offenses in question lay in the making, uttering and cashing of the particular checks with fraudulent intent, all of which is proved, the variance with respect to Specification 1, and the failure with respect to Specifications 5, 7 and 9, to establish the identity of the persons defrauded, is not fatal to the conviction in any case. ***"

In CM 270052, Gibney, 7 BR (ETO) 91,102, the Board of Review said:

> "(b) The gravamen of the offense of issuance of bank checks without sufficient funds or credit to insure payment thereof is the intent to defraud. In order to sustain a conviction the burden was on the prosecution to prove beyond a reasonable doubt that accused not only signed and uttered the checks particularly described without a sufficient credit balance or without a credit arrangement at his bank to secure their prompt payment, but also that he uttered them with a fraudulent intent. Proof of merely 'over drafting' of one's bank account

and nothing more does not prove a criminal offense (Burnham v Commonwealth, 228 Ky. 410, 15 SW (2nd) 256; People v Humphries, 226 App. Div. 500, 234 NY Supp. 688; State v Felman, 50 SW (2nd) (Mo.App.) 683; People v Becker, 137 Cal. App. 349, 30 Pac. (2d) 562; Seaboard Oil Co. v Cunningham, 51 Fed. (2d) 321, Cert. denied 284 US 657; 76 L.Ed.,557).

> 'The gist of the statutory offense of drawing, with intent to defraud, a check or draft upon a bank, with knowledge at the time of such drawing of the insufficiency of funds in or credit with such bank to meet it upon presentation, is such fraudulent intent and knowledge, and it is essential that the drawer should have not only knowledge of the insufficiency of his funds or credit, but an intent to defraud.
>
> ***********
>
> By reason of either the express provision of the statute, or judicial construction thereof to that effect, the gravamen of the offense denounced by "bad check" statutes is the intent to defraud, which is an indispensable element of the crime' (95 ALR, Annotation, p. 489)."

In CM 307125, Kellar, supra, the Board of Review said:

"*** The essence of the fraud is that the checks relied upon were of no value. Whether they were worthless because drawn against no account or against an empty account is relevant only in so far as the amount of proof of intent to defraud is concerned. It may be easier to prove fraud where an accused uses a fictitious account, but a check is as worthless in one case as it is in the other, and the fraudulent intent once established is the same. ***"

In CM 283726, Bowles, supra, the Board of Review said:

"Because the checks set out in Specifications 6,7,8,9, 10, and 11 were drawn at a time when a sufficiency of funds existed for their payment the reviewing authority, upon the recommendation of the Staff Judge Advocate, excepted the words 'with intent to defraud' and 'fraudulently'. Since the finding of fraud was necessarily based on the allegation of blameworthy knowledge and purpose and since the reviewing authority apparently found neither element, it appears that the words on which the alleged fraud was bottomed, to-wit, 'then well knowing that he did not have and not intending that he should have

sufficient funds in the /drawee bank/ for the payment of said check', should also be excepted from the findings of guilty. The accused apparently had sole control of the account, however, and should be charged with the responsibility for its depleted state. His failure to provide funds adequate for the payment of the checks upon presentment, while lacking the elements of fraud and deceit, was wrongful and manifestly of a nature to bring discredit and disrepute to the military service, in violation of Article of War 96. The evidence is sufficient to support so much of the findings of guilty of each of Specifications 6, 7,8,9,10, and 11 as involves a finding that the accused, at the time and place alleged, wrongfully failed to maintain sufficient funds in the drawee bank to pay the alleged checks. See 32 BR 255, CM 249993, Yates."

In CM 237741, Ralph, supra, the Board of Review said:

"c. As to Charge III, Specifications 2 to 5 inclusive, and the Additional Charge and Specifications thereunder, the evidence as implemented by the stipulation clearly shows that the checks as described in the several Specifications were negotiated by the accused, that accused received in exchange for the checks cash, merchandise or credit, and that each of said checks was dishonored and returned by the drawee bank marked 'insufficient funds.' The evidence shows that accused had maintained a checking account with the drawee bank since 1 December 1942, that accused had known the president of the bank for 15 years, and that when the checks in the total amount of $29.45 were presented to the bank for payment accused's credit balance had been reduced to $3.29.

"The accused has been found guilty of uttering the checks with the intent to defraud, well knowing that he did not have and not intending that he should have funds in the bank for the payment of the checks. Broadly speaking, the only evidence which tends to show a fraudulent intent is that accused with a credit balance of approximately $47 and without having made any credit arrangement with the bank, by the negotiation of the worthless checks overdrew his account in the amount of $26.16."

"*** In the opinion of the Board of Review the record of trial is *** legally sufficient to support only so much of the findings of guilty of Specifications 2,3,4 and 5 of Charge III and the Specifications of the Additional Charge as involves findings that accused wrongfully failed to maintain a sufficient bank balance to meet the checks therein described in violation of Article of War 96, ***"

In CM 276285, Lucas, supra, the Board of Review said:

"Accused is charged with cashing the three checks described in Specifications 1 to 3 inclusive of Charge III with the intent to defraud, knowing he did not have and not intending to have sufficient funds on deposit to pay them. *** The prosecution's evidence established only that the balance in accused's account was insufficient to pay these three checks when presented for payment. *** Thus, the proof does not establish beyond a reasonable doubt that in fact accused had insufficient funds on deposit to pay these three checks when he made and uttered them. A fortiori, the proof similarly fails to establish that he had knowledge of any such insufficiency when he made and uttered these checks (CM 258171, Lucas; CM 267843, Bonar). Accused's testimony also indicated he had maintained an active bank account with the drawee bank for some time prior to commission of the instant offenses. The prosecution's evidence did not controvert that testimony. That fact, in the light of all other circumstances here present, does not lend support to an inference of intent to defraud (See CM 271153, Karsanoff).

"In view of all of the foregoing it is our opinion that the evidence is sufficient to sustain only so much of the findings of guilty of Specifications 1 to 3 inclusive of Charge III as involves findings of guilty of the lesser included offense of failing to maintain a sufficient bank balance to pay these three checks, in violation of Article of War 96."

"*** legally sufficient to support only so much of the findings of guilty of Specifications 1 to 3 inclusive of Charge III as involves findings of guilty of the lesser included offense of failing to maintain a sufficient bank balance to pay the three checks described in said Specifications, in violation of Article of War 96, ***"

The Board of Review is of the opinion that the gravamen of the offense in the instant case is the making and uttering of the check with intent to defraud as charged and that the allegations "and by means thereof did fraudulently obtain from" and "not intending that he should have," although desirable to explain the fraudulent intent alleged in the specification, are not essential to the specification as originally drawn and their absence from the specification did not prohibit the reviewing authority from approving the lesser included offense of wrongfully failing to maintain sufficient funds in the drawee bank to pay the check when presented.

The evidence establishes that the accused was extended credit at the 241 Club of Phenix City, Alabama, in order to gamble and that he lost $1500.00. He thereupon made a check in the amount of $1500 and

delivered it to the manager of the club. The drawee bank refused to honor this check upon presentation. The fact that the accused failed to maintain sufficient funds in the drawee bank to pay this check was established by the records of the drawee bank, the fact that the check had not been honored at the time of trial and the accused's statement that he did not have sufficient funds on deposit to pay the check at the time it was presented. It was also shown that this check was issued to pay a gambling obligation which originated in a state where gambling was illegal and where such obligation could not be collected by civil suit. Under such circumstances it is necessary to determine whether the failure to maintain a sufficient balance in the drawee bank to pay the check upon presentation was wrongful.

The Board of Review in CM 266930, Rankin, 43 BR 323,328, considered spurious checks issued to the managers of gambling clubs by an accused and said:

> "He drew and cashed ten checks in the aggregate face value of $550 upon a bank in which, by his own testimony, he knew he had no account. True, the victims of his spurious checks were both admittedly managers of gambling clubs and it is patent from a consideration of all the evidence that the accused cashed the checks in order to use the proceeds for the purpose of gambling. Yet this state of affairs constitutes no defense. Even in case an officer gives a check in payment of a preexisting gambling debt, which check is, therefore, without consideration in the eye of the law, such conduct would clearly be discreditable to the military service under certain circumstances and in many cases conduct unbecoming an officer and a gentleman (CM 202601, Sperti, 6 B.R. 171 at p. 219)."

In CM 294486, Gault, 57 BR 333,337, the Board of Review said:

> "The proof with respect to twelve of these checks (Chg., Specs. 1-4, incl., 7-10, incl.; Add. Chg., Specs. 3-6 incl.) clearly establishes that accused uttered these checks during poker games with other officers and at a time when he had no balance on deposit with the drawee bank. Furthermore, his bank account remained in that condition for at least five months thereafter. These facts were ample to warrant the court's conclusions that when accused uttered these checks he did not have sufficient funds on deposit to pay them and did not intend so to have. These checks were either actually cashed for accused during the poker sessions or were used by him to make wagers. When accused used his checks as wagers he in fact incurred a gambling debt to whomever might eventually win the stakes. His action was no different in legal effect than if he had played 'light' on particular wagers and after losing had given a check

for the amount of his lost wager. Thus, it is apparent that accused's conduct in making by check wagers which he eventually lost was tantamount to delivery of checks in payment of gambling debts. To issue worthless checks in payment of a gambling debt constitutes conduct violative of at least Article of War 96 (CM 202601, Sperti, 6 BR 171,219; CM 256563, Andrews, 36 BR 297). Accordingly, the record of trial is sufficient to sustain the findings of guilty of these twelve Specifications."

The Board of Review in CM 256563, Andrews, 36 BR 297, discussed and distinguished some earlier cases and held:

"The only question remaining to be considered is raised by an apparent conflict between two authorities contained in the Digest of Opinions of The Judge Advocate General, 1912-1940. In section 453 (24) it is said that:

> 'Where accused is charged (A.W. 95) with drawing a worthless check and the court by exception excluded the allegation that the check was given for value it was held that the view that no offense is committed in passing a bad check unless value be received for it is too strict and would cause unfortunate consequences. A check given in payment of preexisting debt or a gambling debt, a check given as a charitable contribution or as a gift, are all given without valuable consideration in the eye of the law, yet the giving of a bad check by an officer under the above circumstances would clearly be discreditable to the military service and in many cases conduct unbecoming an officer and a gentleman. The specification as modified states an offense. CM 202601 (1935).'

On the other hand section 453(26) states that:

> 'Where accused was found guilty (A.W. 95) of wrongfully and dishonorably stopping payment on certain of his checks previously cashed for him by the operator of a gambling game, the proceeds being used by accused in such game, it was held, that a drawer has a legal right to stop payment on his checks before payment or certification, and while certain acts not otherwise denounced may constitute violations of the Articles of War when committed by military personnel, no such offense was here committed inasmuch as the acts themselves were not wrongful or dishonorable and the State statutes

concerned (Colorado) make void all such gambling checks and the evidence raises considerable doubt as to the fairness of the game. The debts of accused were not shown by the evidence to be just nor does the proof establish that a moral obligation existed for him to pay them. CM 203609 (1935).'

"Since under the law of Louisiana gambling is illegal, and since recovery on an instrument given in payment of a gambling debt has been denied in that state, it is strenuously argued by defense counsel that the last precedent sanctions the accused's utterance of a worthless check. This contention overlooks the distinction between the two cases cited.

"A careful consideration of the opinion in the second case supra, shows that the Board of Review recognized that 'a grave doubt' existed as to the fairness of the gambling game in question and found that the 'actions on the part of the accused certainly indicate his intent to do nothing wrongful and dishonorable'. The findings and sentence were disapproved because the conduct of the accused under the facts presented was not deemed to be dishonorable or prejudicial to the service within the contemplation of Articles of War 95 or 96. No principle inconsistent with the earlier decision cited was announced.

"On the other hand, in the present case, the evidence upon the issue of the fairness of the gambling game is conflicting. The court, acting within its prerogative, resolved the issue against the accused's contentions. The conduct of the accused in making and uttering checks directed to a bank in which he had no account was deceitful and not consonant with the standards required of an officer and a gentleman. The evidence is, therefore, legally sufficient beyond a reasonable doubt to sustain the findings of guilty and the sentence."

In the instant case there was no contention that the dice game, wherein the accused lost the $1500, was dishonest. Under the circumstances, the Board is of the opinion that, irrespective of any legal defense available to accused in a civil action, a moral obligation rested upon the accused to maintain sufficient funds in his bank account to pay the $1500 check issued by him and his failure to so do was wrongful and a violation of Article of War 96.

6. Department of the Army records show the accused to be 30-7/12 years of age and married. He graduated from high school and attended college for about two years. He enlisted in the Army on 30 August 1938 and attained the grade of staff sergeant. On 17 February 1941 he was commissioned a second lieutenant, Infantry Reserve. On 29 December 1941 he was called to active duty as an officer. He was promoted to

first lieutenant, Army of the United States, on 1 February 1942 and to captain on 11 December 1943. On 5 November 1943 he was appointed a warrant officer junior grade in the Regular Army. He was separated from the service on 16 March 1946 and commissioned a captain of Infantry in the Organized Reserve. On 26 May 1946 he began duty as a warrant officer junior grade with rank from 5 November 1943. He was recalled to active duty on 18 July 1946. His recall to active duty operates to suspend his Regular Army warrant and upon relief from active duty he can reapply for duty as a warrant officer in the Regular Army. He is entitled to wear the American Theater Service Medal, Asiatic Pacific Theater Service Medal, Distinguished Unit Badge and the World War II Victory Medal. His efficiency reports are "Excellent" and "Superior." On 16 September 1947 he was given an administrative reprimand by the Commanding General, The Infantry Center, Fort Benning, Georgia, for exceeding the speed limits on the post and for failing to stop at an intersection which was marked with a stop sign.

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

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

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

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

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

CSJAGU CM 336515

U N I T E D S T A T E S)	THE INFANTRY CENTER
)	
v.)	Trial by G.C.M. convened at
Captain WISDOM H. STEWART)	Fort Benning, Georgia, 23
(O-405378), Headquarters and)	March 1949.. Dismissal.
Headquarters Company, Student)	
Training Regiment, The Infantry)	
School.)	

Opinion of The Judicial Council

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

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

2. Accused was tried at Fort Benning, Georgia on 23 March 1949, He was charged with making and uttering a check with intent to defraud (Specification 1) and dishonorably neglecting and failing to pay a debt (Specification 2); both in violation of Article of War 95. He pleaded not guilty to and was found guilty of the charge and specifications. He was sentenced to be dismissed the service. The Reviewing Authority approved the findings of guilty of Specification 1, in a modified form, disapproved the finding of guilty of Specification 2, approved the sentence, and forwarded the record of trial under Article of War 48. The Board of Review in its opinion of 6 June 1949 holds the record of trial legally sufficient to support the findings and sentence as approved by the Reviewing Authority.

3. We find it necessary to consider only the question whether or not the finding of guilty of Specification 1, as modified by the Reviewing Authority, states a lesser included offense of that with which the accused was charged and of which the trial court found him guilty.

Specification 1 alleged in substance, that the accused did, at Phenix City, Alabama, on or about 4 December 1948, with intent to defraud, wrongfully and unlawfully make and utter to Charles R. Garrett, a check, dated 4 December 1948, for $1500.00, on the Columbus Bank and Trust Company, Columbus, Georgia, payable to the order of "Cash", accused then well knowing that he did not have sufficient funds in the drawee bank

for payment of the check. Of the finding of guilty of this specification the Reviewing Authority approved "only so much" as found the accused guilty of:

> "making and uttering the check described therein, at the time and place, and to the person alleged, and wrongfully failing to maintain sufficient funds in the drawee bank alleged to provide for payment of said check when presented for payment in due course * * *."

Stated simply, for a finding that the accused made and uttered the check wrongfully and unlawfully, in that he intended to defraud and knew that he then did not have sufficient funds in the drawee bank for its payment, the Reviewing Authority substituted a finding, stripped of every statement of illegality of act and intent and of guilty knowledge in the making and uttering of the check, and substituted therefor a finding that the accused made and uttered the check without any then existing fraudulent intent or guilty knowledge and wrongfully failed to maintain in the drawee bank sufficient funds for payment of the check when presented for payment in due course.

The question before us is whether or not this action is within the scope of the power vested in the Reviewing Authority by Article of War 47(f)[1] to approve:

> "only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense."

4. The test prescribed by the Manual for Courts-Martial, 1949, for determination of what is a lesser included offense by court-martial is:

> "* * * that it /the lesser offense/ is included only if it was necessary in proving the offense charged to prove all the elements of the offense found." (par 78c, page 77)

There was in Specification 1 no allegation on the subject of failure of the accused, after uttering the check, to maintain an adequate bank balance. If such failure can be considered as included in the offense alleged, it must be on the theory that proof of such failure was necessary to prove the allegation of fraudulent intent.

The intent which was an element of the offense alleged was the intent which existed at the time the check was made and uttered; and the offense charged was committed, if at all, when the instrument was uttered with the intent alleged (35 CJS page 659, note 61; 22 Am Jur 476; Nix v. State, 27 Ala App 94, 166 So 716, cert den 232 Ala 53, 166 So 719 (1936); State v. Alphonse, 154 La 950, 98 So 430 (1923); State v. Smith, 97 W. Va. 313; 125 S.E. 90 (1924)).

The Manual for Courts-Martial prescribes no special rules for proving fraudulent intent in "bad check" cases. When a specific intent is an

essential element of an offense the evidence by which its existance may be established or refuted is governed by the principles generally applicable where the state of mind of a person is in issue. Intent may be established by indirect or direct evidence. It may be gathered from the attending facts and circumstances. It may be determined by inference from evidence of other acts of the accused closely connected in time and circumstances to the offense for which he is on trial (MCM, 1949, pars 125b and 140a, pp 154-188; 20 Am Jur 293, 295; Wigmore on Evidence, 3d Ed, Secs 242, 302, 304, 321). Cases such as this are no exception to the rule, except in those jurisdictions where special statutory rules apply. The various kinds of evidence, direct and indirect, held competent to establish or disprove intent to defraud are illustrated by the decisions in People v. Weiss, 263 N. Y. 537, 189 N.E. 686 (1933); Huffman v. State, 205 Ind 75, 185 N.E. 131 (1933); State v. Schock, 58 N.D. 340, 226 N.W. 525, 72 ALR 888 (1928); Ex parte Levschen, 134 Cal App 246, 25 P(2d) 243 (1933); State v. Smith, 97 W. Va. 313, 125 S.E. 90 (1924); McBride v. State, 141 Miss 186, 104 So 454 (1925); Clark v. State, 102 Tex Cr App 88, 277 S.W. 132 (1932); Whitney v. State, 63 Fla 53, 58 So 230 (1912); People v. Weir, 30 Cal App 766, 159 P 442 (1916); Rogers v. People, 76 Colo 181, 230 P 391 (1924); Green v. State, 53 Ga App 18, 182 S.E. 74 (1935); Arrington v. State, 107 Tex Cr App 422, 296 S.W. 568 (1927); Armstrong v. State, 123 Tex Cr App 372, 59 S.W. (2d) 140 (1933); State v. Holmes, 98 Kan 174, 157 P 412, LRA 1916E, 1104 (1916); Hinman v. State, 179 Miss 503, 176 So 264 (1937); Wharton's Crim. Law, 12th Ed., secs 215 and 1439; 22 Am Jur 476, 490.

The rule deducible from the adjudicated cases is illustrated by the following extract from an Alabama case:

> "There is no merit in the objection that the indictment fails to allege a nonpayment of the check upon presentation. As has already been seen, the crime fixed by the Legislature is the obtaining of certain property by fraud by the giving of a check, etc., knowing at the time of such making, etc., that the maker and drawer has not (presently) sufficient funds in the depositary or credit therewith for the payment of such check upon its due presentation. If he has sufficient funds on credit, at the time of making and delivering the check, no crime is committed and no conviction can be had. It is the status at the time of the transaction which is the subject of this inquiry, and that fixed the crime. The payment or non-payment of the check upon due presentation is evidence, but is not the subject of averment.
>
> * * * * * * * * * *
>
> "It makes no difference whether the check was ever presented for payment or not. The crime was and is not dependent upon the presentation of the check. Of course, if the check was presented and promptly paid, that would be a complete defense. If it was presented and not paid, the question would then be open to inquiry as to whether the drawee had with the depositary either sufficient funds or credit to have paid the check.
>
> * * * * * * * * * * *

"Counsel seems to lay unusual stress upon the rulings of the court permitting the evidence to prove that the various checks were unpaid. If the checks had been paid upon presentation or having been refused payment by the bank, if the defendant had immediately paid them, this evidence would have had strong weight with the jury as tending to rebut any fraudulent intent in giving the checks. If they were not paid, such fact would be a circumstance to be considered by the jury along with all the other evidence in the case as tending to prove the intent to defraud. We recognize the insistence made by defendant's counsel that the nonpayment of the check or checks, is not an ingredient of the offense charged. The charge embraces the giving of the check, the obtaining of the cotton by reason thereof, and the fraudulent intent, and the fact of payment or nonpayment is evidence to be considered by the jury." (Caughlan v. State, 22 Ala App 220, 114 So 280, 282 (1927)). See also Arrington v. State, 107 Tex Cr App 422, 296 S.W. 568.

In People v. Weir, supra, it was held that, in a prosecution under a statute making it a crime to make and utter a check, willfully with intent to defraud, knowing that the drawer did not have sufficient funds in the drawee bank for payment of the check, it was not necessary either to allege or prove that the check was presented to the bank, and that the criminal intent could be proved by evidence of other similar acts before or after the acts charged. To the same effect see Rogers v. People, supra.

The authorities leave no room for serious question that although, in this and like cases, evidence that the accused after uttering the check, failed to maintain an adequate balance in the drawee bank would be competent on the issue of fraudulent intent, proof of such failure is not legally requisite. To hold otherwise might well enable a "bad check operator", after his offense is complete, to purge himself of guilt and avoid the just penalty for his offense by covering a worthless check, fraudulently issued, when confronted by a threat of prosecution. The law governing military offenses contains nothing to require or justify any such special consideration for this type of offender.

7. Nothing herein is to be construed as holding that the wrongful failure to maintain an adequate bank balance to cover the payment of a check previously innocently and lawfully uttered, would not constitute a military offense, if it were included in the offense charged.

It is unnecessary to consider or decide whether or not the many previous opinions of Boards of Review cited by the Board of Review, all decided before 1 February 1949, the effective date of the Manual for Courts-Martial, 1949, were sound.

8. The Judicial Council concludes that the record of trial is legally insufficient to sustain the findings of guilty, as modified by the Reviewing Authority, and the sentence.

Franklin P. Shaw, Brig Gen, JAGC

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

E. M. Brannon, Brig Gen, JAGC
Chairman

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 336515

THE JUDICIAL COUNCIL

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

In the foregoing case of Captain Wisdom H. Stewart (O-405378), Headquarters and Headquarters Company, Student Training Regiment, The Infantry School, upon the concurrence of The Judge Advocate General, the findings of guilty and the sentence are disapproved.

Franklin P. Shaw
Franklin P. Shaw, Birg Gen, JAGC

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

E. M. Brannon, Brig Gen, JAGC
Chairman

22 September 1949

In concur in the foregoing action.

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

27 Sep 1949

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

CSJAGH CM 336558

JUN 10 1949

U N I T E D S T A T E S	UNITED STATES ARMY EUROPE
v.	Trial by G.C.M., convened at Wurzburg, Germany, 12,13 April 1949. Dismissal.
Captain Jessie C. Armstrong, 02000185, 7861st Ordnance Medium Automotive Maintenance Company	

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

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

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

CHARGE I: Violation of the 94th Article of War.
(Finding of not guilty).

Specifications 1 and 2: (Finding of not guilty).

CHARGE II: Violation of the 69th Article of War.

Specification: In that Captain Jessie C. Armstrong, Ordnance, 7861st Ordnance Medium Automotive Maintenance Company, having been duly placed in arrest to the limits of Leighton Barracks, Wurzburg, Germany, on or about 14 February 1949, did, at Wurzburg, Germany, on or about 19 February 1949 break his said arrest before he was set at liberty by proper authority.

CHARGE III: Violation of the 85th Article of War.

Specification: In that Captain Jessie C. Armstrong, Ordnance, 7861st Ordnance Medium Automotive Maintenance Company, was

at Wurzburg, Germany, on or about 7 February 1949, found drunk on duty as Ordnance Shop Officer of said Company.

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

Specification: In that Captain Jessie C. Armstrong, Ordnance, 7861st Ordnance Medium Automotive Maintenance Company, did at Leighton Barracks, Wurzburg, Germany, on or about 27 January 1949, with intent to deceive Colonel Rafael L. Salzmann, Infantry, officially state to the said Colonel Rafael L. Salzmann that he, the said Captain Jessie C. Armstrong, had, on 20 December 1948, purchased a United States Postal Money Order in the amount of One Hundred Dollars ($100.00), in favor of one Robert C. Malcolm, which statement was known by the said Captain Jessie C. Armstrong to be untrue in that he had not in fact purchased such a Postal Money Order.

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

Specification: In that Captain Jessie C. Armstrong, Ordnance Department, 7861st Ordnance Medium Automotive Maintenance Company, did, at Leighton Barracks, Wurzburg, Germany, on or about 9 March 1949, with intent to deceive Colonel Rafael L. Salzmann, Infantry, officially state to the said Colonel Rafael L. Salzmann, Infantry, that he, the said Captain Jessie C. Armstrong, had on 20 December 1948, purchased a United States Postal Money Order in the amount of one Hundred ($100.00) dollars in favor of one Robert C. Malcolm, which statement was known by the said Captain Jessie C. Armstrong to be untrue in that he had not in fact purchased such a Postal Money Order.

He pleaded not guilty to all the Charges and Specifications, and was found not guilty of Charge I and the Specifications thereunder, but guilty of Charges II, III, IV, the Additional Charge, and all Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence but recommended that it be commuted to forfeiture of $100.00 of the accused's pay per month for a period of six months, and forwarded the record of trial for action under Article of War 48.

3. The pertinent evidence of the record of trial pertaining to the findings of guilty is summarized as follows:

a. For the prosecution.

The accused is a member of the military service of the United States. At the times of commission of the offenses alleged herein, the accused was the maintenance officer of the Field Maintenance Shop, 7861st Ordnance Medium Automotive Maintenance Company, Wurzburg Military Post, APO 800 (R 11,24,109).

On 27 January 1949 the accused was called to the office of Colonel Rafael L. Salzmann, the Deputy Post Commander of the Wurzburg Military Post, to discuss an admitted indebtedness to one Robert C. Malcolm of Atlanta, Georgia (R 12,13). During the interview which followed, Colonel Salzmann read to the accused a letter which he had received from Mr. Malcolm, and accused was reminded that he had previously agreed, or "promised" to discharge the debt by remitting a money order in the amount of one hundred ($100.00) dollars each month beginning in December of 1948 (R 12,13). Colonel Salzmann, acting in his official capacity as Deputy Post Commander, asked the accused if he had made any payments to Mr. Malcolm. The accused replied that he had purchased a money order in the local post office on 20 December, and had mailed it to Mr. Malcolm on 30 December. Colonel Salzmann's purpose in interviewing accused was to determine whether the accused "had done what he promised to do," so that he could answer Mr. Malcolm's correspondence (R 13-15).

Subsequent to the interview on 27 January 1949, and on or about 9 March 1949, Colonel Salzmann received another letter from Mr. Malcolm pertaining to accused's indebtedness (R 15). Upon receipt of this letter he checked with the several post offices of the Wurzburg Military Post to ascertain whether the accused had in fact purchased the $100.00 postal money order in favor of Mr. Malcolm, as accused had stated he had in the interview of 27 January (R 17,18). Thereafter, Colonel Salzmann again called the accused into his office. According to the latter:

> "* * * I asked Captain Armstrong if he remembered the statement he made to me on January 27th; He said, 'yes.' I said, 'Then in the face of what this letter contains, do you still want to tell me that that statement you made to me was correct?' He said, 'Yes.' I told him, 'I have made inquiries and I cannot find any records of any Post Office Money Order having been purchased in any Army Post Office in your locality at the time you said you had.' He then reached into his wallet and produced a stub of a Post Office Money Order in the amount of $100.00. He said, 'Yes, I did. Here is the stub.' I looked at the stub, and saw the Post Office number and the date of August 23, 1948. I said, 'This cannot be it, because you said it was purchased in December 1948.' Then he took it back and said, 'This is the wrong one.

I have got another one in my quarters.' I then told him again 'If you want to change your statement to me and say you were wrong or anything of that sort, tell me now, because you know a false official statement is a very -- is punishable under the Manual of Courts-Martial.' 'If you didn't buy the Money Order at the time you said you did tell me now, so you can correct it.' He said, 'No, sir, I bought the money order. I have the stub in my quarters.'" (R 16)

At the time of this second interview, according to Colonel Salzmann, he had no intention of charging the accused with anything. He called him in "to give him a chance to change his statement. I didn't want to accuse him. I wanted him to tell me the truth if he wanted to." (R 18). Colonel Salzmann admitted that he was not misled or deceived by the accused on this latter occasion since he had previously ascertained from postal authorities that no money order had been purchased by accused in December 1948. (R 17-18)

The postal facilities of the Wurzburg area included the 25th Base Post Office, and Army Post Office 800, both located at Leighton Barracks; Unit 2 of APO 800 located at the Basic Training Center; Unit 3 thereof located at Bad Mergentheim and Army Post Office 62 located at Bad Kissingen (R 17,69,70,71). First Lieutenant John D. Reese of the 25th Base Post Office, who was the postal officer for the installations mentioned and therefore the custodian of the records of money orders sold in the Wurzburg area, testified that there was no record of accused having purchased a money order on 20 December 1948 (R 69-70). More particularly, there was no record showing he had purchased a money order in the amount of one hundred ($100.00) dollars payable to Robert C. Malcolm on the above date (R 71). Lieutenant Reese further stated that there were no overages in December 1948 and there had never been a discrepancy of one hundred ($100.00) dollars in any of his post offices (R 71).

On 7 February 1949, while the accused was on duty as Ordnance Shop Officer at the 7861st Ordnance Medium Automotive Maintenance Company, Wurzburg Military Post, he was, during the usual working hours, viz. at about 0900 hours and 1400 hours, observed by Major Charles L. Sage, Ordnance Officer of the Wurzburg Military Post, to be "under the influence of liquor." (R 24-25). The accused's speech was "incoherent," and his face was "Flushed and blotchy." He had an alcohol breath, and was "very argumentative." In the opinion of Major Sage, the accused's immediate commander, the accused was not fit to perform his duties at that time because he "had been drinking to a great extent * *" (R 25-26). On the same day another witness, Mrs.

Alice Purvin, who had gone to the accused's office to get his signature on certain customs certificates for packages which were to be mailed, observed the accused at about 1330 hours. At this time, according to Mrs. Purvin, "He /the accused/ was flushed. His eyes were reddish. He spoke hesitatingly, * * and * * appeared drunk." While accused was attempting to sign his name to the certificates "He would look at the card and look up and look back at the card, and look up again and seemed to be staring off into space, and would repeat his question of what it was for * *. Finally his secretary filled it out * *." (R 34-35)

On or about 14 February 1949 Brigadier General Lewis C. Beebe, Commanding General of the Wurzburg Military Post, issued orders to Colonel Salzmann, The Deputy Post Commander "* * to place Captain Armstrong in arrest" (R 10). Pursuant to these orders Colonel Salzmann instructed the Company Commander to bring the accused to his office. On the same day, in the presence of the Company Commander, Colonel Salzmann "* * explained to Captain Armstrong that he was under arrest, and that he was relieved of all duties; that the limits of the arrest would consist of the limits of the troop area of Leighton Barracks as marked by the fence; from the East to the West gates, North and South by the fence." (R 10,12). The accused replied that he understood (R 12). The accused was not, subsequently, and up to and including the time of trial, released from arrest (R 11,12).

The accused lived at the Bachelor Officers Quarters in the area adjacent to the Officers' Club at Leighton Barracks, which post comprises an area approximately one and one half miles from East to West and between 1000 yards and three quarters of a mile from North to South. (R 18,20). Between 1700 and 1800 hours on 19 February 1949, at the bar of the Bachelor Officers Quarters at Leighton Barracks, the accused requested and was granted permission to use the private automobile of Captain Donald H. Davis. The latter expressly stated, however, that he wanted it back at 7:00 o'clock, because of an appointment at 7:15. The accused left with the keys to the car (R 20). Sometime during the early evening before 2300 hours, 19 February, the Police Sergeant at the 537 MP Service Company, received a call from a person who identified himself as accused and who requested assistance in locating his lost car (R 67-68). The Police Sergeant dispatched a Military Police Patrol which was unable to find the "lost" vehicle because of the dense fog (R 23,68). At about 2300 hours, 19 February, the accused came into the station of the Military Police in downtown Wurzburg with "Pfc Cleveland, the driver of the patrol car, and Private Malloy" (R 68). Accused had been brought to the Military Police Station from #64 Zeppelinstrasse, where he had been waiting (R 23). The vehicle which accused had

borrowed was ultimately found the following morning stuck in the mud in a ditch at a point "approximately half a mile" from the reservation of Leighton Barracks, and had to be pulled out by a tow truck (R 21). Zeppelinstrasse is "quite a bit" south of the central portion of Leighton Barracks and is joined by several unbarricaded roads leading off the reservation. Along the southern boundary of the reservation the fence is down in "quite a few" places, and at one such place at least is an unbarricaded road leading south to Zeppelinstrasse (R 18,21).

b. For the defense.

Lieutenant John D. Reese, Postal Officer APO 800 and APO 62, was recalled as a witness for the defense, and testified that the records in his legal custody showed that the accused had, on 30 November 1948, purchased from APO 800, a post office under his jurisdiction, a money order in the amount of $100.00 payable to one R. C. Malcom, Atlanta Ordnance Depot, Atlanta, Georgia (R 91-92; Def Exs A,B).

It was stipulated that between the period from 10 March 1944 through 18 February 1947 the efficiency ratings on the record of the accused, Form 66, were as follows:

"10 March 1944-30 June 1944, excellent; 1 July 1944-31 December 1944, superior; 1 January 1945-6 February 1945, superior; 7 February 1945-26 February 1945, superior; 27 February 1945-7 April 1945, superior; 8 April 1945-30 June 1945, 4.9; 1 July 1945-5 November 1945, 5.5.

* * *

"14 November 1945-to 2 December 1945, no rating; 3 December 1945-28 January 1946, no rating; 29 January 1946-15 February 1946, no rating; 1 March 1946-20 March 1946, no rating; 21 March 1946-1st May 1946, 5.5; 2 May 1946-15 May 1946, 5.5; 16 May 1946-29 May 1946, 5,5; 30 May 1946-30 June 1946, 5.5; 1 July 1946-19 August 1946, 5.4; 20 August 1946-31 December 1946, 5.1; 1 January 1947-8 January 1947, 5.1; 9 January 1947-18 February 1947, 5.5." (R 104,105)

Further, that the ratings subsequent to those read in evidence were not yet entered on the said record, but were in fact recorded in Washington.

It was further stipulated that if Major Thomas C. Burnett; Lieutenant Colonel James L. Massey, 127th Ord. Regiment; Lieutenant Colonel Lawrence C. Collins, Ord. Dept.; 1st Lieutenant John L. Faricy, Ord. Dept.; Captain William R. Francis, Ord. Dept.; Captain

John W. Campbell, Ord. Dept.; Colonel Henry C. Jones; and Brigadier General Lewis C. Beebe were present they would testify that the accused's "character is of the highest type"; that he is "conscientious and thorough in his work"; that he is a man of "high moral character, painstaking in his attention to his duties"; that he is "trustworthy in all respects, highly skilled in all phases of automobile mechanics and a person who can be depended upon in an emergency"; that he has "outstanding soldierly qualities of initiative and leadership * * has demonstrated his abilities as an instructor * * is an excellent example of an ernest, conscientious, energetic, wide-awake and ambitious worker"; that his duties were performed "in a superior manner. He is intelligent, ambitious, loyal, and superior in his attention to duty"; that he performed his duties in an "excellent manner", and that his duty was "well performed" (R 105-107). The periods covered by the above letters included the accused's service both as an enlisted man and as a commissioned officer.

The accused, after being advised of his rights, testified only in connection with Specification 1 of Charge I, of which offense he was found not guilty (R 108-109).

c. Rebuttal for the prosecution.

Major Charles L. Sage, Post Ordnance Officer of the Wurzburg Military Post was recalled and testified that the reputation of the accused for truth and veracity in an official status "is bad", and that he would not believe him under oath (R 117). The witness had administratively reprimanded the accused on two occasions relating to the performance of "official duties" (R 119). Colonel R. L. Salzmann, Deputy Post Commander, recalled by the prosecution, testified that the general reputation of the accused as to truth and veracity in the community was "bad", and that he would not believe him under oath (R 125).

4. The accused has been found guilty of two offenses of making a false official statement, knowingly and with intent to deceive, at Leighton Barracks, Wurzburg, Germany, on or about 27 January 1949 and on or about 9 March 1949, in violation of Article of War 95. "'The making of a false official statement, knowing it to be false, and with intent to deceive, is conduct unbecoming an officer and gentleman, and violates Article of War 95.'" (CM 288574, Wilkins, 56 BR 373,377 and authorities therein cited; CM 280335, Alexander, 53 BR 177,180).

In order to support a conviction of this offense, the record must show: "that the accused: (a) made a certain official statement, (b)

that the statement was false, (c) that the accused knew it to be false, and (d) that such false statement was made with intent to deceive the person to whom it was made." (CM 324352, Gaddis, 73 BR 181, and authorities cited).

The evidence is clear and undisputed that on or about 27 January 1949, the accused was interviewed by his superior officer, who was acting in his official capacity as Deputy Post Commander, Wurzburg Military Post, and was interrogated with respect to his existing indebtedness to one Robert C. Malcolm. The accused stated on this occasion that on 20 December 1948 he had purchased a $100.00 money order in favor of his creditor at the local post office, and had mailed it to him on 30 December 1948. It is likewise clearly shown that the accused had not in fact purchased a money order in the amount stated or payable to the person claimed, on 20 December 1948, or for that matter, at any time during the month of December 1948. Although the defense offered evidence of the accused's having purchased a $100.00 money order payable to Mr. Malcom on 30 November 1948, it was not specifically contended that this particular purchase of a money order would exonerate the accused of the offense of making the false statements with which he is charged, and of course it does not do so. There is no reasonable basis for the inference that the accused, during the course of his conversation with the Deputy Post Commander on 27 January 1949, had inadvertently referred to the money order purchased on 30 November 1948. The question propounded by the Deputy Post Commander was explicitly stated, and the response elicited from the accused was equally so. There is no room for doubt. Having established that a false statement was made, it remains to be shown that this statement was "official," and that the requisite intent existed. As to the "official" nature of the statement, it has been held that "What makes a statement 'official' is that it be made during an official inquiry." (CM 280010, Blair, 52 BR 383,387, citing CM 244159, Camp). It is undisputed and indisputable that Colonel Salzmann at the time in issue, was acting in his official capacity as Deputy Post Commander, and was carrying on the usual business of his office at the time the statements here involved were made. More particularly, he was ostensibly answering correspondence referred to him by virtue of his military assignment. As to the intent to deceive, the conclusion that this requisite intent to deceive Colonel Salzmann existed, is demanded by the undisputed falsity of the statement (CM 334635, Simpson, citing CM 275353, Garris, 48 BR 42).

The finding of guilty as to the Additional Charge and its Specification is equally as justifiable as is that with regard to Charge IV and its Specification. The evidence clearly shows that the same relationship existing between Colonel Salzmann and the accused on 27

January 1949 existed also on 9 March 1949. On this latter date, when the accused was again called into the office of the Deputy Post Commander, the letter received from Mr. Malcolm after the accused claimed to have made the $100.00 payment in December was read to him, and the accused persisted in his statement that he had in fact purchased the money order as he claimed. On this second occasion, the accused was informed that the records of the local post offices showed that he had not purchased the money order on 20 December 1948. The accused thereupon produced a stub of a money order bearing the purchase date 23 August 1948, and upon being apprised of the discrepancy in such date as compared with the date he had previously claimed to have purchased the money order, the accused unequivocally stated that it was the "wrong one," and that he had another one in his quarters. Upon being asked if he wanted to change his statement the accused reiterated "No, sir, I bought the money order. I have the stub in my quarters." (R 16).

It is thus manifest from the record of trial in the instant case, that the evidence adduced clearly establishes every element of these two offenses beyond a reasonable doubt, and consequently that the accused was properly found guilty of the Specifications charged as violations of Article of War 95.

In regard to these two offenses of making false official statements, the defense moved for a finding of not guilty to the Additional Charge and its Specification on the grounds (1) that Colonel Salzmann had already investigated the matter and determined the facts under it to his satisfaction and was therefore "not deceived" by the statement made by the accused on 9 March 1949; and (2) that this was a mere reiteration of the previous conversation of 27 January 1949; that the crime had already been committed; and that the accused "could not do the same thing twice." (R 89). The court properly denied the motion (R 90). These contentions of the defense cannot be sustained. That the person to whom a false official statement is made must be in fact deceived, is not an element of the offense (CM 324352, Gaddis, supra; CM 262360, Campbell, 41 BR 58; CM 316750, Ortiz-Oponte, 66 BR 1; CM 318167, Green, 67 BR 173; CM 318705, Jackson, 81 BR 427). The second ground of the defense motion likewise warrants but summary disposition. In this connection the Board of Review has so held and stated:

> "There was no improper multiplication of offenses even though each false statement was made with respect to the same specific matter. Each offense occurred during a separate and distinct transaction. Had all of the false statements subsequent to

> the first one been elicited from accused for the purpose of increasing the punishment to which accused had exposed himself by his first statement, then it might well have been improper to have tried accused for these later statements (See CM 281923, Hosford). However, such was not the case. It is quite clear from the record that each statement was made by accused to an officer who, in the course of his official duties, was solely engaged and interested in ascertaining particular material facts." (CM 286548, Welch, 56 BR 233,239). (Underscoring supplied)

In the instant case the evidence is clear and unrebutted that the accused was not questioned on the occasion of the second interview on 9 March 1949 in order to increase the punishment to which he had already exposed himself on 27 January 1949. The Deputy Post Commander desired merely to ascertain the particular fact as to whether the accused had done "what he promised to do" so that he "could inform Mr. Malcolm to, that effect" and to give the accused an opportunity to correct his earlier falsification. Although the two interviews were between the same parties and concerned the same subject matter, such were substantially removed in point of time and, in the interim, further correspondence from Mr. Malcolm concerning the matter had been referred to Colonel Salzmann in the course of his official duties.

The defense further raised the objection to the admissibility of any of the testimony of Colonel Salzmann pertaining to his conversation with the accused on these two occasions, basing its objection on the fact that the accused had not been warned of his rights under the 24th Article of War. In so far as would concern the instant case, the pertinent part of Article of War 24 reads:

> "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." (underscoring supplied)

In considering these defense objections in the light of the Article of War, above, it should be observed at the outset that the record of trial clearly indicates the statements of the accused were received in evidence for the sole purpose of showing that the statements were in fact made. Neither statement was introduced as proof of an antecedent offense or offenses, such as those arising out of accused's failure to pay a just indebtedness or his prior "promises" or commitments to a military superior to retire his indebtedness. Had the statements been offered as evidence in support of offenses such as those last mentioned, the fact that the accused was not advised of his rights under Article of War 24, by his military superior, might have precluded their use, dependent upon the subordinate's understanding of his rights. Conceding in the present case that the accused should have been advised of his rights on each

occasion and could properly have refused to answer Colonel Salzmann's questions, it is nevertheless patent that the accused did make the two statements and in so doing, twice falsified, obviously to foster his own cause. Accordingly, for the well defined and limited purpose of showing the fact of the making of the false statements, such were admissible and properly received in evidence. To conclude otherwise would have the effect of making the failure to comply with provisions of Article of War 24 tantamount to a license to falsify and repetition of this Article a necessary prerequisite to the trustworthiness of every official conversation.

The accused has been found guilty of being drunk on duty as Ordnance Shop Officer, 7861st Ordnance Medium Automotive Maintenance Company, Wurzburg, Germany, in violation of the 85th Article of War, on or about 7 February 1949.

> "In order to sustain a conviction of being found drunk on duty in violation of the 85th Article of War, it is necessary to prove that accused was on duty and that he was found drunk while on such duty." (CM 315761, Conway, 65 BR 99,102; CM 275196, Steward, 48 BR 15; and see MCM 1949, par 173, p.226).
>
> "* * * any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties is drunkenness within the meaning of the article." (MCM 1949, par 173, ibid).

The record of trial contains competent testimony showing that at 0900, at 1330, and at 1400 hours, the accused while actually on duty as Ordnance Shop Officer, was observed by at least two witnesses in whose opinion he was "under the influence of liquor," "appeared drunk," and was not fit to perform his duties at that time because he "had been drinking to a great extent."

> "On an issue of drunkenness, admissible testimony is not confined to a description of the conduct and demeanor of the accused, and the testimony of a witness that the accused was drunk or was sober is not inadmissible on the ground that it is an expression of opinion" (MCM 1949, par 173, ibid).

And further,

> "* * military witnesses, when of the proper rank and experience to enable them to testify as quasi experts, may be asked their opinion as to whether the accused was or not capable, under the circumstances of the case, of properly executing the duty indicated in the specification" (Winthrop 1920, Reprint, p.615).

From the foregoing it clearly appears that the elements of the offense were fully proved, and the accused was properly found guilty of a violation of the 85th Article of War.

The accused was found guilty of breaking his arrest in violation of Article of War 69, on or about 14 February 1949, after having been

duly placed in arrest to the limits of Leighton Barracks, Wurzburg Military Post, and before he was set at liberty by proper authority.

To sustain a conviction of this offense it must be shown: "(a) That the accused was duly placed in arrest; and (b) that before he was set at liberty by proper authority he transgressed the limits fixed by Article 69 or by the orders of proper authority." (MCM 1949, par 157(a), p.211). Officers may be placed in arrest "By commanding officers only, in person or through other officers, or by oral or written orders or communications. * * * The term 'commanding officer' shall be construed to refer to an officer commanding a post, camp, or station or other place where troops are on duty, and the officer commanding a body of troops who, under Article 10, has power to appoint a summary court-martial." (MCM 1949, Par 20, p.16; CM 278968, Salyer, 52 BR 55,61).

The evidence herein is clear and undisputed that on or about 14 February 1949 the accused was duly placed in arrest pursuant to the orders of his commanding officer; that the limits of his arrest were specifically defined; that the accused fully understood the foregoing; and that he was not subsequently thereto and up to and including the time of trial released from arrest by proper authority. The competent evidence further shows that on 19 February 1949 while still in arrest, the accused was observed outside the limits of such arrest (R 23,66,68).

"Breach of arrest does not require any specific intent * * *." (CM 232596, King, 19 BR 129,135). Though the record of trial indicates that the night of 19 February 1949 was foggy; that the accused had been drinking; that the fence along the northern boundary of the limits of accused's arrest was down in "quite a few places"; that many of the roads leading north to Zeppelinstrasse from the military reservation were unbarricaded; and that the vehicle used by the accused was found the following morning in a ditch, one-half mile from the reservation where the accused had apparently abandoned it in order to seek help, the evidence is sufficient to justify the court's conclusion that the breach of accused's arrest was not inadvertent. Further, in the absence of any requirement of a specific intent to commit this offense (CM 232596, King (supra); MCM 1949, par 157(a), p.211), such inadvertence, even if established, would go merely to extenuation, and would be immaterial to the issue of guilt.

5. The records of the Department of the Army show that the accused is 36 years of age, married, and has one daughter, 12 years of age. He was graduated from high school in 1928. In civilian life he was a general auto mechanic. He had continuous enlisted service from 18 July 1933. He attained the rank of Master Sergeant on 5 July 1943 and

he was appointed WO(JG) AUS on 10 March 1944. He was commissioned a second lieutenant, AUS, on 20 December 1944 and promoted to first lieutenant, AUS, on 1 June 1945. On 26 February 1947 he was promoted to Captain. He is on extended active duty until 30 September 1951 (Category III). His adjectival efficiency ratings for the period of his commissioned service include 15 ratings of Superior, 6 ratings of Excellent, and 3 not-rated.

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 violation of Article of War 95, and is authorized upon conviction of violations of Articles of War 69 and 85.

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

Charles J. Berkeley, J.A.G.C.

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

(146)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 336558

THE JUDICIAL COUNCIL

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

In the foregoing case of Captain Jessie C. Armstrong (O-2000185), 786lst Ordnance Medium Automotive Maintenance Company, upon the concurrence of The Judge Advocate General the sentence is confirmed but in view of the recommendation of the reviewing authority, the sentence is commuted to forfeiture of one hundred dollars ($100.00) pay per month for six months. As thus commuted, the sentence will be carried into execution.

E. M. Brannon, Brig Gen, JAGC
Chairman

Franklin P. Shaw, Brig Gen, JAGC

11 August 1949

Brigadier General J. L. Harbaugh, Jr. having acted as Staff Judge Advocate to the reviewing authority, took no part in the consideration and action in this case by The Judicial Council.

I concur in the foregoing action.

THOMAS H. GREEN
Major General
The Judge Advocate General

12 August 1949

(GCMO 54, 22 Aug 1949).

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

CSJAGI CM 336569

JUN 30 1949

U N I T E D S T A T E S v. Recruit CLINTON L. HARSHMAN (RA 19194552), Detachment of Patients, 9952 Technical Service Unit, Surgeon General's Office, Madigan General Hospital, Tacoma, Washington	2D INFANTRY DIVISION Trial by G. C. M., convened at Fort Lewis, Washington, 15 March 1949. Dishonorable discharge (suspended), total forfeitures and confinement for one (1) year. Disciplinary Barracks.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Recruit Clinton L. Harshman, Detachment of Patients, 9952 Technical Service Unit - Surgeon General's Office, Madigan General Hospital, did, at Madigan General Hospital, Tacoma, Washington, on or about 4 August 1948, desert the service of the United States, and did remain absent in desertion until he was apprehended at Tacoma, Washington, on or about 16 February 1949.

He pleaded not guilty to and was found guilty of the Charge and Specification and was sentenced to be dishonorable discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for one and one-half years. The reviewing authority approved the sentence but reduced the period of confinement to one year, ordered the sentence,

as thus modified, into execution but suspended the execution of the dishonorable discharge until the soldier's release from confinement and designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement. The results of trial were promulgated in General Court Martial Orders No. 78, Headquarters 2d Infantry Division, Fort Lewis, Washington, dated 6 May 1949.

3. The record of trial is legally sufficient to support the findings of guilty and legally sufficient to support the sentence in part. The only question for consideration is the legality of the sentence with respect to the effective date of the forfeiture.

4. The offense of which accused was found guilty was committed prior to 1 February 1949, but he was tried and sentenced after that date on 15 March 1949. Section 245, Public Law 759, 80th Congress, provides that all offenses committed and all penalties, forfeitures, fines or liabilities incurred prior to 1 February 1949 may be prosecuted, punished and enforced in the same manner and with the same effect as if the new law had not been passed. This provision, however, must be considered along with Article of War 16 as implemented and interpreted by Executive Order 10020 and the Manual for Courts-Martial, 1949.

Article of War 16 prohibits any punishment or penalties, other than confinement, during the time an accused is waiting trial and prior to sentence on charges against him. This prohibition is expressed in the Manual for Courts-Martial, 1949, in the words: "nor shall any accused prior to the order directing execution of the approved sentence, be made subject to any punishment or penalties other than confinement" (par. 115, MCM 1949). With respect to the effective date of forfeitures, it is stated in paragraph 116g, Manual for Courts-Martial, 1949, that "a forfeiture becomes legally effective on the date the sentence adjudging it is promulgated." Appendix 9, Manual for Courts-Martial, 1949, at Item 8, provides that the sentence to total forfeitures should read:

> "* * * to forfeit all pay and allowances <u>to become due</u> after the date of the order directing execution of the sentence, * * *." (Underscoring supplied).

Executive Order Number 10020 prescribes that the Manual for Courts-Martial, 1949, "shall be in full force and effect * * * on and after February 1, 1949, with respect to all court-martial processes taken on or after February 1, 1949 * * *."

The only reasonable interpretation of that part of the sentence adjudged against accused which reads "to forfeit all pay and allowances due or to become due" would effect a forfeiture of all pay and allowances due or to become due at the date the sentence was adjudged.

In view of the Article of War 16 and the provisions of the Executive Order and Manual for Courts-Martial cited above, even though the offense was committed prior to 1 February 1949, the court was authorized to impose a sentence with respect to forfeitures of only pay and allowances to become due after the date of the order promulgating the sentence. That part of the sentence adjudging forfeiture in excess thereof is clearly excessive and cannot be sustained.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence and confinement at hard labor for one year.

On Leave, J.A.G.C.

Frank C. Alfred, J.A.G.C.

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

(150)

JUL 19 1949

CSJAGI CM 336569 1st Ind

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

TO: Commanding General, 2d Infantry Division, Fort Lewis, Washington

1. In the case of Recruit Clinton L. Harshman (RA 19194552), Detachment of Patients, 9952 Technical Service Unit, Surgeon General's Office, Madigan General Hospital, Tacoma, Washington, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Specification and the Charge and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for one year. Under Article of War 50e this holding and my concurrence vacate so much of the sentence relating to forfeitures as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence.

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

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

(CM 336569)

2 Incls
1. R/T
2. Lft GCMO

THOMAS H. GREEN
Major General
The Judge Advocate General

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

CSJAGK - CM 336607

17 JUN 1949

U N I T E D S T A T E S	COMMAND AND GENERAL STAFF COLLEGE AND FORT LEAVENWORTH, KANSAS
v.	
Second Lieutenant ROBERT T. HOSICK (O-1329483), 50th Infantry) Scout Dog Platoon, Fort Lewis, Washington, attached Station Complement, Headquarters Station Complement, 5025 Area Service Unit, Fort Leavenworth, Kansas.	Trial by G.C.M., convened at Fort Leavenworth, Kansas, 5 May 1949. Dismissal, total forfeitures and confinement for four (4) years.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Second Lieutenant Robert T. Hosick, Infantry, Fiftieth Infantry Scout Dog Platoon, Fort Lewis, Washington, did, at Fort Lewis, Washington, on or about 16 August 1946, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Omaha, Nebraska, on or about 28 February 1949.

ADDITIONAL CHARGE I: Violation of the 58th Article of War.

Specification: In that Second Lieutenant Robert T. Hosick, Infantry, Station Complement, 5025 Area Service Unit, Fort Leavenworth, Kansas, did, at Fort Leavenworth, Kansas, on or about 21 March 1949, desert the service of the United States and did remain absent in desertion until he was apprehended at Denver, Colorado, on or about 8 April 1949.

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

Specification: In that Second Lieutenant Robert T. Hosick, Infantry, Station Complement, 5025 Area Service Unit, Fort Leavenworth, Kansas, having been restricted to the limits of Fort Leavenworth, Kansas, did, at Fort Leavenworth, Kansas, on or about 19 March 1949, break said restriction by going to Leavenworth, Kansas.

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

Specification 1: In that Second Lieutenant Robert T. Hosick, Infantry, Station Complement, 5025 Area Service Unit, Fort Leavenworth, Kansas, did, at St. Joseph, Missouri, on or about 23 March 1949, with intent to defraud, wrongfully and unlawfully make and utter to Frank's Market, a certain check in words and figures as follows, to wit:

Mar 23 1949
Army National Bank
Ft. Leavenworth, Kansas

PAY TO THE
ORDER OF Frank's Market $ 1.75

One Dollar & 75/100 - - - - - - - - - - - - - - - - DOLLARS

I hereby certify that I have sufficient funds
on deposit with this bank to pay this check
/s/ Robert T. Hosick Lt. Inf.
O-1329483

and by means thereof, did fraudulently obtain from Frank's Market, One Dollar and seventy-five cents ($1.75), he, the said Second Lieutenant Robert T. Hosick, then well knowing that he did not have, and not intending that he should have, any account with the Army National Bank for payment of said check.

Specification 2: Nolle prosequi by direction of the appointing authority.

Specifications 3, 4 and 5: These specifications vary materially from Specification 1 only with respect to the date of the offense, and the date, payee, and amount of the check, as follows:

Spec.	Date of Offense	Check	Payee	Amount
3	3/24/49	3/24/49	Y.M.C.A.	$10.00
4	3/31/49	3/31/49	Officers Club	15.00
5	4/7/49	4/7/49	V.F.W. Lowery Lowry Post Canteen	11.50

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

Specification: In that Second Lieutenant Robert T. Hosick, Infantry, Station Complement, 5025 Area Service Unit, Fort Leavenworth, Kansas, did, at Fort Leavenworth, Kansas, on or about 19 March 1949, feloniously steal four Turf Rider golf clubs, value about $36.00, the property of the Fort Leavenworth Golf Club.

He pleaded guilty to the specifications of the Charge and of Additional Charge I, except the words "desert" and "in desertion," substituting therefor, respectively, the words "absent without leave from" and "without leave", of the excepted words, not guilty, of the substituted words, guilty; to the Charge and to Additional Charge I, not guilty of violations of Article of War 58, but guilty of violations of Article of War 61; not guilty to the specifications of Additional ChargesII and IV and to Additional Charges II and IV; and he remained mute as to Additional Charge III and its specifications. He was found guilty of all of the specifications and charges. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority might direct for four years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

The evidence in this case is not in dispute. On 16 August 1946 the accused, then assigned to the 50th Infantry Scout Dog Platoon, Fort Lewis, Washington, feeling that he was not being treated fairly by his superior officers, went absent without leave. He thereafter wore civilian clothes and worked at various civilian jobs. More than thirty months later, on 28 February 1949, he surrendered himself to the military authorities at Omaha, Nebraska. He was then taken to Fort Leavenworth, Kansas (R 61-62; Pros Exs 1, 2 and 3).

On 1 March 1949 the accused was formally restricted to the limits of Fort Leavenworth (R 16,18; Pros Ex 7). He was later assigned to "help out" at the Golf Shop on the post. On 18 March 1949 the accused, without paying for them, took a set of four Wilson "Turf Rider" golf clubs from the Golf Shop. On the following day, 19 March 1949, while the restriction was still in effect, he went to the town of Leavenworth, beyond the limits of the military reservation, where he pawned the golf clubs for $20. These clubs had a wholesale price of $36 and a retail price of $53 (R 18, 36-38,42, 44-45 Pros Exs 8 and 15).

On 21 March 1949 the accused again left the military reservation. On

23 March 1949 he made and uttered a check in the amount of $1.75 drawn on the Army National Bank, Fort Leavenworth, Kansas, and payable to the order of "Frank's Market." This check was signed by the accused in the presence of Mr. Frank Datillo, the owner of the market, in St. Joseph, Missouri, and was given as payment for groceries. It was returned by the bank marked "Cannot locate account." Mr. Datillo has not been reimbursed the amount of the check (R 21-22,25; Pros Exs 4, 9 and 15).

On 24 March 1949 the accused made and uttered a check in the amount of $10 drawn on the Army National Bank and payable to the order of "Y.M.C.A." This check was signed by the accused in the presence of the secretary of the Y.M.C.A. in St. Joseph, Missouri, who gave him $10 in cash. The check was first returned by the bank marked "Cannot locate account" and was later returned marked "No Account." The Y.M.C.A. reimbursed its bank and has not been repaid (R 23-24, Pros Exs 10 and 15).

On 31 March 1949 a check in the amount of $15 drawn on the Army National Bank, payable to the order of "Officers Club," and bearing the signature "Robert T. Hosick, Lt. Inf., O-1329483," was presented to and cashed by the hostess of the Officers' Club of the Fitzsimons General Hospital, Denver, Colorado. It was later returned by the bank marked "No account" and the club reimbursed its bank (Pros Exs 11,13 and 15).

On 7 April 1949 a check in the amount of $11.50 drawn on the Army National Bank, payable to the order of "V.F.W. Lowery," and bearing the signature "Robert T. Hosick, Lt. Inf., O-1329483, Ft. Leavenworth, Kansas," was presented to and cashed by the club manager of V.F.W. Post 510, Denver, Colorado. It was later returned by the bank marked "No account" and the post reimbursed its bank (Pros Exs 12, 14 and 15).

On 8 April 1949 the accused was apprehended by the civilian police in Denver, approximately 660 miles from Fort Leavenworth, and was returned to the Fort where he was confined to the Post Guardhouse (Pros Exs 5 and 6).

The accused did not have and had never had an account in the Army National Bank, Fort Leavenworth, Kansas (R 25).

It having been shown that a pre-trial confession made by the accused was voluntary, the same was received in evidence (R 58, Pros Ex 15). In his confession the accused admitted taking the set of golf clubs from the Golf Shop and pawning them; admitted going to the town of Leavenworth on 19 March 1949; admitted leaving the post on 21 March 1949 and staying away until he was arrested by two civilian policemen in Denver, Colorado, on 8 April 1949; and admitted that he had "cashed" a "bad" check for $1.75 at a grocery store in St. Joseph, Missouri, one for $10 at the

Y.M.C.A. in St. Joseph, one for $15 at the Fitzsimons General Hospital, Denver, Colorado, and one for $11.50 at the V.F.W. Lowery Post.

4. Discussion

The Charge and its Specification

The absence without leave for the period alleged is conclusively established by the accused's plea of guilty to such absence and competent and relevant evidence introduced by the prosecution. The circumstances of his departure from his organization, his absence without leave for a period in excess of two and one-half years, and the fact that during that period he wore civilian clothes and worked at numerous civilian jobs, constituted facts sufficient to warrant the court in finding an intent to desert despite his testimony that he had merely intended to visit his home and then return but that he was later "afraid to come back." The evidence established all of the elements of desertion (MCM, 1928, par 130a; MCM, 1949, par 146a; CM 282723, Garvey, 55 BR 1, 7; CM 286579, Pfeiffer, 56 BR 265, 268; CM 316657, Sheldon, 65 BR 369,370).

Additional Charge I and its Specification

The second charge of desertion was likewise established. While a charge of violation of Article of War 58 was pending against him, and while he was, for this reason, restricted to the limits of Fort Leavenworth, the accused took a set of golf clubs from the Post Golf Shop, pawned them, and again went absent without leave, remaining in that status for 18 days until he was apprehended by the civilian police in Denver, Colorado, a distance of about 660 miles from Fort Leavenworth, financing himself meanwhile by making and uttering a number of checks on a bank with which he had no account. The foregoing facts warranted the court in finding an intent to desert (CM 326004, Shelby, 75 BR 111,114; CM 261405, Bailey, 40 BR 229,232; CM 274989, Smith, 47 BR 393,399; CM 274990, Baxley, 48 BR 1, 7; CM 312092, Currey, 61 BR 363,375; CM 280124, Payne, 53 BR 73,84).

Additional Charge II and its Specification

On 1 March 1949 the accused was placed in restriction to the limits of Fort Leavenworth, Kansas, by competent authority (MCM, 1949, par 19b). The notice of restriction was embodied in a formal communication (Pros Ex 7), the contents of which were read to the accused (R 17). While the restriction was still in effect he went to the town of Leavenworth, which was beyond the limits of the restriction. The evidence clearly established (1) that the accused was placed in restriction by competent authority; (2) that he was informed of the restriction; and (3) that he breached the restriction by going beyond the limits thereof. The offense charged was fully proven.

Additional Charge III and its Specifications

Four separate violations of Article of War 95 are charged, it being alleged that the accused did, with intent to defraud, wrongfully and unlawfully make and utter certain checks drawn on the Army National Bank, "then well knowing that he did not have, and not intending that he should have, any account" with that bank.

There is no dispute that the accused did not have an account in the Army National Bank. All of the elements of the offenses set forth in Specifications 1 and 3 of Additional Charge III were fully established by the testimony of witnesses who appeared at the trial. The evidence concerning the offenses alleged in Specifications 4 and 5 of this Charge was, in part, presented through the medium of depositions by witnesses who did not know the accused and were not able to identify him as being the person who, "representing himself to be Lieutenant Robert T. Hosick, O-1329483," cashed the described checks (Pros Exs 13 and 14). However, these checks were in evidence (Pros Exs 11 and 12), together with proven or admitted signatures (Pros Exs 9, 10 and 15), and the court had the right to make its own comparison of the latter with the signatures appearing on the two disputed checks and to conclude as a fact that the accused signed each of them (MCM, 1949, par 129b; CM 324725, Blakeley, 73 BR 307, 324; CM 320478, Vance, 71 BR 415,430; CM 202601, Sperti, 6 BR 171,239). Moreover, in his confession (Pros Ex 15) the accused specifically admitted making and uttering all of these checks which he characterized, in each instance, as "bad." Under the circumstances the existence of an intent to defraud is clear. The findings of guilty of this charge and its four specifications is, therefore, fully supported by the evidence (MCM, 1949, par 182; CM 294832, Lewis, 57 BR 405,408).

Additional Charge IV and its Specification

While Sergeant Canausa, the manager of the Golf Shop, could not positively identify the four golf clubs which had been pawned by the accused and which were exhibited to him at the trial (Pros Ex 8) as being the property of the Shop, the circumstantial evidence to that effect is overwhelming. Wilson "Turf Rider" golf clubs are only sold in professional shops, not in commercial stores; the Golf Shop carried this type of club; it had had three sets and one set was unaccountably missing; the accused had had access to the clubs; and he had pawned a set in a box which contained code markings placed thereon by Sergeant Canausa to indicate the cost and selling prices. The court was fully warranted in arriving at the conclusion that the clubs pawned by the accused and produced on the trial were those missing from the Golf Shop; and this conclusion is substantiated by accused's confession. The pawning of the golf clubs by the accused, followed shortly thereafter by his unauthorized departure under circumstances

which we have held to constitute desertion, was sufficient evidence of an "intent to deprive the owner permanently of his property therein" (MCM, 1949, par 180g). All of the elements of larceny in violation of Article of War 93 were established.

5. Department of the Army records disclose that accused is 25 years old and has had some high school education. He is divorced. He enlisted in the Army on 7 December 1942 at the age of 18 years and 7 months and attained the grade of staff sergeant. He completed Officer Candidate School at The Infantry School and was commissioned a second lieutenant on 23 December 1944. He has one efficiency rating of "Excellent" and one of "Very Satisfactory."

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 58, 93 or 96.

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

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

Roger Ter Vrieze, J.A.G.C.

(158)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

M 336,607

THE JUDICIAL COUNCIL

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

In the foregoing case of Second Lieutenant Robert T. Hosick (O-1329483), 50th Infantry Scout Dog Platoon, Fort Lewis, Washington, attached Station Complement, Headquarters Station Complement, 5025 Area Service Unit, Fort Leavenworth, Kansas, with the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

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

21 July 1949

E. M. Brannon, Brig Gen, JAGC
Chairman

I concur in the foregoing action.

THOMAS H. GREEN
Major General
The Judge Advocate General

25 July 1949

(GCMO 49, 3 Aug 1949).

Incl #1

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

AUG 3 1949

CSJAGH CM 336639

U N I T E D S T A T E S	)	MARIANAS-BONINS COMMAND
	)	
v.	)	Trial by G.C.M., convened at
	)	Guam, Marianas Islands, 18,
First Lieutenant ROBERT B.	)	19 April 1949. Dismissal and
COLE, JR., 0-495584, 226th	)	total forfeitures.
Military Police Company (Type	)	
A), APO 246.	)	

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

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

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

CHARGE I: Violation of the 93rd Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty).

CHARGE II: Violation of the 96th Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty).

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

Specification 1: In that First Lieutenant Robert B. Cole, Jr., 226th Military Police Company (Type A), did, at Guam, Marianas Islands, on or about 5 December 1948, feloniously steal one Zenith Radio, table model, value about $68.50, the property of the Marianas-Bonins Command Central Exchange.

Specification 2: (Same as Specification 1, except the date, "7 December 1948," and the property stolen, "currency of the United States in the sum of $40.00.")

Incl #3

Specification 3: (Same as Specification 1, except the date, "27 December 1948," and the property stolen, "one 35 millimeter Clarus Camera, value about $95.00")

Specification 4: (Same as Specification 1, except the date, "12 January 1949," and the property stolen, "one Revere Motion Picture Camera, value about $73.00.")

Specification 5: (Same as Specification 1, except the dates "between about 13 January 1949 and 28 January 1949," and the property stolen, "one Bulova wristwatch, value about $26.75 and two LeCoultre wristwatches, each of a value of about $47.00, total value about $120.75.")

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

Specification 1: In that First Lieutenant Robert B. Cole, Jr., 226th Military Police Company (Type A), did, at Guam, Marianas Islands, on or about 10 December 1948, wrongfully borrow the sum of $40.00 from Private Earl R. Harrington, an enlisted man of his organization.

Specification 2: (Same as Specification 1, except the date "5 February 1949," and the sum borrowed, "$20.00.")

Specification 3: In that First Lieutenant Robert B. Cole, Jr., 226th Military Police Company (Type A), did, at Guam, Marianas Islands, on or about 29 January 1949, wrongfully conspire with Private John L. Williams to conceal a shortage in the accounts of Branch Exchange Number 10, Marianas-Bonins Command, by causing a Bulova wristwatch belonging to Private William W. Gruennberg to be placed with the property of the said Branch Exchange Number 10 at the time such property was being inventoried.

He pleaded guilty to Specifications 1 and 2 of Additional Charge II, and Additional Charge II, and not guilty to all other Specifications and Charges. He was found not guilty of Charges I and II and the Specifications thereunder; guilty of Additional Charge I only in so far as it involves a violation of Article of War 96, and guilty of its Specifications except the words "feloniously steal" in each Specification substituting therefor the words "wrongfully with the intent to deprive the owner temporarily of his property and without consent of the owner take and use"; and guilty of Additional Charge II and the 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, but recommended that the dismissal be suspended during good behavior and that the total forfeitures be mitigated to partial forfeiture, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the prosecution.

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

During December 1948 and January 1949 accused was a member of the Marianas-Bonins Command Provost Marshal and Stockade Detachment located at Guam and was administrative officer of the detachment (R 9). A post exchange designated as Post Exchange #10, a branch of the Marbo Central Exchange, was maintained at the stockade (R 31,54). At the times the offenses set forth in the Specifications of Additional Charge I were alleged to have been committed, accused was "PX Officer" of Exchange #10, Private John L. Williams was the manager, and Private First Class Earl R. Harrington was employed in the said Exchange (R 31,46). Williams identified a 35 millimeter Clarus camera (Pros Ex 2 for identification, Pros Ex 7), two 17 jewel LeCoultre wristwatches (Pros Exs 4 and 5 for identification, Pros Exs 8 and 9), a Revere Motion Picture Camera (Pros Ex 3 for identification, Pros Ex 10), a 21 jewel Bulova wristwatch (Pros Ex 7 for identification, Pros Ex 11), and a Zenith Radio, table model (Pros Ex 6 for identification, Pros Ex 12), as items of post exchange property which had been removed from the exchange by accused. Sometime in the month of December, accused was observed by Williams taking forty dollars out of the cash register in the Exchange (R 45,52). A few days later, accused borrowed $40.00 from Harrington and used it to replace the money he had taken from the register (R 52). Accused had taken the Zenith radio from the PX in December, returned it just prior to the December inventory, and took it again after the inventory was completed. Williams subsequently recovered the radio from accused's quarters on 5 February. At the time, Williams observed that the radio was plugged in (R 37,38). Warrant Officer (JG) Thomas E. McGuire, who was accused's roommate in the period extending from December through February, testified that during that period there was a Zenith radio in the quarters which he shared with accused, and that the radio was used by both him and accused. Accused had told McGuire that he had purchased the radio (R 50).

The Clarus camera was likewise removed by accused in December and January and returned for inventory (R 34). The Bulova watch was taken

by accused either in December or in January (R 35,36). The Revere camera was taken by accused in January, as were two LeCoultre watches. The second LeCoultre watch taken was brought to accused by Williams. At that time, the first LeCoultre watch was returned by accused and he told Williams that the crystal had come out of the watch (R 35-37). On occasion, Williams had told accused that he did not believe accused should take property from the exchange, to which the latter would rejoin that "It was his PX and he could do with the merchandise as he pleased." (R 40). Accused's takings were, however, open and he would state that he was trying to find a buyer (R 42). All the articles taken by accused were returned to the "PX" by 6 February.

A shortage existed in the Exchange which was discovered during the January inventory. Williams was informed of the shortage and he in turn notified accused. Williams and accused rechecked their figures and found part of the shortage, but not all of it. Williams suggested to accused that the only thing that could be done would be to replace the value of what was gone. Williams testified that accused told him to secure Private Gruennberg's watch and place it in the inventory (R 34,43,48). Williams secured the watch from Gruennberg, to whom he had previously sold it, and entered it in the inventory. Williams admitted that in pretrial statements made by him on 7 and 9 February he had not mentioned accused's instructions to him with reference to Gruennberg's watch. Harrington was aware that Williams had placed Gruennberg's watch on the inventory sheet, but had not been told that this was done on accused's instructions. Harrington identified Prosecution Exhibit 8 for identification as the January inventory and testified that the entry:

"Stock No.	Description
* * *	* * *
4512	Watch men, Bulova"

appearing thereon, represented Gruennberg's watch (R 48). Lieutenant Robert McGregor Hunter identified the signatures R. M. Hunter appearing upon Prosecution Exhibit 8 for identification as his and testified that the articles listed on the inventory were physically present at the time of the inventory. The inventory was admitted in evidence (R 53; Pros Ex 8 for identification; Pros Ex 2).

On 5 February accused borrowed $20.00 from Harrington (R 47). This sum and the $40.00 borrowed by accused from Harrington in December were repaid (R 51).

It was stipulated that the articles mentioned in the Specifications of Additional Charge I were of the value and ownership alleged (R 66; Pros Ex 13).

Accused was interviewed on 5 and 7 February by Freeman B. Mariner, Agent, 38th CID, and First Lieutenant Charles S. Strickland, and on 7 March by Mariner. On each occasion accused made a statement after being advised of his rights under Article of War 24. None of the statements was induced by force or promises. The statements were introduced in evidence as Prosecution Exhibits 4, 5 and 6. The defense objected to the admission of Prosecution Exhibit 6 on the ground that it was cumulative evidence (R 59-61).

In these statements accused admitted taking money as well as merchandise from the Post Exchange. He asserted that he was PX officer from some time in October 1948 to 5 February 1949 (Pros Ex 6). On either 6 or 7 December 1948 he "borrowed" $40.00 from the PX to pay a debt to a friend who was leaving the island. He repaid this amount two or three days later by borrowing $40.00 from Harrington. On 27 December 1948, accused removed a Clarus .35 millimeter camera and on 11 or 12 January 1949 he took out a Revere moving picture camera. He returned both cameras just before the inventory of 23 January. Between 13 or 14 January and 28 January he took three watches from the Post Exchange. The first watch he took out was a Bulova, which he kept out for three or four days. He exchanged it for a LeCoultre watch and, as its crystal came out, he had Williams bring him another LeCoultre in its place; the latter watch was returned on or about 28 January 1949. Accused admitted taking out the Zenith radio about 19 January. He stated that he returned it for the January inventory and then took it out again, retaining it until 5 February.

With reference to the incident of the substituted watch, in the statement of 5 February, he stated:

> "* * When we finished the Jan inventory it came back that we were I believe $190.00 short I went down and rechecked the figures, I thought that we had found it & then Williams came back and told me that we had put a figure down wrong. I think I recall telling him that well try & find out the shortage. I believe the next day he came & told me that the inventory was ok then he mention using Gruenberg watch, well I knew then that it would still have to be made up so I was going to make it up after Payday. I do not believe to the best of my knowledge that I gave him permission to cover any inventory that way." (Pros Ex 4).

In his interrogation of 7 February he gave the following version of the incident:

> "9. Q. Were you aware that Gruenbergs watch had been inventoried to cover a shortage in Jan 1949?

A. I found out, The day after the Jan inventory when Williams came down and told me * * that he had used Gruenbergs watch on the inventory.

10. Q. Had you ever given permission to Williams to cover this shortage in that manner?
A. No, not that I can recall. I think I told him to check again to see where the shortage was at." (Page 2, Pros Ex 6)

4. Evidence for the defense.

After being apprised of his rights to testify, remain silent, or make an unsworn statement, accused through counsel, made the following unsworn statement:

"DEFENSE: Lt. Cole is a graduate of Massanutten Military Academy of Woodstock, Virginia. He entered the Army in June 1942, went overseas with the 34th Infantry in the first part of 1943, and he was wounded in Africa. He was wounded while with that unit in Italy and again in France. He is married and he is the holder of the Silver Star and the Bronze Star, and he comes from an Army family. He is 26 years old and is married." (R 70)

5. The uncontradicted evidence and the extrajudicial statements of accused amply support the findings of the court attained by exceptions and substitutions that accused did "wrongfully with the intent to deprive the owner temporarily of his property and without consent of the owner take and use" articles and money of the value and ownership alleged, in the Specifications of Additional Charge I, and that accused's takings of the described articles and money were accomplished at the times and place as the thefts alleged in the same Specifications. Had accused been arraigned upon the offenses found, no doubt could be entertained as to the legal sufficiency of the findings of guilty under consideration. Arraignment was had, however, upon several Specifications each of which alleged that accused did "feloniously steal." It follows that we are required in the instant case to determine whether these offenses found were lesser included in the offenses charged. In deciding a similar question, the Board of Review has recently stated in CM 335726, Leach (May 1949):

"In the findings in any given case one or more words or figures alleged may be excepted and, where necessary, others substituted, provided the facts as so found constitute an offense by an accused which is punishable by the court, and provided that such action does not change the nature or identity

of any offense charged * * *.' (Par 78c, MCM 1949, p.77). The offense found is of the same nature or identity of the offense charged if it is necessarily included in the offense charged. The test for determining if the offense found is necessarily included in that charged is set forth in Paragraph 78c, MCM 1949, p.77, as follows: '* * it is included only if it was necessary in proving the offense charged to prove all the elements of the offense found.' The test thus enunciated is definitive of the test as it existed prior to the promulgation of the Manual for Courts-Martial 1949 (CM 330750, Pilgrim, 1st Indorsement, 79 BR 163,166; CM 316917, Morrison, 1st Indorsement, 66 BR 111,115; 6 Bull JAG 12; CM 334409, Hunt)." (Underscoring supplied)

The offense of larceny, or stealing, upon which the accused herein has been arraigned, is defined in Paragraph 180g, MCM 1949, 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." The elements of proof of the offense of larceny 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." (Par 180g, MCM 1949)

When the above test for determining if the offense found is necessarily included in the offense charged is applied to the elements of proof outlined it is clear that proof of wrongful taking and using is not necessary to prove the offense of larceny. "Unlawful appropriation may be by trespass /larceny/ or by conversion through breach of trust or bailment /embezzlement/." (Par 180g, MCM 1949). Although this statement does not exhaust the methods by which an unlawful appropriation may be accomplished, it is considered highly significant in view of the language used by the Board of Review in CM 324805, Gatchalian, 73 BR 373, in discussing the offenses of misappropriation and misapplication:

"It may thus be concluded from the opinions cited /CM 243287, Poole, 27 BR 321; CM 318499, White, 67 BR 331/ that either the offense of misappropriation or that of misapplication

may be committed by acts which are in no way connected with taking by trespass, and where the taking of the property was rightful or wrongful, or where there is no taking at all."

In the Gatchalian case, supra, the Board of Review held that the offense of wrongfully taking and carrying away was not lesser or included in the offense of misapplication.

More pertinent to the instant case is the holding of the Board of Review in CM 331611, Bejino, 80 BR 101, that the offense of wrongfully taking and using is not lesser included within the offense of misappropriation. We find it extremely difficult to distinguish the offense of misappropriation of personal property from that of larceny as defined in the Manual for Courts-Martial 1949. Excluding for the moment the element of felonious intent to deprive the owner permanently of his property, we find no substantial difference between misappropriation of personal property and larceny as thus defined. In neither offense is it necessary to establish, or show in well defined terms, the manner of an accused's acquisition of the property. We feel the same may be said of wrongful appropriation which is substantially synonymous with misappropriation of personal property (CM 243287, Poole, 27 BR 321). Thus, it would seem tenable only to conclude that if wrongful taking and using is not lesser and included in misappropriation (CM 331611, Bejino, supra), or wrongful appropriation (CM 243287, Poole, supra), it would not be lesser and included in the offense of larceny, as presently defined.

Passing next to the issue of whether accused was fairly apprised of the offenses of which he was found guilty under the specifications of Additional Charge I, we may well concede that he was from a subjective point of view. The determination of whether an accused person has been fairly apprised of an offense of which he has been found guilty must be made objectively, however, and we presume that the reason for the inclusion of the test for lesser and included offenses in the Manual for Courts-Martial 1949 is to remove the determination from the realm of subjective speculation. In the application of the test for determining lesser and included offenses we are thus impelled to the conclusion that the offenses under consideration are not lesser and included within the offense charged.

Making reference to a collateral matter, it is suggested that the phrase "wrongfully take and use" is synonomous with the phrase "wrongfully appropriate"; that every unlawful appropriation is accomplished or accompanied by a wrongful taking or taking and using. Assuming, but not conceding, that by exhausting the science of lexicography such

a result might be attained, we find that we are precluded from assigning to the phrase "wrongfully take and use" any meanings foreign to that historically assigned in military law. The offense of "wrongfully taking and using" is an offense recognized in our system of military jurisprudence and presently, pursuant to Article of War 45, is prescribed in paragraph 117c (p.142), MCM 1949. Under these circumstances we find that we are bound by the rule enunciated in United States v. Patton, 120 F2d 73,75. Speaking of the offense of larceny, the court therein stated:

> "It is, however, well settled that when a Federal statute uses a term known to the common law to designate a common law offense and does not define that term, courts called upon to construe it should apply the common law meaning." (See also United States v. Brandenberg, 144 F2d 656).

While the offense of wrongfully taking and using is undefined in the Articles of War and in the Manual for Courts-Martial, 1949, it has been authoritatively defined prior to 1 February 1949 as follows: "The offense in question, [wrongful taking and using] in its most serious aspect, contains all elements of the offense of larceny except the intent permanently to deprive the owner of his property." (Ltr, JAGO; subject: Charge of "Joyriding," 23 December 1947). The letter cited has the force of law (CM 326039, McCarthy, 1st Ind, 75 BR 133,144).

Similarly, the elements of the offense of wrongfully taking and using have acquired judicial definitions, inconsistent with the suggested meanings. Thus, in CM 318380, Yabusaki, 67 BR 265,276, it was held that a specification averring that accused did, by trickery, take and carry away, alleged larceny, i.e., the taking and carrying away by trespass. Comparable thereto, we find that in the Patton case, supra, the court in construing the language "or whoever shall take and carry away, with intent to steal and purloin," alleging a violation of the bank robbery act stated: "It seems to be conceded that to take and carry away from a bank property belonging to it with intent to steal and purloin the same, as charged in the third count, is the equivalent of committing larceny in the bank." With reference to the element of "use" contained in the findings, wrongful use has been held to be predicated upon a wrongful physical possession (CM 316917, Morrison, 66 BR 111,114), and is to be distinguished from the phrase, "to his own use" which "* * is nothing but a carry over from common-law pleading in trover, and means no more than that the convertor deprived the rightful owner of his property" (Hubbard v. United States, 79 F2d 850,854). While the last mentioned might conceivably be considered as a concomitant expletive of appropriation, it is not synonomous with the word "use." Accordingly,

we are unable to find that proof of physical use is necessary to the proof of larceny as now defined.

Even if we were not faced with the obstacle poised by the Patton and Brandenberg cases, we would nevertheless be unable to attain a different conclusion. Assuming that in addition to the meanings attached to the phrase "take and use" as a phrase of art, we may also ascribe to it the various meanings found in the dictionaries, and further assuming that in some senses the phrase is synonomous with the word appropriate, we find that we are precluded from resorting to the proof in order to determine the meaning of which the court may have intended to find the accused guilty (CM 323728, Wester, 72 BR 383,384; CM 330750, Pilgrim, 79 BR 163,165). Since we are not able to state with certainty whether the court meant a taking and using analogous to common-law larceny, or a taking and using in an extra legal sense, and since in the former sense wrongful taking and using is clearly not lesser and included in the offense charged, we are unable to change our conclusion hereinbefore attained. "It is not within the power of the court * * * to find an accused guilty of an offense which is any way open to an interpretation that it may decry acts with which he was not confronted upon his arraignment (MCM 1928, Par 78c)" (CM 323728, Wester, supra).

In view of our conclusion that the record of trial does not support the findings of guilty of Additional Charge I and its Specifications, we find it unnecessary to discuss the legal effect of charging accused with larceny as presently defined for acts committed prior to 1 February 1949.

The evidence introduced by the prosecution and accused's pleas of guilty conclusively show that accused borrowed money from Harrington, an enlisted man of his organization, on two occasions as alleged in Specifications 1 and 2 of Additional Charge II. The borrowing of money by an officer from an enlisted man under the circumstances shown constitutes conduct to the prejudice of good order and military discipline and is violative of the 96th Article of War (CM 334905, Johnson (April 1949)).

Finally, accused was found guilty of wrongfully conspiring with Williams to conceal a shortage in the accounts of Exchange Number 10, by causing a watch belonging to another to be placed with the exchange property during the inventory thereof.

We are of the opinion that the offense alleged is that of common law conspiracy, since the specification does not properly allege the commission of an overt act (CM 330224, McGuire, 78 BR 309,311). Common law conspiracy to commit an unlawful offense not violative of the 94th

Article of War is violative of the 96th Article of War (CM 328248, Richardson, 77 BR 1). A conspiracy is the corrupt agreeing together of two or more persons to do by concerted action something unlawful either as a means or an end (Bishop) (Par 150c, MCM 1928; Par 181j, MCM 1949). The instant conspiracy was essentially an agreement to lend property to the exchange during the inventory of exchange assets, thus concealing a shortage in the exchange. In McGuire, supra, the Board of Review commented as follows on an almost identical agreement:

> "We think such a conspiracy to have been unlawful in that the object thereof was prejudicial to good order and military discipline. The object had a tendency to shield mismanagement if not criminal conduct in the operation of the exchange. It matters not whether the shortage had been caused by the criminal conduct or willful neglect of any of the participants in the conspiracy. The evil of the device or ruse lay in the fact that it concealed from the authorities charged with supervisory duties over the exchange the true status of its accounts."

We conclude that the conspiracy here charged is similarly unlawful.

The evidence shows that in the course of the inventory of the branch exchange on 23 January 1949, a shortage became apparent and notice thereof was transmitted to Williams, the exchange manager, and by him to accused. Williams and accused located part of the shortage, but not all. Williams, thereupon, suggested placing something in the inventory of the value of the amount of the shortage. Accused instructed him to secure a watch which had been previously sold to one Gruennberg and place it in the inventory. Williams acted pursuant to accused's instructions and Gruennberg's watch was included in the inventory.

This evidence of the corrupt agreement alleged is uncontradicted save for the equivocal denials of memory thereof contained in accused's pretrial statements, and sustains the allegations of the specification under consideration.

6. Department of the Army records show that accused is 27 years of age and married. He was graduated from Massanuten Military Academy in 1942 and was commissioned second lieutenant, Infantry Reserve, on 23 September 1942. He was promoted to first lieutenant 29 December 1945. He had foreign service in the Mediterranean and European Theaters of Operation from April 1943 until 29 December 1947. He served in the Pacific during 1948 and 1949. He is entitled to wear the EAME Ribbon with three bronze stars, the American Theater Ribbon and the World War II Victory Medal, and the Occupation Ribbon. Accused's Form 66-1 shows

the following entries:

"Atzd Purple Heart w/2 OLC Per Cert. Dtd 30 Nov 46 See 201 File; Awarded Silver Star & Bnz Star Medal."

Verification of these five decorations has not been found in Department of the Army records. Accused's efficiency ratings are as follows: Superior (2); Excellent (5); and Very Satisfactory (7).

7. The court was legally constituted and had jurisdiction of the person and the offenses. Except as hereinbefore noted no errors injuriously affecting the substantial rights of accused were committed during trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Additional Charge I and its Specifications, legally sufficient to support the other findings of guilty and the sentence, and to warrant confirmation of the sentence. A sentence 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 is authorized upon conviction of violations of Article of War 96.

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

(Dissent), J.A.G.C.

, J.A.G.C.

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

AUG 3 1949

CSJAGH CM 336639

U N I T E D S T A T E S	)	MARIANAS-BONINS COMMAND
	)	
v.	)	Trial by G.C.M., convened at Guam, Marianas Islands, 18, 19 April 1949. Dismissal and total forfeitures.
	)	
First Lieutenant ROBERT B. COLE, JR., O-495584, 226th Military Police Company (Type A), APO 246.	)	

DISSENTING OPINION BY
BERKOWITZ
Officer of The Judge Advocate General's Corps

I dissent from so much of the opinion of the majority of the Board of Review as holds that the court's findings of guilty, by exceptions and substitutions of each of the specifications of Additional Charge I, were illegal because the offenses found were not necessarily lesser and included in the offenses charged.

To reach its published result, the majority of the Board of Review necessarily had to assume as the major premise of its legal rationale, that the term "take," contained in the findings deemed by them to be unsustainable, was susceptible to no other interpretation than that of "taking by trespass," its definition at common law.

While it is true that the word "take" when employed in an allegation charging common law larceny is interpreted to mean a taking by trespass and that the word formerly enjoyed identical definition with respect to the military offense of larceny, nevertheless, it is my opinion that application of the limited and restricted meaning to the offenses being considered is not authorized or warranted under the circumstances of this case.

In studying the legal problem posed, it must be borne in mind that accused was not charged with offenses alleging larceny as it was defined in MCM 1928 (Par 149g), and at common law, but he was charged with five offenses of "feloniously stealing" under the amended 93rd Article of War (10 USCA 1565; 62 Stat 640). This article differs from its predecessor

Apel. #4

in that embezzlement is omitted as a cognizable military offense, but it is therein provided "that any person subject to military law who commits larceny or embezzlement shall be guilty of larceny within the meaning of this article."

From an examination of the authoritative and binding definition of this offense and the necessary elements of proof prescribed therefor contained in Manual for Courts-Martial 1949 (Par 180g), it can be seen that a new military offense has been legislatively created by the merger of the common law offenses of larceny and embezzlement into a single offense. It is an offense previously unknown to either the common law or military jurisprudence and consequently is without former definition to restrict and limit its meaning. The obvious purpose of its enactment was to abolish former existing distinctions between larceny and embezzlement and to eliminate the possibility that an accused charged with either larceny or embezzlement might escape conviction of the offense charged by proof that he had committed the other (Crabb v. Zerbst, 99 F2d 562,563,565). No longer is an evidentiary showing of a felonious trespassory taking an indispensable and necessary element of proof of the offense for an accused may as well be found guilty if competent proof is tendered showing that the appropriation was by a felonious fraudulent conversion to his own use after trust or bailment.

Turning then to the question presented in the instant case, I conclude that there is no legal basis or justifiable reason to hold that the substitutions by the court in the Specifications of Additional Charge I of the words "wrongfully take and use" for the words "feloniously steal" did not constitute proper findings by exception and substitution of lesser and included offenses of those charged.

My view is that definitions of terms as understood at common law and adopted in military law with reference to the crimes of larceny and embezzlement are not to be applied in their restrictive and limiting sense to the offense of "feloniously steal" currently recognized as a military offense. Such action would be arbitrary and unreasonable. To the contrary, I am of the opinion that the new military offense of larceny or stealing, having been unknown or undefined at common law, must be regarded only in the light of the definition assigned to it by Manual for Courts-Martial 1949. Since this definition characterizes the offense as an "unlawful appropriation" and may be proved by showing that the appropriation was either by trespass or by conversion through breach of trust or bailment, and since common law definitions of terms respecting larceny and embezzlement are not applicable to the offense, it follows that findings of the court expressed in language spelling out a wrongful appropriation even if the term "take" is included by substitution, are findings of a lesser and included offense.

"Wrongfully take and use" is synonomous with "wrongful appropriation" when each word is regarded to mean what it does in everyday, common usage. Thus it has been said that "appropriate" in its common acceptation means:

> "It is defined by lexicographers 'to take to oneself in exclusion of others.' As used in this statute it embraces every mode by which an officer or agent fraudulently or unlawfully obtains the property of the corporation." (Commonwealth v. Dow (Mass), 105 NE 995,997) (Underscoring supplied)

and

> "* * * to deprive or take away from one to whom the chattel belongs, and to devote it to the exclusive use and benefit of one who appropriates it." (Davis v. Perkins (Ga) 172 SE 563,565)

For the reasons above stated, I conclude that the court's findings with respect to each Specification of Additional Charge I of "Guilty, except the words 'feloniously steal', and substituting therefor respectively the words 'wrongfully with the intent to deprive the owner temporarily of his property and without consent of the owner take and use.' Of the excepted words, Not Guilty, of the substituted words Guilty." was in the applicable nontechnical connotation of the substituted words, a finding of guilty of wrongful appropriation, an offense necessarily lesser and included in each of the offenses charged. To hold otherwise would defeat the ends of justice and stultify the recognized test for lesser and included offenses.

It is noted that each Specification of Additional Charge I alleges an offense committed prior to 1 February 1949, the effective date of the amended 93rd Article of War and Manual for Courts-Martial 1949. This circumstance raises the question whether the amendment of the 93rd Article of War affects the instant case in such a manner so as to make it an ex post facto law. My opinion is that it does not. A statement of law contained in People v. Stevenson (Cal), 284 Pacific Reporter 487,489, a case dealing with a statute that merged the offenses of larceny, embezzlement, and obtaining money by false pretenses into a single offense of theft, is cited below as pertinent, applicable and dispositive of the situation presented:

> "* * * The law as amended does not 'make an action, done before the passing of the law and which was innocent when done, criminal.' * * * It does not 'aggravate the crime or make it greater than it was when committed,' nor does it

'change the punishment and inflict a greater punishment than was annexed to the crime when committed,' * *. * * Neither does it 'alter the legal rules of evidence, and receive less, or different testimony than the law required at the time of the commission of the offense * * * to convict the offender.' These are the tests of an ex post facto law as stated in Calder v. Bull, 3 Dall. 386,390, 1 L.Ed. 648; Kring v. Missouri, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506; People v. Edenburg, 88 Cal. App. 558, 263 P.857. * * *"

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

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

CSJAGU CM 336639

16 August 1949

U N I T E D S T A T E S	)	MARIANAS-BONINS COMMAND
	)	
v.	)	Trial by G.C.M., convened at Guam, Marianas Islands, 18, 19 April 1949. Dismissal and total forfeitures.
	)	
First Lieutenant ROBERT B. COLE, JR., O-495584, 226th Military Police Company (Type A), APO 246	)	

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Opinion of The Judicial Council

Brannen, Shaw and Harbaugh
Officer of the Judge Advocate General's Corps

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

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

CHARGE I: Violation of the 93rd Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty).

CHARGE II: Violation of the 96th Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty).

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

Specification 1: In that First Lieutenant Robert B. Cole, Jr., 226th Military Police Company (Type A), did, at Guam, Marianas Islands, on or about 5 December 1948, feloniously steal one Zenith Radio, table model, value about $68.50, the property of the Marianas-Bonins Command Central Exchange.

Specification 2: (Same as Specification 1, except the date, "7 December 1948," and the property stolen, "currency of the United States in the sum of $40.00.")

Jud. # 2

Specification 3: (Same as Specification 1, except the date, "27 December 1948," and the property stolen, "one 35 millimeter Clarus Camera, value about $95.00")

Specification 4: (Same as Specification 1, except the date, "12 January 1949," and the property stolen, "one Revere Motion Picture Camera, value about $73.00.")

Specification 5: (Same as Specification 1, except the dates "between about 13 January 1949 and 28 January 1949," and the property stolen, "one Bulova wristwatch, value about $26.75 and two LeCoultre wristwatches, each of a value of about $47.00, total value about $120.75.")

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

Specification 1: In that First Lieutenant Robert B. Cole, Jr., 226th Military Police Company (Type A), did, at Guam, Marianas Islands, on or about 10 December 1948, wrongfully borrow the sum of $40.00 from Private Earl R. Harrington, an enlisted man of his organization.

Specification 2: (Same as Specification 1, except the date "5 February 1949," and the sum borrowed, "$20.00")

Specification 3: In that First Lieutenant Robert B. Cole, Jr., 226th Military Police Company (Type A), did, at Guam, Marianas Islands, on or about 29 January 1949, wrongfully conspire with Private John L. Williams to conceal a shortage in the accounts of Branch Exchange Number 10, Marianas-Bonins Command, by causing a Bulova wristwatch belonging to Private William W. Gruennberg to be placed with the property of the said Branch Exchange Number 10 at the time such property was being inventoried.

He pleaded guilty to Specifications 1 and 2 of Additional Charge II, and Additional Charge II, and not guilty to all other Specifications and Charges. He was found not guilty of Charges I and II and the Specifications thereunder; guilty of Additional Charge I only in so far as it involves a violation of Article of War 96, and guilty of its Specifications except the words "feloniously steal" in each Specification substituting therefor the words "wrongfully with the intent to deprive the owner temporarily of his property and without consent of the owner take and use"; and guilty of Additional Charge II and the 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, but recommended that the dismissal be suspended during good behavior and that the total forfeitures be mitigated to partial forfeiture, and forwarded the record of trial for action under Article of War 48.

The Board of Review, one member dissenting in part, is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Additional Charge I and its specifications, legally sufficient to support the other findings of guilty and the sentence and to warrant confirmation of the sentence. The dissenting member is of the opinion that the record of trial is legally sufficient to support all findings of guilty.

3. The Judicial Council finds the evidence to be as set forth in its opinion by the Board of Review and concurs in the opinion that the record of trial is legally sufficient to support the findings of guilty of Additional Charge II and its specifications.

With respect to the findings of guilty of Additional Charge I and its specifications the Board of Review concludes that the offenses of which the accused was found guilty, namely: "wrongfully with the intent to deprive the owner temporarily of his property and without his consent take and use" the property described in the respective specifications is not necessarily included in the offenses charged, feloniously stealing the same property.

4. Additional Charge I and its specifications were based on acts alleged to have been committed during the months of December 1948 and January 1949. Whether or not these acts constitute offenses, and, if so, the nature thereof, are questions which must be decided on the basis of the law as it then existed. As to each of the specifications of this charge, the offense, if any, was either larceny or embezzlement, as denounced by Article of War 93 in its then form (MCM, 1928, p. 223, App I). Each offense could properly have been pleaded in one or the other or both of the forms in use prior to 1 February 1949 (MCM, 1928, App 4, Forms 94 and 95).

By the act of 24 June 1948 (62 Stat 627; PL 759, 81st Cong.), effective 1 February 1949, Article of War 93 was amended by dropping from the offenses denounced eo nomine, embezzlement, but with the proviso:

> "That any person subject to military law who commits larceny or embezzlement shall be guilty of larceny within the meaning of this article."

The Manual for Courts-Martial, 1949 contains a form of specification for "Larceny and Embezzlement" (Form 92, page 323, App4), which eliminates the words "take, steal and carry away", and "embezzle by fraudulently converting to his own use" which were incorporated in Forms 94 and 95, supra, for charging larceny and embezzlement respectively and uses in lieu of both the word "steal".

Paragraph 149g "Larceny", pages 171-73 Manual for Courts-Martial, 1928 provided, in part:

> "Larceny is the taking and carrying away, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein.

* * *

"Proof.—(a) The taking by the accused of the property as alleged; (b) the carrying away by the accused of such property; (c) that such property belonged to a certain other person named or described; (d) that such property was of the value alleged, or of some value; and (e) the facts and circumstances of the case indicating that the taking and carrying away were with a fraudulent intent to deprive the owner permanently of his property or interest in the goods or of their value or a part of their value."

In subparagraph h, "Embezzlement", of the same paragraph the Manual for Courts-Martial, 1928, provided:

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come (Moore v. U.S., 160 U.S. 268)

* * *

"Proof.—(a) That the accused was intrusted with certain money or property of a certain value by or for a certain other person, as alleged; (b) that he fraudulently converted or appropriated such money or property; and (c) the facts and circumstances showing that such conversion or appropriation was with fraudulent intent."

Paragraph 180g "Larceny", Manual for Courts-Martial, 1949, provides in pertinent part:

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

* * *

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

* * *

"If it appears upon trial for larceny that the accused intended to deprive the owner only temporarily of his property without his consent, the court may find the lesser included offense of wrongful appropriation of the property in violation of Article 96."

In hearings on HR 2575, 80th Congress, 1st Session, the purpose of the foregoing amendment to Article of War 93 was explained by General Hoover, as follows:

> "* * * The purpose of this amendment is to remove the technical distinction between larceny and embezzlement which in many cases becomes very difficult of application, particularly with personnel administering courts-martial who are not thoroughly versed in the law. Larceny, as we know, at common law requires a trespass, whereas embezzlement is the fraudulent conversion of property into whose hands the property has lawfully come. We soon find ourselves in the area of custody as distinguished from possession. The proposed amendment we think follows the trend of most State jurisdictions toward avoiding the technical distinctions between larceny and embezzlement." (Hearings, p 2129)

It is quite apparent from the proviso to Article of War 93 that the Congress by this amendment, did not create a new offense, but gave a new designation to embezzlement. Pursuant to the action of Congress, in the Manual for Courts-Martial, 1949, the President has dispensed with the necessity, in pleading, of distinguishing between the two offenses according to previous practice, and authorized the use of the word "steal" to designate both offenses. In other words a specification alleging that the accused did "steal", since 1 February 1949 includes the allegations that the accused did "take, steal, and carry away" and "embezzle by fraudulently converting to his own use".

The result of the amendments to the Article and to the Manual for Courts-Martial, in the opinion of the Council, are similar to those of a California statute like in import to the amended Article of War 93. The California statute abandoned the previously existing names of larceny, embezzlement, and obtaining property by false pretenses, for the wrongful acquisition of property, and adopted one name "theft".

In People v. Stevenson ((Cal. App.) 284 Pac. 487, 489) wherein the defendant contended that as to an offense committed prior to its effective date, prosecution under this statute was in violation of the constitutional prohibition against ex post facto laws, the California Court of Appeals quoted with approval from People v. Giron ((Cal. App.), 270 P. 462):

> "'If an act is criminal and punishable when committed, and a statute is subsequently enacted also making it criminal and punishable, but giving the crime a designation not before given to it, the situation of the accused is not altered to his disadvantage, and hence it cannot be said that there has been any ex post facto legislation, nor does the new or amendatory statute obliterate the pre-existing law so that a conviction and punishment after its enactment and the consequent repeal of the former statute can be regarded as a conviction and punishment of an act not criminal when committed.'" (P. 489)

The court concluded:

"* * * The law as amended does not 'make an action, done before the passing of the law and which was innocent when done, criminal' * * * It does not 'aggravate the crime or make it greater than it was when committed,' nor does it 'change the punishment and inflict a greater punishment than was annexed to the crime when committed,' * * * Neither does it 'alter the legal rules of evidence, and receive less, or different testimony than the law required at the time of the commission of the offense * * *'"

In the opinion of the Council, the amended Article of War 93 effects only a procedural change, and charging the accused with "stealing" under the amended article is not objectional as an ex post facto application of the new legislation.

5. The applicable rule in respect of findings of guilty of a lesser included offense is set forth in paragraph 78c, Manual for Courts-Martial, 1949, as follows:

"Lesser Included Offenses. --If the evidence fails to prove the offense charged but does prove the commission of a lesser offense necessarily included in that charged, the court may by its findings except appropriate words and figures of the specification, and, if necessary, substitute others, finding the accused not guilty of the excepted matter but guilty of the substituted matter. The test as to whether an offense found is necessarily included in that charged is that it is included only if it was necessary in proving the offense charged to prove all elements of the offense found. * * *"

As pointed out above the word "steal" in the specifications in question included first the allegation that the accused did "take, steal and carry away" and second that he "did embezzle by fraudulently converting to his own use" the property described. All the elements of larceny and all of the elements of embezzlement were as clearly alleged as if all the elements of each of those crimes had been averred separately in the manner indicated in Forms 94 and 95, supra.

The test prescribed in paragraph 78c, supra, is met if the findings of the court under each of the specifications herein considered, included either an offense all the elements of which it would have been necessary to prove to support a finding of guilty of larceny, or one all of the elements of which must have been proved to support a finding of guilty of embezzlement, as those crimes existed when the offenses alleged were committed.

Taking up first the offense of larceny as recognized prior to 1 February 1949, the court as to each specification substituted for the words "feloniously steal" the words "wrongfully with intent to deprive the owner temporarily of his property and without the consent of the owner take and use" the property described. The controlling question

is whether or not the amended findings include an offense all elements which must have been proved to support a finding of guilty of larceny as that term was understood prior to 1 February 1949.

In CM 221019, Goodman, et al (49 BR 123, 129), a case in which the accused had been found guilty of larceny under a specification laid under Article of War 93, which alleged that he "did feloniously, take, steal and carry away" an automobile, The Judge Advocate General in his indorsement to the opinion of the Board of Review, stated that the evidence had been found sufficient to satisfy the legal requirements of proof, but that he was not convinced that the accused actually intended permanently to deprive the owner of his property or that the offense amounted to more than what is commonly known as "joy riding". The Judge Advocate General, therefore, adverting to the note on page 216 of the Manual for Courts-Martial, 1928, recommended that only so much of the findings of guilty of the larceny charged be approved as involved findings that the accused did "wrongfully and without the consent of the owner take and carry away" the automobile described. See also CM 326588, Sattler (75 BR 259, 261); CM 323378, Learned (72 BR 225, 226); CM 241045, Cleaver (26 BR 190).

The statement in paragraph 180g, Manual for Courts-Martial, 1949, hereinbefore quoted, that upon trial for larceny if it appear that the accused intended to deprive the owner temporarily of his property, a finding of guilty of "the lesser included offense of the wrongful appropriation of the property in violation of Article of War 96" may be made, amounts to no more than a statement in slightly different language of what was held to be permissible under the law prior to 1 February 1949.

In this case, to find the accused guilty of one of the two offenses charged in each specification (larceny) the wrongful taking of the property alleged would have to be proven. The court in the instant case has added the word "use". Use of the property by the accused was proven by the evidence, but was required neither to be alleged nor proven (CM 316917, Morrison, 66 BR 111). In the opinion of the Council this was merely surplusage.

For the reasons hereinbefore stated, it is the opinion of the Council that it is unnecessary to consider whether or not the finding of the court in this case stated an offense included in embezzlement as that term was understood prior to 1 February 1949.

Accordingly, the Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the specifications of Additional Charge I and so much of that charge as involves a finding of guilty under Article of War 96.

5. For the foregoing reasons the Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty, and the sentence and to warrant confirmation of the sentence.

Franklin P. Shaw, Brig Gen, JAGC

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

E. M. Brannon, Brig Gen, JAGC
Chairman

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

CM 336,639

In the foregoing case of First Lieutenant Robert B. Cole, Jr., O-495584, 226th Military Police Company (Type A), APO 246, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

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

E. M. Brannon, Brig Gen, JAGC
Chairman

24 August 1949

I concur in the foregoing action. In accordance with the recommendation of the reviewing authority execution of the dismissal is suspended during good behavior and so much of the forfeitures as is in excess of forfeiture of $100.00 per month for three months is remitted.

THOMAS H. GREEN
Major General
The Judge Advocate General

24 August 1949

(GCMO 55, 30 Aug 1949).

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

CSJAGN-CM 336675

1 JUL 1949

U N I T E D S T A T E S	)	FRANKFURT MILITARY POST
	)	
v.	)	Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 11-13 May 1949. Dishonorable discharge and confinement for eighteen (18) months. Federal Reformatory.
	)	
Private First Class ALEX D. FRIEDLAND (RA 12270391), Company B, 709th Military Police Service Battalion, APO 757.	)	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Alex D. Friedland, Company B, 709th Military Police Service Battalion, did, in conjunction with an unknown person, on the Autobahn near Darmstadt, Germany, at or about 25 February 1949, feloniously steal 5,000 Deutsche Marks, of a value of over $50.00, the property of Marga Roemer, and $3,000 in United States Federal Reserve Notes, of a value of over $50.00, the property of Morris Ungar, all of a total value of more than $50.00.

The accused pleaded not guilty to and was found guilty of the Charge

and Specification thereof. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority might direct for two years. The reviewing authority approved only so much of the findings of guilty as involved finding that accused did at the time and place alleged, in conjunction with an unknown person, feloniously steal 5,000 Deutsche Marks, the property of Marga Roemer, of a value of over $50.00. He approved the sentence but reduced the period of confinement to eighteen months, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and withheld execution of the sentence pursuant to Article of War 50e.

3. Evidence for the prosecution.

Pertinent evidence for the prosecution shows that Guenther Weig and Marga Roemer, German dental students, were only slightly acquainted with Morris Ungar (R. 9, 12, 42), a member of an import-export firm doing business in New York and Paris (R. 42). On or about 23 February 1949, Ungar returned from a business trip to Switzerland (R. 42) where he had contacted one Rueg, an uncle of Guenther Weig (R. 43). This uncle had expressed a desire to supply Weig with funds, so on condition that the uncle deposit sums to Ungar's account in the Chase National Bank in New York, Ungar, having an ample supply of cash, agreed to supply Weig with whatever funds he required (R. 43). When Ungar contacted Weig and informed him of this agreement, on 24 February, Weig declined to accept any money, preferring to receive it directly from his uncle (R. 44). However, Weig had 5,000 marks belonging to his father and wished to go to Stuttgart either to return them to his father or to purchase for him a Volkswagen (R. 12, 22). Since Ungar wished to go to Stuttgart "to buy some things" (R. 49, 58), he volunteered to take Weig and Roemer with him the afternoon of February twenty-fourth (R. 12, 29, 33, 49). However, Ungar, accompanied by Weig, contacted a Frenchman by the name of Bertin and talked "about a price for exchanging dollars" (R. 34, 48, 56), after which Ungar decided "it was too late," they "had better go the next morning" (R. 29). The following day, 25 February, following a lesson at the dental school, Weig and Roemer then left Frankfurt en route to Stuttgart in Ungar's green Chevrolet (R. 9, 22, 44). Ungar again saw Bertin just prior to their departure (R. 56), a meeting which occurred, according to Ungar's statement, in Weig's presence (R. 44). Ungar probably knew nothing of Weig's 5,000 marks until he saw Weig give them to Roemer to carry in her handbag just before the trio left on the morning of the twenty-fifth (R. 22, 29, 30, 34, 58). Ungar carried approximately $20,000 in American currency, part in a loose roll in his pocket and the balance hidden in the front seat of his car (R. 52). It is not clear whether the money was all his own or that of the corporation which he represented (R. 56). At the time of the trial, he was

serving a one year prison term for illegal possession of American "greenbacks" (R. 52, 54).

Enroute to Stuttgart, on the autobahn, Ungar drove peculiarly slow giving as his reason: "There are MPs around anywhere and they could stop me" (R. 23, 36). Earlier, according to Weig, he had stopped the car at a filling station for water (R. 36), although upon being asked whether he had stopped for water he said, "I don't remember, maybe for gas too" (R. 51). Shortly before the turnoff to Darmstadt, the car was stopped by the accused, dressed as an American military policeman (R. 11, 23, 26). The accused was accompanied by an unidentified civilian (R. 11, 16). The accused asked Ungar, Weig and Roemer for identification (R. 11). He hastily searched Weig's billfold (R. 24), looked at Roemer's kennkarte and having demanded "more papers" from her, searched her bag, removed the 5,000 marks and handed them over to the unidentified civilian (R. 24). He did not search Ungar (R. 16), nor did he examine Ungar's proferred papers (R. 37). Accused directed Weig and Roemer to get out and wait by the side of the road for "a jeep" or for "an MP jeep." The testimony varies as to which expression was used (R. 30-32, 37). Ungar never dismounted (R. 37), and leaving Weig and Roemer, he, the accused and the unidentified civilian, all seated in the front seat (R. 65), drove off under the latter's direction to return to Frankfurt (R. 16, 37, 45, 60). Thereafter, the unidentified civilian asked whether Ungar had any money and being informed that he did not, stated that he knew Ungar had some (R. 46, 60), searched him and removed some $3,000 from his right pocket (R. 45). Because of fear, Ungar complained neither to the civilian nor to the accused, although he believed him to be a military policeman (R. 65). At a bridge near Frankfurt, Ungar was told to stop the car, whereupon the unidentified civilian and accused dismounted and departed (R. 46, 61). Weig and Roemer were not picked up on the autobahn by the military authorities but by some other unknown autoist and taken to Darmstadt where they reported the incident to the military police and to CID Agent Rolls (R. 19, 25).

Prior to the morning of the hold-up, accused had informed CID Agent Wilson in Frankfurt that he had been approached by an unidentified Italian male who asked him to participate in a fake robbery (R. 67, 76, 80). On the morning of 25 February, this report was passed along to CID Agent Stewart (R. 76). Accused, while stationed at "D" Gate of the Frankfurt compound, telephoned Agent Stewart at 0845, 25 February, stating that he had been instructed by Agent Wilson to contact Stewart with reference to the planned hold-up (R. 68). He was told there was nothing for him to do until the Italians again contacted him, at which time he should call Agent Stewart (R. 68, 77). He telephoned again at 0930 from his place of duty at "D gate," reporting that the Italians wanted him to assist in the robbery immediately and was told to get their automobile license number (R. 68).

He left the telephone with the circuit open to obtain the license number but never returned to report the desired information (R. 77). He called again at about 1030 to report that the Italians were changing cars and was informed that Agent Stewart had dispatched two vehicles to patrol the autobahn to "be on the alert to interfere with any M.P. check points that might be on the Autobahn, either North or South of the Wiesbaden road" (R. 68). Neither vehicle was radio equipped (R. 77). One was a black Mercedes which Stewart described to accused, and the other a jeep painted a civilian color with civilian license plates. He was uncertain whether he had described the jeep to the accused (R. 84). No further word was received from the accused until 1330 the same day when he reported to Stewart and inquired, "Well, where were your men? It's all over" (R. 69). He further reported that:

> "He did as he was told, the American vehicle came along, he stopped it, he asked the people in the rear of the vehicle for their identification, but he thought they had shown him Kenn Cards although he couldn't be too sure of that. Then he asked the driver for identification. The driver had shown him what Friedland thought was an A.G.C. card. He had then told the two passengers in the back of the vehicle to get out, remain there until they were picked up by an M.P. jeep, he in turn got into the vehicle with the driver and returned to Frankfurt. During the trip into Frankfurt Friedland told me that he had been threatened both for himself and his family and warned that if he ever said anything about what had taken place violence would be used towards he and his family. I asked him what had taken place. He said nothing took place. I said, 'Why the violence and why the threats?' He couldn't tell me. I again asked him what he thought took place and he told me that in his opinion the driver of the vehicle probably had something that belonged to the passengers, and with the phony M.P. check point, the next time he saw the passengers he would tell them that what he had had in his possession that belonged to the passengers had been confiscated by the M.P.'s." (R. 69).

In his report, accused stated that the license number of Ungar's car was C 33476 (R. 70) whereas in fact it was C 33976 (R. 72). He denied that he had taken anything or seen anything taken from anyone (R. 70). However, Agent Stewart testified as follows with reference to an interrogation of accused on the evening of 25 February:

"Q Did you later see Friedland that day?

A Yes, at approximately 1930 hours that night Friedland called me at my home. I asked Friedland where he was and he said he was in the duty officer's office at the Theater Provost Marshal Building. I told him that he had better go to the Central Booking Station and wait there until Agt. Rolls contacted him.

Q And then did you see Friedland later that evening?
A Yes, as Operations Agent with the Detachment, I made periodic checks at the Booking Station and that night at approximately a quarter after 8:00 or 8:00 o'clock, I went down to the Booking Station and Friedland approached me at the gate of the Booking Station and said that he hadn't been able to see Rolls.

Q Did you have any conversation with him in relation to the incident that had happened earlier that day?
A I then went inside with Friedland and in the duty officer's office I told Friedland that we had received information which led us to believe that he had not told the entire truth during his prior conversations with me.

Q What did Friedland say in answer to that?
A And I told Friedland that it was my duty as an investigating agent to advise him of his rights under the 24th A.W. Friedland said he was well aware of them, being a Military Policeman and I stressed to him that he had to fully understand them and I showed him the 24th A.W. which is written on the wall of the Booking Station, the room we were in. Friedland read it and said he understood his rights perfectly. He then told me, or rather, I then told him that we had information whereby he had taken approximately 5,000 Deutsche Marks from the woman's pocketbook and I wanted to know what had happened to the 5,000 Deutsche Marks and why he had not told me previously. He then said, 'Well, what about the two thousand dollars that I have?' I said, 'What about that?' Then he told me that he had taken the 5,000 Deutsche Marks from the woman's handbag, on the way back to D Gate with the driver of the vehicle the driver had given him $2,000.00 in American currency, and that when he reported to me at 1330 hours he had the American currency in the leggings of his uniform. I asked him about the license number of the vehicle and how he could have been mistaken about that. We found out the true license number was 33976 instead of 476.

He said, 'Yes, I knew that all the time. I had it written in the visor of my hat.' Friedland insisted that he be treated as a more or less informant on this case and that his name be left completely out of the incident. I told him that if he could prove himself in the clear and he had any worries about his family, we could treat him as we treat all confidential informants, but he must be in the clear himself. He then told me the money was over in his wife's apartment, but he wasn't sure all the Deutsche Marks were there because his wife had paid a few bills. We went over to the wife's apartment. He introduced me to his wife. That was the first I had ever seen her. He asked his wife for the Deutsche Marks that he had given her previously. She gave him the Deutsche Marks and he handed me forty 20-Mark Deutsche Marks. We then went into the other room, the bedroom. The right-hand dresser drawer was removed by Friedland and a white piece of paper had been fastened on the bottom of the dresser drawer with Scotch tape. Friedland removed the white paper, opened it and displayed twenty $100.00 Federal Reserve Notes which I took from Friedland, we both returned to the Booking Station, I contacted an officer of Friedland's Unit, Lt. Sims, who was on duty. I explained to Lt. Sims exactly what had taken place. Lt. Sims asked Friedland if he had been fully advised of his rights under the 24th A.W. and if all the statements he had made to me verbally was true. Friedland said, 'Yes,' it was. Lt. Sims and an interpreter and myself then checked the money in front of Friedland, the interpreter typed up a receipt which I signed and gave one copy to Friedland." (R. 72-73).

As indicated by the following testimony of Agent Stewart, the CID knew nothing of the $2,000 in American currency until accused admitted possession of it:

"Q You didn't know about $2,000.00 in greenbacks and he told you about that?
A Yes, he told me about that.

Q Showed you where it was?
A Yes, he got it and after he handed it to me he said, 'You know, it is a wonderful temptation. Is there any way I would be able to keep those $2,000.00?[']

Q He told you at that time the man in the car had given it to him, didn't he?
A That is right.

Q At that time he was even asking you if there would be any way to keep it?
A That is right" (R. 83).

4. Evidence for the defense.

The accused elected to testify under oath (R. 90). On 24 February, accused, a military policeman, was approached by an unidentified Italian, an acquaintance of accused's Italian wife, with a plan to engage his participation in a fake robbery (R. 91, 120). Two supposed Swiss nationals /actually the German nationals, Weig and Roemer/ were believed to possess some $9,000 in Federal Reserve Notes. Being fearful that if discovered, the money would be confiscated, they planned to allow Ungar, believed to be an American, but actually a Nicaraguan, to hold the money in the belief that an American would be less apt to be searched (R. 92). A scheme was devised between Ungar, Bertin and several Italians to fake a hold-up, so that it would appear that Ungar had nothing to do with it, but that the money had been confiscated by the police (R. 92, 101, 129). Accompanied by a second Italian conspirator, accused was taken to a railroad station where Bertin was contacted. Bertin showed accused Ungar's car and then left for fifteen minutes professing that he was going to talk to Ungar (R. 93). Prior to the date he was approached concerning the scheme, 24 February, accused had never heard of Ungar or Bertin (R. 119, 120). Accused at first refused to take part in the robbery but then apparently left the perpetrators with the impression that he would participate in it the next day (R. 93). Subsequently, upon the advice of his friend, Mr. Tsouprake, Circulation Manager of the Stars and Stripes, accused reported the plot to the Officer of the Day in the Theatre Provost Marshal's Office, who in turn contacted the CID for accused (R. 94, 104-105, 142). Agent Wilson of the CID told accused that he should contact Agent Stewart at 0830 the next morning, the twenty-fifth, and that he should carry out his routine duties as usual. This he did (R. 94, 105, 106, 143). Upon making the second telephone call at 0930 the following morning, and upon being told to get the license number of the Italians' car, he did so but returned to the telephone to find it had been hung up. In attempting to call Agent Wilson again, he found the latter's line understandably busy (R. 94, 107). Later when he called to report that the Italians were changing cars, he reported his location and the number of the taxi in which they had ridden until that time (R. 95, 103, 107). He was then informed that "there would be a black Mercedes with a warrant officer and some other agents in the car that would follow me on the Autobahn and /it was/ implied that

they would apprehend me there" (R. 95). Thereafter, following the arrival of several Italians and Mr. Bertin, the latter and one Italian "went around the corner presumably to speak to Mr. Morris Ungar or to let us know when the Chevrolet pulled out" (R. 95, 107). Accused was then instructed to stop the Chevrolet, "frisk the two Swiss Nationals to see if they had anything on them, taking what they had, put Mr. Ungar under arrest * * * and have Mr. Ungar drive away" (R. 95). Aside from these instructions, accused had no other instructions from anyone, and had no plan of operation; he testified that it "wasn't my type of work" (R. 126). One Italian, a German driver, the unidentified civilian and accused then drove off, passed Ungar's Chevrolet on the autobahn, and stopped about a mile ahead of it, whereupon the unidentified civilian and accused dismounted (R. 95-96). Thereafter, the actual robbery of Weig and Roemer took place substantially as shown by the evidence for the prosecution, supra. During the robbery, accused did not bother Ungar, because he "understood Ungar was in on this" (R. 109). While driving away from the scene of this fake military police road block, Ungar told accused that he had a large gang and "there would be always someone who could make it rough" for him if he disclosed what took place (R. 96). The $2,000 was not taken from Ungar, but was given to him by Ungar for accused's part in the scheme (R. 110, 122). The unidentified civilian also gave accused 800 of the 5,000 marks taken from Roemer and received from Ungar $1,000 in Federal Reserve Notes (R. 96, 122). Accused did not turn in the money until about 2000 the evening following the robbery, because he feared his wife would suffer violence if any of Ungar's people returned in his absence and demanded the money from his wife (R. 97, 111). In view of the poor cooperation he had received from the CID, he had little confidence in their powers of protection (R. 112). They could "get just as messed up on that as they did on the Autobahn" (R. 97). "I started thinking whether it was best to turn it in to the company commander, the duty officer, or the C.I.D. At that point I put it in my leggings and decided to hold it until evening or sometime that day until I could sit down with someone and think what I could do with it, who would give me the most protection" (R. 111).

Accused stated that he had reported the license number of Ungar's car improperly because having scratched it in his hat band, he had misread the numeral 9 for a 4 (R. 98, 112). He reported to Agent Stewart all the details of the incident except that pertaining to the retention of the moneys (R. 97). The afternoon of the day of the robbery, accused had his own car serviced in a local garage, returned home to find that a CID agent had been looking for him, so he reported to the Provost Marshal's office where he was met by Agent Wilson. Upon being informed that Wilson did not believe he had told the whole truth, he told him of the American currency and marks which he had hidden in his bureau at home, and which he jokingly had said he had given to his wife to pay some bills:

"I was kidding Mr. Stewart and told him I had given the money to my wife to pay bills. Any man that tells that to a C.I.D. Agent, I am not going to be the person - I was just joking. I also remarked to him, 'A large amount of money like this, most ordinary G.I.'s would try to keep money like that because to a Pfc. in the Army, that is quite a sum of money', and apparently Mr. Stewart took that in the wrong manner" (R. 113).

Accused then took the agent to his home and surrendered the $2,000 and the 800 marks (R. 114).

The prosecution stated that Bertin, a key witness, was detained by the police on another charge but "jumped his bail" and was unavailable for this trial (R. 119).

Extensive evidence was introduced in the form of oral testimony and stipulations concerning the good character and reputation of the accused (R. 135-140).

5. It is fundamental that an essential element of proof in the offense of larceny is that the accused intended permanently to deprive the victim of his property (par. 180g, p. 240-241, MCM, 1949). Careful consideration of the evidence adduced in this case, summarized above, leads irresistably to the conclusion that accused did not have this intent at any time prior to the actual commission of the staged robbery. The well established fact that he kept the law enforcing agencies fully informed of all developments renders any other conclusion inconceivable. As stated in Price v. People, 109 Ill. 109, 115-116:

"* * * the undisputed facts, as appears from the foregoing, are, that the accused, on the day of the attempted robbery, went deliberately to a constable of the town in which he lived and told him all about the contemplated crime, giving the true names of the parties, and telling him when and where it was to take place, and the name of the intended victim; * * * That a sane person, really guilty of committing so grave a crime as the one imputed to the accused, would thus act, is so inconsistent with all human experience as not to warrant the conviction of anyone under the circumstances shown. The accused is a mere youth, only some nineteen years of age at the time of this transaction, and the fact that some of his conduct subsequent to the occurrence/by entering the victim's house and brandishing a weapon in active participation instead of remaining outside as instructed/ tends rather to strengthen the view taken by the jury, as is conceded, yet

that may well have resulted from his youth and inexperience. But as to the exculpating facts above stated, we see no rational solution of them, and none that is satisfactory has been suggested by counsel for the People which would seem to warrant the conviction."

However, since the animus furandi need not necessarily coincide with the trespassory taking (CM 280034, Conroy, 53 BR 1; CM 315347, Ramsbottom, 64 BR 377), there remains for consideration only the question of whether the accused entertained such an intent during or subsequent to the actual taking of the money. Presumably the court inferred the existence of this intent from the fact that accused submitted his report of the actual accomplishment of the robbery at 1330, 25 February, but failed to disclose the fact that he had part of the proceeds thereof until some seven hours later. Ordinarily whether the explanation by an accused of the reason for his possession of stolen property will sufficiently rebut the incriminating inference arising therefrom is a question solely for the determination of the court (CM 269377, Benson, 8 BR (ETO) 77). On the other hand, there must be competent evidence sufficient to indicate the reasonableness of the court's determination of fact. The circumstances must not only be consistent with guilt, but inconsistent with innocence (CM 195705, Tyson); they must exclude "any fair and rational hypothesis except that of guilt * * *" (par. 78a, p. 74, MCM, 1949). Thus in CM 238937, Mitchel, 24 BR 395, the Board of Review held that the larcenous intent was not proved beyond a reasonable doubt where accused, while drunk, had wrongfully taken a watch and a sum of money, since he made good the loss and explained that he had done it as a joke. Similarly, in CM 242605, Beauchamp, 27 BR 129, accused feloniously took a knife and a sheath, but since his assertion that he held them as security for a debt was partially corroborated, the Board of Review held that the necessary intent had not been proved beyond a reasonable doubt.

In the case under consideration, the accused explained why he hesitated before turning in the money, wondering whether it was best to turn it in to his company commander, the duty officer, or the CID. He feared for his wife's safety if any of Ungar's associates were to return and demand the money from his wife. That Ungar could have dangerous associates is considered entirely feasible in view of his doubtful character as evidenced by the content of his testimony and by his convenient memory. Accused had no confidence in the protective capacity of the CID, and in the light of the events on the morning of 25 February, his attitude does not appear to be unreasonable. Permitting one unassisted and inexperienced eighteen year old military policeman to act as the entrapping officer in a vicious plot involving robbery of a considerable sum of money, naturally leads to the supposition that someone lacked discretion or efficiency. The accused first called Agent Stewart at 0830 on 25 February and was

instructed to do nothing until the Italians contacted him. No action was taken by the CID to have an agent or a vehicle at "D" gate to maintain surveillance of the accused and to follow him when he left the gate, although the CID had approximately an hour in which this action could have been taken. Sometime after his second telephone call at 0930, two vehicles were dispatched to patrol the Autobahn, searching for "M.P. check points." Only by extreme good fortune could such a plan have been successful in preventing or interrupting the planned robbery. No such fortuitous circumstance occurred, and accused was forced to carry on alone in a task he had reluctantly accepted and which resulted in his being placed in a difficult position which he said "wasn't my type of work." His fear, distrust and confusion cannot be said to have been without foundation. In the opinion of the Board of Review, the fact that he secretly retained the stolen money for a few hours, in the circumstances disclosed here, will not justify an inference of the larcenous intent. In so holding, we are not unmindful that an intent to return the owner's property upon the happening of a future condition or contingency is not a defense to a charge of larceny (par. 180g, p. 240, MCM, 1949), but here the uncontroverted testimony of the accused shows that he did not intend to keep the money for himself. His entire mental attitude and conduct are indicative of an intent to get rid of the money, not an intent permanently to deprive the owner or to convert it to his own use. For understandable reasons he delayed surrender of the money because of a justifiable fear for the safety of his family, but such a purpose does not reveal the "guilty mind" contemplated in such felonies as larceny (CM 325523, Hanni, 74 BR 285).

In its appellate review of records of trial by courts-martial the Board of Review has authority "to weigh evidence, judge credibility of witnesses, and determine controverted questions of fact" (AW 50g, MCM, 1949). The only controverted question of fact pertinent to the issue is whether the accused developed the necessary felonious intent prior to surrendering the stolen money. In determining the proper conclusion from such conflicting inferences and evidence, consideration may well be given to the character of the accused. As stated in CM 320681, Watcke, 70 BR 125, 136:

> "In cases of this type, where there is much conflict in the testimony and when the issue of accused's guilt or innocence is in delicate equipoise, the good character of accused for honesty, integrity, and general law-abidingness, as exhibited by his actions prior to and after the alleged commission of the offense and by the opinion held of him by others, may play a large part in tipping the scales of justice in his favor."

By stipulation or direct testimony, the accused's immediate military

superior and numerous associates in and outside the military service, emphatically pronounced his reputation for truth and veracity and his general character as excellent. This factor cannot be disregarded, but considering it along with the conflicting testimony and unfavorable inferences, the Board of Review does not believe that the "proof as a whole" is convincing beyond a reasonable doubt (par. 125a, p. 152, MCM, 1949).

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

On leave, J. A. G. C.

J. R. Sturgeon, J. A. G. C.

John F. Taylor, J. A. G. C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CSJAGU CM 336675 THE JUDICIAL COUNCIL

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

In the foregoing case of Private First Class Alex D. Friedland (RA 12270391), Company B, 709 Military Police Service Battalion, APO 757, upon the concurrence of The Judge Advocate General the findings of guilty and the sentence are disapproved.

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

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

E. M. Brannon, Brig Gen, JAGC
Chairman

6 September 1949

I concur in the foregoing action.

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

9 Sep 1949

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

(199)

CSJAGQ - CM 336688

AUG 1 2 1949

U N I T E D S T A T E S	FORT ORD
v.	Trial by G.C.M., convened at Fort Ord, California, 12 and 16 May 1949. Dishonorable discharge (suspended), total forfeitures after promulgation and confinement for one (1) year. Disciplinary Barracks.
Recruit TOMMIE FRANCISCO VARGAS (RA 19323449), Battery A, Twentieth Field Artillery, Fort Ord, California.	

HOLDING by the BOARD OF REVIEW
LIPSCOMB, SHULL and WOLF
Officers of the Judge Advocate General's Corps

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

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

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

Specification: In that Recruit Tommie Francisco Vargas, Battery "A" Twentieth Field Artillery Battalion, did, at Fort Ord, California, on or about 21 April 1949, feloniously steal a 1941 Chevrolet Convertible Coupe, value of over $50.00 the property of Private First Class Eliso Castro.

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

Specification: In that Recruit Tommie Francisco Vargas, Battery "A" Twentieth Field Artillery Battalion, did, without proper leave absent himself from his organization at Fort Ord, California from about 4 April 1949, to about 25 April 1949.

Accused pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification. He was found guilty of the Specification, Charge I, except the words "feloniously steal", substituting therefor the words "with intent to deprive the owner temporarily of his property, wrongfully and without the consent of the owner take and use",

of the excepted words, not guilty, of the substituted words, guilty and not guilty of the Charge, but guilty of a violation of the 96th Article of War. He was found guilty of Charge II and the Specification thereunder. There was evidence of one previous conviction. 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 eighteen months. The reviewing authority approved the sentence, but reduced the period of confinement to one (1) year, ordered the sentence executed, but suspended execution of that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army may direct, as the place of confinement. The result of trial was promulgated in General Court-Martial Order No. 29, Headquarters, Fort Ord, California, on 24 May 1949.

3. The only question which requires discussion is the legal sufficiency of the court's action in excepting in its findings under the Specification of Charge I the words, "feloniously steal," and substituting therefor the words, "with intent to deprive the owner temporarily of his property, wrongfully and without the consent of the owner take and use." In other words, is the substituted offense of wrongfully taking and using property with intent to deprive the owner temporarily thereof a lesser included offense within the larger offense of larceny as alleged in the Specification of Charge I?

Article of War 93, as amended, after designating various crimes which are made punishable therein, including larceny, adds the proviso:

"That any person subject to military law who commits larceny or embezzlement shall be guilty of larceny within the meaning of this Article". The manifest purpose of the above-quoted amendment was to abolish the technical distinction between larceny and embezzlement which had proved difficult of application and too frequently resulted in reversals of conviction because the proof showed: (1) that the thief, who was charged with larceny had in fact deprived the owner of his property by breach of trust, or (2) that the thief being charged with a breach of trust had in fact taken the property by trespass.

Consistent with the amendment of Article of War 93, the Manual for Courts-Martial has redefined larceny, 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." (MCM 1949, par. 180g).

In recognition of the significantly-enlarged meaning of larceny under Article of War 93, the Manual sets forth requirements of proof for this new offense as follows:

"(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).

When the first of the above requirements of proof is considered in the light of the explanation in the definition of larceny that, "Unlawful appropriation may be by trespass or by conversion through breach of trust or bailment," it is apparent that the act of taking and using, which act has been regarded as a trespass, is merely one method of appropriation, and that a conversion of property to one's own use is another form of appropriation. Each method of appropriation is of equal criminal animus and proof of either method is equally competent and sufficient to establish the appropriation required. The particular method of appropriation cannot, therefore, be involved in the problem of determining whether the offense found by the court is legally a lesser included one. Furthermore, as stated in Winthrop's Military Law and Precedents, 2nd Edition, page 686, trespass as an element to larceny "must include removal of a thing from its place; in other words there must be not only a caption but also an asportation or carrying away. This carrying away, however, is no more than is reasonably implied in the term taking since it may consist in the slightest removal of the article from the place which it occupied while in the owner's possession." The word "use" merely emphasizes the control which is inherent in the caption and asportation. Accordingly, it seems clear that the words "wrongfully and without the consent of the owner take and use" describe a course of action which is necessarily included in that defined by the words "unlawfully appropriate".

The Manual in defining a lesser included offense states that:

> "If the evidence fails to prove the offense charged but does prove the commission of a lesser offense necessarily included in that charged, the court may by its findings except appropriate words and figures of the specification, and, if necessary, substitute others, finding the accused not guilty of the excepted matter but guilty of the substituted matter. The test as to whether an offense found is necessarily included in that charged is that it is included only if it was necessary in proving the offense charged to prove all elements of the offense found." (MCM 1949, par. 78c).

In our present case the Specification charges that the accused "did ... feloniously steal" certain property of the value and ownership described. There is no expressed allegation in the Specification that the accused appropriated the property in question with intent permanently to deprive the owner of his interests therein. The word "steal", however, as used in the Specification signifies both an unlawful appropriation and that the appropriation is accompanied with the specific intent permanently to deprive the owner of his interest in the property appropriated (MCM 1949, par. 180g). Accordingly, when the court excepted from its findings the words "feloniously steal" it excluded the words of the specification which allege:

(1) the intent permanently to deprive the owner of his interest therein, and
(2) the unlawful appropriation of the property described.

The court was then authorized, under its power to find a lesser included offense, to substitute words in the specification to conform to the facts found. The words substituted by the court contain two separate concepts.

The first concept is presented in the words "with intent to deprive the owner temporarily of his property" and describes a specific intent of a lesser character involving less criminal <u>animus</u> than the intent alleged by the word "steal". When the test for determining a lesser included offense is applied to the above substitution, we must conclude that in the process of attempting to prove that the property was appropriated with an intent permanently to deprive the owner of his interest therein, it was necessary to prove an intent to deprive him of his property at least temporarily. The lesser is necessarily included within the greater.

The second concept of the court's substitution is presented in the words "wrongfully and without the consent of the owner take and use", and describes the manner of the appropriation as having been accomplished by a trespass rather than by a conversion. It follows, therefore, since the word "steal" as used in the specification signifies an appropriation which may be accomplished either by trespass or by conversion that the second part of the substituted words are merely a detailed description of the method of the appropriation by trespass, and that the substituted words are included in the word excepted. Accordingly, they present no problem of a lesser included element of an offense and the court's choice of verbiage in no way departs from accepted legal principles.

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

Abner E. Lefcourt, J.A.G.C.
Lewis F. Shull, J.A.G.C.
Samuel S. Crew, J.A.G.C.

(204)

CSJAGQ - CM 336688 1st Ind AUG 30 1949

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

TO: Commanding General, Fort Ord, California.

In the case of Recruit Tommie Francisco Vargas (RA 19323449), Battery "A", Twentieth Field Artillery, Fort Ord, California, attention is invited to the foregoing authenticated copy of the holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confirming action is not by The Judge Advocate General or the Board of Review deemed necessary.

FOR THE JUDGE ADVOCATE GENERAL:

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

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

CSJAGI CM 336690

JUN 2 9 1949

U N I T E D S T A T E S v. Recruit ROBERT W. DAVIS (RA 44007794), Company A, 9th Infantry Regiment, Fort Lewis, Washington	SECOND INFANTRY DIVISION Trial by G.C.M., convened at Fort Lewis, Washington, 4 March 1949. Dishonorable discharge, total forfeitures and confinement for two (2) years. Disciplinary Barracks.

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

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

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

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

Specification: In that Recruit Robert W. Davis, Company A, 9th Infantry, then Private Robert W. Davis, Company A, 9th Infantry, did, at Fort Lewis, Washington, on or about 17 February 1947 desert the service of the United States and did remain absent in desertion until he surrendered himself at Seattle, Washington on or about 17 January 1949.

CHARGE II: Violation of the 65th Article of War.

Specification: In that Recruit Robert W. Davis, Company A, 9th Infantry, having received a lawful order from Master Sergeant Raymond E. Bitzer, Company A, 9th Infantry, a noncommissioned officer who was then in the execution of his office, to draw equipment and fall out for drill, did, at Fort Lewis, Washington, on or about 24 January 1949, willfully disobey the same.

He pleaded not guilty to and was found guilty of both Charges and their Specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for two years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50g.

3. The record of trial is legally sufficient to support the findings of guilty and legally sufficient to support the sentence in part. The only question for consideration is the legality of the sentence with respect to the effective date of the forfeiture.

4. The offense of which accused was found guilty was committed prior to 1 February 1949, but he was tried and sentenced after that date on 4 March 1949. Section 245, Public Law 759, 80th Congress, provides that all offenses committed and all penalties, forfeitures, fines or liabilities incurred prior to 1 February 1949 may be prosecuted, punished and enforced in the same manner and with the same effect as if the new law had not been passed. This provision, however, must be considered along with Article of War 16 as implemented and interpreted by Executive Order 10020 and the Manual for Courts-Martial, 1949.

Article of War 16 prohibits any punishment or penalties, other than confinement, during the time an accused is waiting trial and prior to sentence on charges against him. This prohibition is expressed in the Manual for Courts-Martial, 1949, in the words: "nor shall any accused prior to the order directing execution of the approved sentence, be made subject to any punishment or penalties other than confinement" (par. 115, MCM 1949). With respect to the effective date of forfeitures, it is stated in paragraph 116g, Manual for Courts-Martial, 1949, that "a forfeiture becomes legally effective on the date the sentence adjudging it is promulgated." Appendix 9, Manual for Courts-Martial, 1949, at Item 8, provides that the sentence to total forfeitures should read:

> "* * * to forfeit all pay and allowances <u>to become due</u> after the date of the order directing execution of the sentence, * * *." (Underscoring supplied).

Executive Order Number 10020 prescribes that the Manual for Courts-Martial, 1949, "shall be in full force and effect * * * on and after February 1, 1949, with respect to all court-martial processes taken on or after February 1, 1949 * * *."

The only reasonable interpretation of that part of the sentence adjudged against accused which reads "to forfeit all pay and

allowances due or to become due" would effect a forfeiture of all pay and allowances due or to become due at the date the sentence was adjudged.

In view of Article of War 16 and the provisions of the Executive Order and Manual for Courts-Martial cited above, even though the offense was committed prior to 1 February 1949, the court was authorized to impose a sentence with respect to forfeitures of only pay and allowances to become due after the date of the order promulgating the sentence. That part of the sentence adjudging forfeiture in excess thereof is clearly excessive and cannot be sustained.

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

On Leave, J.A.G.C.

Frank E. Allred, J.A.G.C.

Jackson K. Jolley, J.A.G.C.

AMBJA 201 Davis, Robert W. (GP) 2d Ind

Hq, 2d Infantry Division, Fort Lewis, Washington, 29 July 1949

TO: The Judge Advocate General, Department of the Army, Washington 25, D.C.

Forwarded herewith is record of trial in the case of Recruit Robert W. Davis, together with six (6) copies of GCMO #151, this headquarters, dated 20 July 1949, promulgated in accordance with the holding of the Board of Review.

FOR THE COMMANDING GENERAL:

A. V. MAHONEY
Capt., AGD
Asst Adj Gen

1 Incl
Record of Trial

(208)

CSJAGI CM 336690 1st Ind. JUL 13 1949

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

TO: Commanding General, 2d Infantry Division, Fort Lewis, Washington

1. In the case of Recruit Robert W. Davis (RA 44007794), Company A, 9th Infantry Regiment, Fort Lewis, Washington, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and is legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence and confinement at hard labor for two years. Under Article of War 50a this holding and my concurrence vacate so much of the sentence relating to forfeitures as is in excess of forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence. Under the provisions of Article of War 50, you now have authority to order the execution of the sentence as modified in accordance with the foregoing holding.

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

(CM 336690)

Incl.
R/T

THOMAS H. GREEN
Major General
The Judge Advocate General

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

CSJAGK - CM 336706

11 JUL 1949

U N I T E D S T A T E S	RYUKYUS COMMAND
v.	Trial by G.C.M., convened at APO 331, c/o Postmaster, San Francisco, California, 18 March 1949. Dishonorable discharge and confinement for life.
Recruit PASCUAL POMADA (PS 10327248), "C" Battery, 532d AAA Gun Battalion (PS), APO 331.	

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Recruit Pascual Pomada, Battery "C", 532d Antiaircraft Artillery Gun Battalion (Philippine Scouts), APO 331, did, at Kawasake, Okinawa, on or about 8 February 1949, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill Adelbert Van Deusen, a human being, by stabbing him with a knife.

He pleaded not guilty to and was found guilty of the charge and specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority might direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Steilacoon, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50.

3. Evidence

a. For the Prosecution

At about 2250 hours on 8 February 1949, as Captain Edward F. Brackett and Captain Hill, Medical Corps, were driving along Highway 8, near the village of Gushikawa, Island of Okinawa, they observed what appeared to be a man "hunched over" at the side of the road. Upon immediate investigation and superficial medical examination, the roadside figure was found to be the dead body of Private Adelbert Van Deusen. Blood was observed on the field jacket and the trousers were wet from the waist down. The body was removed to the Tengen dispensary where it was further identified by Private Robert L. Hicks who had last seen Van Deusen alive at about 1630 hours that day (R 19-22; Pros Ex 1).

An autopsy performed at 1000 hours 9 February 1949 disclosed:

(1) That the body of Van Deusen was about 5 feet 7½ inches long and weighed about 150 pounds.

(2) That the basic cause of death was "Hemothorax, right, acute, severe, secondary to wound, incision, right lower lobe; that the path of the wound was through the right posterior chest, sixth interspace, through the apex of the right lower lobe, into the right lung." (R 21)

On 8 February 1949, Sergeant Miguel Soreda was on duty as sergeant of the guard, 532d AAA Gun Battalion. At about 2000 hours, accused, a member of the guard, requested permission to leave the guardhouse. Sergeant Soreda refused this request (R 46,47). Nevertheless, within a few minutes of his colloquy with the sergeant, accused was sharing a bed in the house of Koza, Tomi, at Gushikawa, Okinawa, a comparatively short distance away, with Shige Matsumora, an Okinawan girl (R 6,8,9). Sometime later, the principals in this bedroom scene were disturbed by someone outside the house calling, "Chicago, Chicago" (apparently an Anglicized corruption of "Chigesan" (Miss Shige)) (R 9,27). Observed by Koza, Tomi, Shige went outside to talk to the intruder, who was the "American G.I.", Van Deusen (R 7,9,10,27; Pros Ex 1). Accused followed. A sketchy conversation (due no doubt to language difficulties) ensued which Shige testified was substantially as follows:

Shige: "I talked to this American and told him I had another guest -- that I have another guest in my bed, so would you go home."

* * *

Pomada (accused): "I have been thinking of you as my wife, but the American love you as if you are a prostitute."

* * *

Van Deusen: "I'll get a couple of friends too; if the Filipinos fight against me, we fight against him, too."

* * *

Pomada (accused): "If you take the girl --"

At this point, Van Deusen took Shige by the hand and led her along a trail toward Kawasake (R 10,11). As they approached a road near a bridge accused was observed running after them. Shige described the subsequent events as follows:

"Q. Pomada is standing there?
A. Yes.

Q. How did he get there?
A. He reached the point with running.

Q. Then he stopped, is that right?
A. Yes.

Q. Right after he stopped, what did he do?
A. (Indicating)

Prosecution: May the record show that the witness raised her right hand, clenched over her shoulder.

Q. What else did Pomada do?
A. There they have been facing for about two minutes like this (indicating), and when I felt that there might be some danger -- it might be dangerous, I moved out from here (indicating) -- I moved from my position because it seems to me very dangerous, for that moment they were falling down from the small way.

Q. When you saw Pomada's right hand raised and clinched, did you see anything in his hand?
A. Yes, I saw.

Q. What did you see in his hand?
A. I didn't know exactly, but anyhow I saw he had something in his hand.

Q. What did it look like?
A. I can't explain what it looked like. The color was black and this long (indicating) -- the color was black, and about this long (indicating).

President: Indicating an object approximately -- have the witness indicate once more how long the object was that was in his hand.

A. (Indicating)

President: Indicating an object approximately ten inches in length.

* * *

Q. When the fight started, who hit the first blow -- who struck the first blow?
A. I couldn't decide which one struck first.

Q. Were there any blows struck by either?
A. I couldn't find out.

* * *

Q. Did the American knock Pomada down?
A. When I paid attention to them they were falling down together.

* * *

Q. You said that during this fight you escaped and ran away. Were you afraid -- were you scared?
A. I was scared." (R 13-15,19)

Within thirty minutes after having followed Shige and Van Deusen from Tomi's house, accused returned there, breathing fast, his clothes wet (R 7,8). At about 2300 hours, Sergeant Soreda saw accused enter the guardhouse via the rear door. He had a black mark on his right cheekbone and "was in a hurry" (R 47).

Two unsworn voluntary statements of accused were introduced into evidence without objection by the defense. In the first statement accused declared that an American soldier "hold me up." In each statement, accused admitted committing a homicide, but asserted that the killing was done in self-defense (R 22,23; Pros Exs 2,3). Since the version of the incident given by accused in his second statement is substantially the same as that given by him in his testimony as a witness in his own defense, which is hereinafter set forth at some length, no detailed summary of such statement is considered necessary.

b. For the Defense

His rights as a witness having been explained to him by defense counsel and the law member, accused elected to be sworn and testify in his own behalf.

At about 1945 hours on 8 February 1949, he left his battalion area bound for the house of Koza, Tomi, where he arrived at about 2145 hours. The route taken from the guardhouse to Tomi's house was thus described:

"Q. Now, when you left the battalion area, which way did you go? Here is a sketch (indicating). Will you come over to this sketch? There is the battalion area in here somewhere (indicating). Will you point out on this sketch which way you went to get to her house?

A. When I left the area I went out the main gate. I walked toward here (indicating), going here (indicating), and then I continued walking down here (indicating), in a southerly direction along Route Number 8. When I passed Route Number 8, I go inside this, going towards the house of Koza, Tomi. I passed this path (indicating), Sir, going to Koza, Tomi's house.

DEFENSE: Let the record show that when he left the battalion area that he followed in an easterly direction along Route Number 8 until he crossed the bridge. Then he turned south along a footpath running in a southwesterly direction on the left hand side of the stream until he reached the second cross-path. Then he turned in a westerly direction across the stream and across the pipeline into a main path, then turned in a southerly direction to the house of Koza, Tomi" (R 26).

After spending about 25 minutes in "Chigesan's" /Shige Matsumora/ room, accused heard someone outside calling, "Chicago - Chicago." He forced Shige to go out of the house to investigate the disturbance, and fifteen minutes later put on his shoes and followed. He found her talking to an American soldier (Van Deusen) who told him, "Here is the girl I am looking for." Accused asked Shige how long she had known this soldier, but further conversation was interrupted by the arrival of several Philippine Scouts. After calling accused by name, however, they continued along the road (R 27,28). At this point Van Deusen took Shige by the hand and led her up the path. Accused started back to his unit, using the same route followed by Shige and Van Deusen. This was related as follows:

"Q. Take this pencil and point out on the map the route that this American soldier and the girl took when they left the house.

A. When they left the house, Sir, they passed over here (indicating), Sir, and continued walking here, Sir, (indicating), and I am here, Sir, (indicating), about five minutes walking because I am going back to my camp, Sir, and I continued walking over here (indicating), and then I followed him because by the same path we were walking we go out to the camp.

Q. I believe you said when they left the house they came out to this main path marked "A" and they proceeded in a generally northerly direction to a point marked "B", where a footpath turns off to the right, leading in an easterly direction. They came

across here (indicating). Now, you said you were following them. How far behind were you?

A. I guess, Sir, almost twelve feet, Sir, away from them, Sir.

Q. Where were you going?

A. Going home, Sir." (R 29)

Van Deusen and Shige continued along the path, followed by accused, until they approached a crossroad along a creek. Here, Van Deusen stopped and asked accused where he was going. As Pomada answered, "I am going home," the American struck him, knocking him to the ground. Accused regained his feet and started to run away, but his assailant caught him and struck him down again. Once more accused rose to flee, but this time Van Deusen flung him down an embankment into the creek, perched on top of him, and pounded him with his fist (R 30,34). Pomada, in fear for his life, reached into his hip pocket, procured and opened a knife and stabbed Van Deusen in the back. Meanwhile, Shige had run away (R 31,35). The American rolled over and accused assumed a crouched position holding the knife in his upraised clenched hand. After about five minutes, Van Deusen crawled across the stream and up the side of the road. Accused threw the knife away, went back to Tomi's house, picked up a jacket which Shige had washed for him, and started back to the guardhouse. On this return trip he noticed a weapons carrier and a jeep near the spot to which Van Deusen had crawled (R 31-33). He proceeded to the guardhouse, changed his wet shoes and stood his tour of duty from 2400 to 0400 hours (R 33,34).

On cross-examination, accused stated that he is five feet five and seven-tenths inches in height and weighs 120 pounds, that the route he took from the guardhouse to Tomi's house is the only practical one, other paths being blocked by plants or barbed wire, that he would not have killed Van Deusen "if he did not hurt me," and that he did not report the stabbing because "How can I go back and tell any officer that I stabbed a guy over there *** I cannot run all over the country" (R 36-45).

It was stipulated between the prosecution, defense, and the accused, that if Lieutenant Crouch, a medical officer, were present he would testify that he examined accused at 1710 hours on 9 February 1949 and found "a small area of redness and tenderness over the left cheek bone. This may have been the result of a blow, struck on that area" (R 35).

c. Rebuttal

Sergeant Soreda testified that there were several pathways free of barbed wire leading from the guardhouse to the Okinawan habitations (R 46,48).

4. Discussion

Accused stands convicted of a charge and specification alleging premeditated murder.

The evidence, both of the prosecution and the defense, clearly establishes that accused committed a homicide at the time and place and upon the victim alleged. The only question presented is whether or not the evidence is legally sufficient to sustain the finding that accused was guilty of premeditated murder.

> "Murder is the unlawful killing of a human being with malice aforethought. *** Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take the life of anyone. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. *** Murder does not require premeditation, but if premeditated it is a more serious offense and may be punished by death. A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intention to kill someone and consideration of the act intended. Premeditation imports substantial, although brief, deliberation or design." (MCM 1949, par 179a)

The testimony of the accused substantially corroborates the evidence adduced by the prosecution except in the following particulars:

> (1) That Van Deusen, not accused, was the aggressor in the affray; and
>
> (2) That accused stabbed Van Deusen only because he thought the latter was about to kill him.

The testimony of Shige Matsumora shows that accused deliberately followed the American soldier and herself along a path toward Kawasake, Okinawa. That accused had anger in his heart and was goaded by jealousy is a natural inference from the circumstances of the interrupted boudoir tete-a-tete. This mental and emotional condition finally exploded into violent action when accused assaulted Van Deusen with upraised knife. Certainly these actions reflect malice aforethought and premeditation.

The defense attempts to rebut this evidence by testimony tending

to show that in following the path used by his victim and their mutual object of affection, accused was merely using the only road available to him to return to the guardhouse. The record is replete with testimony adduced both by the prosecution and by the defense concerning the roads and paths in the vicinity of the incident, all of which refers to a map or sketch of the area. Although a certified copy of this sketch is appended to the record of trial, certain geographical points alluded to in the testimony are not noted thereon. However, after a careful study of all of the pertinent testimony (some of which is quoted in paragraph 3 herein) in connection with the sketch, the Board concludes that the route in question was extremely circuitous, that a much more direct route from Tomi's house to the guardhouse was available, and that a study of the times given by the accused himself indicates conclusively that upon his actual return to the guardhouse he did take a more direct route. This conclusion is supported by competent evidence which indicates that accused had originally gone from the guardhouse to Tomi's house in a matter of minutes, despite his testimony that it took him two hours.

In further attempting to rebut the testimony of Shige Matsumora, accused insists that Van Deusen attacked him and that while being beaten with fists and pinned to the ground by this man who outweighed him by thirty pounds, he drew a knife from his back pocket, opened it, and stabbed his adversary in the back. The physical damage sustained by accused from this attack, which put him "in fear for his life," was a "small area of redness and tenderness over the left cheek bone."

Since the case presented a conflict in the evidence of the prosecution and defense, it was the court's function and duty to resolve such conflict after weighing the competent evidence and judging the credibility of the witnesses before it. This it did. Under the provisions of Article of War 50(g), which gives to The Judge Advocate General and all appellate agencies in his office express authority to weigh evidence, judge the credibility of witnesses, and determine controverted issues of fact in the appellate review of records of trial (CM 335526, Tooze), we conclude, as did the trial court, that the competent evidence of record justified the court's finding of guilty.

The Board of Review is aware of the fact that in order to arrive at its findings, the court was required to give credence to the testimony of an important prosecution witness whose morals obviously were far from beyond reproach. This point is discussed in CM 333001, Manis, 81 BR 270, in which the Board of Review said:

> "The fact that these witnesses were prostitutes in no way disqualified them or made them incompetent as witnesses in a case involving homicide, nor does unchastity or lewdness in

such a case raise a presumption of untruthfulness so as to make their respective testimony unworthy of belief (Sec 1420, Wharton's Crim Evidence, 12th Ed, p. 2329; Butler v. State, 113 Southern Rep (Fla) 699,700)."

The reviewing authority designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Paragraph 87b, Manual for Courts-Martial, 1949, provides, inter alia,

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

In the instant case, pursuant to the provisions of Article of War 48(c)(2), the confirming authority is the Judicial Council, acting with the concurrence of The Judge Advocate General.

5. The record shows the accused to be 23 years of age. It does not appear that he has any dependents. He enlisted in the Philippine Scouts on 28 May 1946 for three years.

6. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. A sentence to death or imprisonment for life is mandatory upon conviction of premeditated murder in violation of Article of War 92.

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

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

Roger Du. Grosier, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 336706

THE JUDICIAL COUNCIL

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

In the foregoing case of Recruit Pascual Pomada (PS 10327248), Battery "C", 532d Antiaircraft Artillery Gun Battalion (PS), APO 331, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. Philcom General and Garrison Prisoners Stockade, Stotsenberg Area Command, Luzon, The Republic of the Philippines, is designated as the place of confinement.

Franklin P. Shaw, Brig Gen, JAGC

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

E. M. Brannon, Brig Gen, JAGC
Chairman

20 September 1949

(GCMO 61, 14 Oct 1949).

I concur in the foregoing action. Under the direction of the Acting Secretary of the Army the term of confinement is reduced to ten (10) years.

THOMAS H. GREEN
Major General
The Judge Advocate General

6 October 1949.

IG, RYCOM OKINAWA
notified of this action by radio

Ltr 1 # 2

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

CSJAGV CM 336798

JUL 19 1949

U N I T E D S T A T E S)	9TH INFANTRY DIVISION
)	
v.)	Trial by G.C.M., convened at
)	Fort Dix, New Jersey, 23 February
Recruit EDWARD LOFFER, JR.)	1949. Bad conduct discharge
(RA 12313088), Service)	(suspended) and confinement
Battery, 60th Field)	for one (1) year. Disciplinary
Artillery Battalion.)	Barracks.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specifications 1 through 8, 10 through 12, 16 and 18: (Withdrawn by direction of the appointing authority from the Charge).

Specification 9: In that Recruit Edward Loffer, Junior, Service Battery, 60th Field Artillery Battalion, did, at Fort Dix, New Jersey, on or about 17 September 1948, feloniously embezzle by fraudulently converting to his own use one cloth valise, civilian, of a value of about $1.00, one pair slacks, civilian, of a value of about $4.00, one athletic jacket, civilian, of a value of about $4.00, two pairs shorts and undershirts, civilian, of a value of about $3.00, and $2.00, Lawful money of the United States, of a total of about $14.00, the property of Recruit George W. Quinn, entrusted to him by the said Recruit George W. Quinn.

Specification 13: In that Recruit Edward Loffer, Junior, Service Battery, 60th Field Artillery Battalion, did, at Fort Dix, New Jersey, on or about 17 September 1948, feloniously embezzle by fraudulently converting to his own use one pair wool slacks, civilian, of a value of about $8.00, one sport shirt, civilian, of a value of about $2.50, two pair socks, civilian, of a value of about $0.50, one set underwear, civilian, of a value of about $1.50, one leather belt, civilian, of a value of about $1.00,

and $2.00, lawful money of the United States, of a total of about $15.50, the property of Recruit Frank Gilbrasi, entrusted to him by the said Recruit Frank Gilbrasi.

Specification 14: In that Recruit Edward Loffer, Junior, Service Battery, 60th Field Artillery Battalion, did, at Fort Dix, New Jersey, on or about 17 September 1948, feloniously embezzle by fraudulently converting to his own use one pair oxfords, civilian, of a value of about $2.00, one cloth valise, civilian, of a value of about $3.00, one pair dungarees, Navy issue, one wool sport sweater, civilian, of a value of about $2.00, two pair socks, civilian, of a value of about $0.50, two handkerchiefs, civilian, of a value of about $0.20, one towel, civilian, of a value of about $0.50, and $2.00, lawful money of the United States, of a total value of about $10.20, the property of Recruit Salvatore G. Perazzo, entrusted to him by the said Recruit Salvatore G. Perazzo.

Specification 15: In that Recruit Edward Loffer, Junior, Service Battery, 60th Field Artillery Battalion, did, at Fort Dix, New Jersey, on or about 17 September 1948, feloniously embezzle by fraudulently converting to his own use one pair trousers, civilian, of a value of about $12.00, one valise, civilian, of a value of about $2.00, one sport shirt, civilian, of a value of about $6.00, one towel, civilian, of a value of about $0.50, three handkerchiefs, civilian, of a value of about $0.75, two pair socks, civilian, of a value of about $0.50, two pair shorts, civilian, of a value of about $1.00, three undershirts, civilian, of a value of about $1.50, of a total value of about $24.25, the property of Recruit Buenaventura Byron, entrusted to him by the said Recruit Buenaventura Byron.

Specification 17: In that Recruit Edward Loffer, Junior, Service Battery, 60th Field Artillery Battalion, did, at Fort Dix, New Jersey, on or about 17 September 1948, feloniously embezzle by fraudulently converting to his own use one cloth valise, civilian, of a value of about $2.50, one pair wool trousers, civilian, of a value of about $5.00, one sport shirt, civilian, of a value of about $5.00, one pair oxfords, civilian, of a value of about $2.00, two "T" shirts, civilian, of a value of about $1.50, insurance receipts, and $2.00, lawful money of the United States, of a total value of about $18.00, the property of Recruit Robert E. Conway, entrusted to him by said Recruit Robert E. Conway.

He pleaded not guilty to and was found guilty of the Charge and all remaining Specifications thereunder. No evidence of previous convictions was introduced. Accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or become due, and to be confined at hard labor

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at such place as the reviewing authority may direct for one and one-half (1½) years. The reviewing authority approved only so much of the findings of guilty of Specification 9 of the Charge as involves findings that the accused did, at Fort Dix, New Jersey, on or about 17 September 1948, feloniously embezzle by fraudulently converting to his own use one cloth valise of some value less than $20.00, the property of Recruit George W. Quinn, entrusted to him by the said George W. Quinn, only so much of the findings of guilty of Specification 13 of the Charge as involves findings that the accused did, at Fort Dix, New Jersey, on or about 17 September 1948, feloniously embezzle by fraudulently converting to his own use one sport shirt and one pair of socks of a total value less than $20.00, the property of Recruit Frank Gilbrasi, entrusted to him by the said Frank Gilbrasi, only so much of the findings of guilty of Specification 14 of the Charge as involves findings that the accused did, at Fort Dix, New Jersey, on or about 17 September 1948, feloniously embezzle by fraudulently converting to his own use one towel and one pair of socks of a total value less than $20.00, property of Recruit Salvatore G. Perazzo, entrusted to him by the said Salvatore G. Perazzo, only so much of the findings of guilty of Specification 15 of the Charge as involves findings that the accused did at Fort Dix, New Jersey, on or about 17 September 1948, feloniously embezzle by fraudulently converting to his own use one valise of some value less than $20.00, the property of Recruit Buenaventura Byron, entrusted to him by the said Buenaventura Byron, only so much of the findings of guilty of Specification 17 of the Charge as involves findings that the accused did, at Fort Dix, New Jersey, on or about 17 September 1948, feloniously embezzle by fraudulently converting to his own use one pair wool trousers, one shirt, one pair of shoes, and one T-shirt of a total value less than $20.00, property of Private Robert E. Conway, entrusted to him by the said Robert E. Conway, and approved only so much of the sentence as provides for bad conduct discharge the service, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for one (1) year, ordered the sentence executed but suspended execution of that portion thereof adjudging bad conduct discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, or elsewhere as the Secretary of the Army may direct, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 203, Headquarters, 9th Infantry Division, Fort Dix, New Jersey, dated 20 May 1949.

3. a. Evidence for the Prosecution. On 17 September 1948 Private George W. Quinn, Recruit Frank Gilbrasi, Recruit Salvatore G. Perazzo and Private Robert E. Conway each gave the accused certain items of their civilian clothing to be shipped to their homes, together with $2.00 each to cover the cost of mailing (R. 9-18). On the same date Private Byron gave accused certain items of his clothing to be shipped to his home (R. 15). On 7 October 1948 in a written statement (Pros. Exhibit 6), admitted in evidence without objection (R. 20), the accused stated that on 17 September 1948 he received 15 packages of clothing to be mailed to the homes of Recruits being processed and $28 to cover the cost of mailing and handling the clothing. These

clothes remained at accused's bunk over night and the following day, when the accused failed to get a pass, the accused had his father take the clothes to his father's home to keep them there until the accused came home or until his father heard from him. On Sunday, 19 September 1948, the accused's father came to Camp and when it developed permission could not be secured for the accused to go home, the accused and his father got in his father's car and drove home, where accused found all of the property he had delivered to his father, and thereupon instructed his father to leave the clothes there until he, the accused, could find out what to do with them. Upon the accused's return to Camp he was restricted and thereafter, approximately a week later, after the accused's father had talked to Colonel Arny, the accused's father advised him that the reason he was restricted was not because of absence without leave, but because "of the clothes and money I had and that the Recruits did not get." When his father interrogated him in respect to what he proposed to do, the accused stated that he "made up a story about a man he gave the clothes to and he did not send them" and his father stated that if the accused told the story to be sure to stick to it. The accused then told his father "to get rid of the clothes", and shortly thereafter, when the accused's father and mother came to Camp, upon being asked whether he had disposed of the clothes , the accused's father stated that "he did."

b. Accused elected to remain silent.

4. The accused under five separate Specifications has been tried and found guilty of the embezzlement, on 17 September 1948, from five Recruits being processed at Fort Dix, of certain items of their civilian clothing and bags, to be shipped or mailed by him to their respective homes, four of whom gave him $2.00 each to defray cost of shipping or mailing. The approved findings have been amended so as to except therefrom in each instance the $2.00 delivered to the accused to defray expenses, and since the evidence is sufficient to support the finding of embezzlement, in each instance, of property of total value of less than $20 the only question presented and which will be considered by the Board of Review is the legality of the sentence imposed.

5. In paragraph 180g of the 1949 Manual for Courts-Martial it is stated:

> "When a larceny of several articles is committed at substantially the same time and place it is a single larceny even though the articles belong to different persons. Thus, if a thief steals a suitcase containing the property of several individuals, or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification."

By reason of the proviso to Article of War 93, as amended by Title II, Selective Service Act of 1948 (62 Stat. 627), the quoted statement in the Manual applies to the offense of embezzlement. With respect to the question here presented, it is immaterial that the charges in this case were drawn according to the form of embezzlement specification in the 1928 Manual (Form 95, p. 250, MCM, 1928; compare Form 92, p. 323, MCM 1949) and that the offenses were committed prior

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to 1 February 1949, the effective date of the amendment to Article of War 93 (People v. Stevenson, 103 Cal App 82, 284 P. 487).

Applying the quoted principle of law, it is at once apparent that the five separate embezzlements of which the accused was found guilty were in fact but one embezzlement which should have been charged in but one specification. It thus becomes necessary to determine whether this improper method of pleading worked to the substantial disadvantage of the accused (See CM 333014, Brooks, 1st Indorsement, 81 B.R. 273, 277). There would seem to be no prejudice to the accused in the multiple findings of guilty. However, since the approved findings as to each specification find the accused guilty of embezzling property of an unspecified value, the aggregate value of all the property embezzled is also of an unspecified value. Inasmuch as the acts committed should have been alleged in one specification, by reason of the finding as some value only the maximum sentence legally imposable is bad conduct discharge, total forfeiture and confinement at hard labor for six months.

6. For the foregoing reasons 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 bad conduct discharge the service, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for six (6) months.

_____, J.A.G.C.

On Leave

_____, J.A.G.C.

_____, J.A.G.C.

CSJAGV CM 336798 1st Indorsement AUG 5 1949

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

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

1. In the case of Recruit Edward Loffer, Jr. (RA 12313088), Service Battery, 60th Field Artillery Battalion, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for bad conduct discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for six months. Under Article of War 50e(3), this holding and my concurrence, vacate so much of the sentence as is in excess of bad conduct discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence and confinement at hard labor for six months.

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

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

(CM 336798).

HUBERT D. HOOVER
Major General
Acting The Judge Advocate General

...el, Record trial
...el 2 Draft GCMO

RECEIVED
12 AUG 1949
Courts-Martial Branch
Fort Dix, N. J.

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

CSJAGN-CM 336812

U N I T E D S T A T E S	)	82D AIRBORNE DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Mackall, North Carolina, 10 May 1949. Dishonorable discharge and confinement for five (5) years. Federal Reformatory.
	)	
Recruit LEONARD R. MILANO, Jr. (RA 13163387), Company C, 505th Airborne Infantry Regiment, Fort Bragg, North Carolina.	)	

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

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

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

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

Specification: In that Recruit Leonard R. Milano, Company "C", 505th Airborne Infantry Regiment, Fort Bragg, North Carolina, did, without proper leave absent himself from his organization at Fort Bragg, North Carolina from about 1 August 1948 to about 1500 hours 10 January 1949.

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

Specification 1: In that Recruit Leonard R. Milano, Company "C", 505th Airborne Infantry Regiment, did at Fort Bragg, North Carolina, on or about 31 August 1948, present for approval and payment a claim against the United

States by presenting to Captain Mauldin G. Quattlebaum, an officer of the United States, duly authorized to pay such claims, in the amount of $52.86, for services alleged to have been rendered to the United States by the said Recruit Milano, which claim was false and fraudulent in that the said Recruit Milano had not rendered any service to the United States subsequent to 25 August 1948, and was then known by the said Recruit Milano to be false and fraudulent.

Specification 2: In that Recruit Leonard R. Milano, Company "C", 505th Airborne Infantry Regiment, did, at Fort Bragg, North Carolina, on or about 30 September 1948, present for approval and payment a claim against the United States by presenting to Captain Clifford L. Myers, an officer of the United States, duly authorized to pay such claims, in the amount of $49.70, for services alleged to have been rendered to the United States by the said Recruit Milano, which claim was false and fraudulent in that the said Recruit Milano had not rendered any service to the United States subsequent to 25 August 1948, and wasthen known by the said Recruit Milano to be false and fraudulent.

Specification 3: In that Recruit Leonard R. Milano, Company "C", 505th Airborne Infantry Regiment, did, at Fort Bragg, North Carolina, on or about 31 October 1948, present for approval and payment a claim against the United States by presenting to Captain Clifford L. Myers,an officer of the United States, duly authorized to pay such claims, in the amount of $49.70, for services alleged to have been rendered to the United States by the said Recruit Milano, which claim was false and fraudulent in that the said Recruit Milano had not rendered any service to the United States subsequent to 25 August 1948, and was then known by the said Recruit Milano to be false and fraudulent.

Specification 4: In that Recruit Leonard R. Milano, Company "C", 505th Airborne Infantry Regiment, did, at Fort Bragg, North Carolina, on or about 30 November 1948, present for approval and payment a claim against the United States by presenting to 1st Lt. James R. Perkins, an officer of the United States, duly authorized to pay such claims, in the amount of $49.70, for services alleged to have been

rendered to the United States by the said Recruit Milano, which claim was false and fraudulent in that the said Recruit Milano had not rendered any service to the United States subsequent to 25 August 1948, and was then known by the said Recruit Milano to be false and fraudulent.

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

Specification: In that Recruit Leonard R. Milano, Company "C", 505th Airborne Infantry Regiment, did, without proper leave, absent himself from his organization at Fort Bragg, North Carolina, from 7 February 1949, to 23 March 1949.

The accused pleaded not guilty to Charge I and the Specification thereof, not guilty to Specification 1 of Charge II, guilty to Charge II and the remaining Specifications thereof, and guilty to the Additional Charge and the Specification thereof. He was found guilty of all Charges and Specifications and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority might direct for five years. The reviewing authority approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and withheld execution of the sentence pursuant to Article of War 50e.

3. The record reveals numerous errors and irregularities but for the purposes of this review we need consider only the propriety of designating the Federal reformatory as the place of confinement, the sufficiency of proof of the knowledge of the falsity and fraudulence of the claims, and the sufficiency of the proof adduced to show the absence without leave between 1 August 1948 and 10 January 1949.

During the month of July, 1948, accused worked in the kitchen of an ROTC mess which was closed out on or about 31 July. At that time all personnel operating the mess were directed to report to their own organization (R. 14, 15), which in accused's case apparently was Company "H", 505th Airborne Infantry Regiment (R. 10, 12). He was transferred from Company "H" to Company "C", 505th Airborne Infantry Regiment, 25 August 1948 at which time his status was "present for duty" (R. 10). With reference to this transfer, Prosecution's Exhibit 3, admitted without objection (R. 9), was an extract copy of the morning report of Company "C" for 26 August 1948, properly authenticated by Captain Clifford L. Myers. It showed that accused was one of "10 EM asgd & jd fr Co H this regt * * * EDCMR 25 Aug 48."

An extract copy of the properly authenticated morning report of Company "C" for the date 12 January 1949, introduced without objection (R. 9), showed:

"Milano Leonard R Jr RA 13163387 Rct
Dy to AWOL eff 0600 hrs 25 Aug 48"
(Pros. Ex. 2).

Sergeant First Class Eugene L. Evans, in so far as pertinent to this morning report, testified as follows:

"Q: Sgt. Evans, during the month of August, 1948, to which organization were you assigned?
A: 'H' Company, 505th Airborne Infantry Regiment, Fort Bragg.

Q: What were your duties during that period?
A: In the month of August I was Field First Sergeant.

Q: At the time of 1 August to 25 August, 1948, was Milano present for duty in your Company?
A: As I recall it, I couldn't say. I was relieved sometime in July. Another Sergeant/1st Class took over.

Q: Were you in 'H' Company?
A: Yes.

Q: Was he present to your knowledge?
A: No.

* * *

Q: What duties did you assume after you were relieved from the duty of Field Sergeant?
A: Mess Sergeant.

Q: In your capacity as Mess Sergeant, would you normally come in contact with all of the men in your Company?
A: Yes" (R. 12, 13) (Underscoring supplied).

The authenticator of the morning report, First Lieutenant James R. Perkins, in explaining the reason for the fact that the morning report entry was made some five months after the occurrence of the event recited, testified as follows:

"A: I assumed command of Company 'C' on the 29th of November, 1948, or thereabouts. On 30 November 1948, I was Class 'A' Finance Agent for that unit. I got acquainted with the men, and during that time I had report to me for pay the accused, Rct. Milano. When most of the men came in, I would talk with them. I had such a talk with Milano, and I asked him what

job he had in the unit, and he informed me that he wasn't with the unit, that he was with the V Corps Military Police. I asked him what kind of work he was doing, and he explained that he was out picking up AWOL's, or something of that sort, with the police. I asked him if he was on orders, and he said 'Yes', and told me that he was on special duty over there. About the 5th of December, I was interviewing the men, trying to find out how many desired leave for Christmas, and I began to look for Milano. The first place that I looked was the V Corps Military Police and on asking there I was informed by competent authority that this man was not present in that organization, and that not only was he not there, but that they had never seen him. I then went back and checked the Morning Report entries regarding this man. At the time that I took over the command, they had a new 1st Sergeant, and they had had four before him, so the Morning Reports were not in very good shape. I finally checked back to 25 August 1948. At that time Milano had been transferred to 'C' Company from 'H' Company of the 505th. The status at the time of transfer was present for duty. Six days later an entry came out on the Morning Report transferring Rct. Milano and placing him on Temporary Duty with CMP Det #1 3420 ASU. That entry, on the 1st of September 1948, carried no Special Order number or anything of that sort, so I started checking with the 3420 ASU. The 3420 ASU authorities informed me that the man had been a member of the unit in the early Spring until about 11 June 1948, and had not been back since that time. I checked their Moring Reports and verified the fact that he had not been there since 11 June 1948. I then began a search of the Post. All of this had taken quite a bit of time, and it was approximately 21 December 1948 at this point. At that time the payroll came out for partial pay for Christmas. Milano's name appeared, but he did not appear for pay on the 21st of December. I continued the investigation and Milano could not be found, and he had been seen in Fayetteville by members of the unit, and at all times of the day and night. I then began on the assumption that he was AWOL, but I had no authority for it at that time. I notified the Military Police, and again on the 31st of December, 1948, Milano did not appear for his pay. The Military Police called me on the 12th of January, 1949, and informed me that they had apprehended Milano in Fayetteville. I picked him up from the Stockade,

and questioned Milano, and questioned the authorities at the place where Milano was supposed to be on duty, and I came to the conclusion and I firmly believe that Milano has been Absent Without Leave since the 25th of August, 1948, or sometime before that. But I knew that he had been AWOL from our organization from the 25th of August. He had no authority for leave, he was no /sic/ on pass, he was not on competent orders from our unit to another unit, therefore, I made the entry on the 12th of January 1949, that Rct. Milano was AWOL effective 0600 hours, 25 August 1948. (R. 10, 11) (Underscoring supplied)

* * *

"Q: The date of the beginning of the absence you fix as the 25th of August, 1948?

A: Yes, because that was the date he was transferred to my organization.

Q: I believe that you stated that you checked back through the Morning Reports and that on the 1st or the 31st of September, 1948, there was an entry on the Morning Report which stated that Rct. Milano was on temporary duty. Is that correct?

A: Yes, but the entry was not substantiated by competent orders. I called to check it, but there were no orders placing that man on temporary duty. The Adjutant of the unit informed me that he had not placed that man on temporary duty from my organization, and that there were no verbal orders.

Q: Did you investigate that entry other than with the Battalion Adjutant?

A: I did. I checked all Special Orders of the 505th Airborne Infantry Regiment, and also all available Special Orders that the 505th has on file with the 82nd Division.

Q: Did you inquire of the former Company Commander or the former 1st Sergeant?

A: I did. I investigated thoroughly. The 1st Sergeant was not available as he had been shipped overseas. I did talk with one of the Company Clerks who was there at that time, and his opinion was that since Milano wasn't present, and they had asked his former organization where he was, and they were told that he was on temporary duty, with the Military Police, that they just assumed that he was still on temporary duty.

Q: What did the Clerk have to do with the Morning Reports?
A: That Clerk was the typist for the Morning Reports. At least he informed me that he was.

Q: What did the former Company Commander have to tell you?
A: The former Company Commander had only been in command of the unit less than a month at that time, and he was pretty vague. He had never seen Milano except to pay him twice.

Q: Did you inquire of the Company Commander of the period of 31 August, or 1 September 1948? That is, the officer who signed that Morning Report?
A: Yes. He informed me that he had no knowledge of that entry, as to the origin of that entry, or what the authority had been for that entry." (R. 11) (Underscoring supplied)

It was stipulated by and between the defense and prosecution that the accused "was Absent Without Official Leave as of sometime in August" (R. 6).

4. Whether it is sufficiently proved by competent evidence that accused was absent without leave during the alleged period 1 August 1948 to 10 January 1949 determines the validity of the finding of guilty not only of the absence without leave alleged under Charge I but also of the false claims alleged under Charge II. The essential elements of proof of such claims are:

> "(a) That the accused presented or caused to be presented for approval or payment to a certain person in the civil or military service of the United States having authority to approve or pay it a certain claim against the United States as alleged; (b) that such claim was false or fraudulent in the particulars alleged; (c) that when the accused presented the claim or caused it to be presented he knew it was false or fraudulent in such particulars; and (d) the amount involved, as alleged" (par. 181b, p. 249, MCM, 1949).

Obviously, if accused was not absent without leave during the periods for which he claimed pay for services rendered, the claims were not false (See CM 246591, Graham, 30 BR 95; CM 318507, Hayes, 71 BR 391).

Careful consideration of the evidence reveals that the accused was transferred from Company "H" to Company "C" on 25 August 1948. There is Sergeant Evans' statement, following his assertion that he could not say whether accused was present, that to his knowledge he was not present.

The statement is of doubtful value, but at most tends only to prove that accused was not present for duty in Company "H" during the period 1 to 25 August 1948, although the testimony of Lieutenant Perkins and Prosecution's Exhibit 3 indicates that accused was present for duty at some time on 25 August 1948 in Company "C". This does not preclude that he also went absent without leave at some time on the same date. While it is apparent that the statement of Lieutenant Perkins that accused was present on that date is of little probative value, nevertheless, in the absence of contrary evidence, the accuracy of Prosecution's Exhibit 3, signed by the unit commander and reciting that accused was "asgd & jd" must be presumed (par. 130b, p. 166-167, MCM, 1949; CM 320957, Boone, 70 BR 223).

A like presumption is permissible with respect to the entry in Prosecution's Exhibit 2, showing the inception of the unauthorized absence as 25 August 1948. Lieutenant Perkins, as of 12 January 1949 had the duty to determine and know the status of the members of his company. As shown by the evidence he made a thorough check as to the status of the accused by inquiry of persons who should have knowledge, checking pertinent special orders, and attempting to verify various entries relating to the accused, found in the morning reports of Companies "C" and "H".

As stated at pages 225, 226 of the Boone case, supra:

> "The Manual, then, as well as the common law exception to the hearsay rule, requires only that an official record, to be admissible in evidence, be based on personal knowledge and that the public official making the entry have the duty to determine the facts recorded and to enter them in a public document. There is no requirement that the person by whom the entry is actually made have himself personal knowledge of the facts recorded, it being sufficient that he had the duty to ascertain such facts through the personal knowledge of his subordinates or informants. It is in this manner that his entry is based on personal knowledge, the observations of his agents in the matter being legally attributable to him."

It is also observed that the prosecution, defense and accused stipulated (R. 6) "to the effect that the man was Absent Without Official Leave as of sometime in August." Without more, such stipulation would sustain a conclusion only that the accused departed without authorization on 31 August 1948. "A stipulation must be interpreted in the light most favorable to the accused and the ambiguity resolved in his favor" (CM 331033, Alvarado, 80 BR 1, 4-5). However when the stipulation is considered in the light of the other evidence adduced, particularly Prosecution's Exhibit 2, it appears inescapable that the

accused was absent without leave commencing on 25 August 1948. The defense at no time contravened such evidence.

Although there is some indication in the record tending to show that the accused was also absent without proper leave from 1 August 1948 to 25 August 1948, the specification alleging the presentation of a false and fraudulent claim on 31 August 1948, for services during that month, is founded upon the allegation that the accused had not rendered any service to the United States subsequent to 25 August 1948. As it is obvious that the false claim is based upon a failure to render service for six days, the Board of Review is of the opinion that with respect to Specification 1 of Charge II the record of trial is sufficient to sustain only a finding of guilty of presenting for approval and payment a false and fraudulent claim for pay in an amount less than $20.00 for the period 25 August to 31 August 1948.

With respect to the false claims set forth in Specifications 2, 3 and 4 of Charge II the record reveals no direct evidence that the accused made or was complicitious in the making of any misrepresentations or in the falsification of any records relied upon in the preparation of the critical payrolls. A review of the pertinent authorities would seem to indicate that such proof is indispensable in a case like the one under consideration (JAGJ 1948/7213; CSJAGJ 1949/1887). In CM 325773, Cruise, 75 BR 41, a similar case involving presentation of a pay roll upon which accused was listed in a higher rank than he actually held, the Board of Review said, at page 48:

> "These exhibits show on their face that accused merely receipted for the money and that the correctness of the vouchers was certified to by a commissioned officer. There is no evidence in the record that accused made any representations to the certifying officer relative to the grade in which he was entitled to be paid and it cannot be assumed that in the presentation of the fraudulent claims (if they be such) to the finance officer, that any act or statement of accused was the basis or source of the false information contained in the pay vouchers (CM 251348, Gaston, 33 BR 211)."

In the Gaston case, cited above, at page 217, the Board stated:

> "The evidence is sufficient to show that accused forged an entry on his service record purporting to promote himself to sergeant and thereafter signed the payroll and received the pay of a sergeant, on the dates alleged in the Specifications. By signing the payroll under these circumstances accused was guilty on each occasion of presenting a false claim against the Government * * *."

After careful consideration of the rationale expressed in the foregoing citations, in conjunction with the requisite elements of proof in the presentation of such false claims (see page 7, supra), the Board of Review is of the opinion that proof of such misrepresentation in this type of case is necessary only to support the finding of fact that accused had knowledge of the falsity or fraudulence of the claim. Where an enlisted man signs the pay roll and receives unauthorized allowances or pay for a higher grade, in the absence of a showing that his misrepresentations formed the basis for the erroneous entries on the pay roll, it is unreasonable to assume that he had knowledge of the falsity of the entries. Such is not the case, however, where, as in the instant case, the accused is actually in an absent without leave status and he presumably returns temporarily in order to sign the pay roll and receive his pay. (It is well settled that presence only to perform those functions does not terminate that status (CM 280665, Matheron, 53 BR 293)). It is inconceivable that under such circumstances an enlisted man would be unaware of the fact that he is falsely, albeit tacitly, representing that he is and has been present for duty and is entitled to his pay. Whether or not he had made any written or oral misrepresentations, his conduct suffices to permit the inference that he had the necessary fraudulent intent. Dimmick v. United States, 116 Fed. 825, was a case involving a prosecution for presentation of a false claim under the Federal code (18 USC 80; R.S. sec. 5438). To the contention that a claim is not false unless it contains a fraudulent or fictitious statement or entry, the court, on page 828, said:

> "The character of the claim - that is to say, whether true, genuine, and honest, or false, fictitious, and fraudulent - must be determined in view of all of the facts and circumstances attending it. If it be originally forged, or otherwise fraudulently concocted, its presentation for payment, with knowledge of the facts, must necessarily be fictitious and fraudulent. Every whit as much so is a similar demand based upon a claim originally valid, but which the party presenting the claim knows has theretofore been paid, and is no longer a subsisting, honest and just demand, or which he knows he is wholly unauthorized to present and demand or receive any money on." (Underscoring supplied)

And in a case involving a statutory monetary penalty for presentation of a false claim (31 USC 231; R.S. sec. 3490), the court upheld the trial judge's instruction to the jury to the effect that:

> "* * * to warrant a finding that he knew such claims were either false, fictitious, or fraudulent they must be satisfied that he was aware of such facts or circumstances as would have created the belief in the mind of an ordinarily intelligent and prudent person that the claims were in some respects false, fictitious, or fraudulent". United States v. Shapleigh, 54 Fed. 126, 135.

Comparing the offense of presenting a false claim to the crime of false pretenses, an analogy adopted in the Cruise case, supra, silence is a well recognized misrepresentation if it is a "part of conduct or acquiescence involving an affirmation" (Wharton's Criminal Law, sec. 1436). The presence of the accused to sign the pay roll and to receive pay is conduct affirming that his status is present for duty.

However, the gist of an offense under Article of War 94 is fraud. In that field, it is firmly established that where a person has a duty to disclose material matters his silence has the same legal effect as if he affirmatively misrepresented the fact (Tyler v. Savage, 143 US 79, 12 S Ct 340; Shepard v. City Co. of N. Y., 24 F Supp 682; Hush v. Reaugh, 23 F Supp 646; Nasaba Corp. v. Harfred Reality Corp., 287 NY 290, 39 NE (2d) 243). That accused had a duty to disclose his status as that of absent without leave rather than present for duty is too clear to require further discussion. His presence without disclosing such status not only justifies an inference that he knew the claim was false, but also satisfies the requirement of proving an affirmative misrepresentation, the test established by the Cruise case, supra. Finally, the accused pleaded guilty to Specifications 2, 3 and 4 of Charge II and did not offer any evidence inconsistent with his plea. On the contrary, the foregoing discussion conclusively shows that his plea was not improvidently entered and may be allowed to stand (CM 261029, Hill, 40 BR 77; CM 278123, Lowes, 51 BR 333; CM 283260, Lemmenes, 55 BR 49; CM 314736, O'Loughlin, 64 BR 207).

5. The reviewing authority designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement. Accused was properly convicted of three offenses under Article of War 94 and properly convicted of the fourth offense under Article of War 94, except as to the amounts shown, and in addition properly convicted of two offenses under Article of War 61. Although presenting a false claim is a crime recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year (18 USC 287, 1001), the court was nonetheless limited by the maximum punishment authorized by the Manual for Courts-Martial. It was not authorized to adjudge confinement in excess of one year for any one of the offenses of which accused was properly found guilty (AW 45; par. 117c, pp 134 and 138, MCM, 1949). It follows that confinement in a Federal penitentiary or reformatory was not authorized (AW 42; par. 90a, p 100-101, MCM, 1949; CM 226579, Evans,

15 BR 125). The fact that the total authorized confinement for conviction of the several offenses exceeds one year is immaterial (CM 288588, Hawkins, 56 BR 397; CM 319950, Ito, 69 BR 209).

6. For the foregoing reasons the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge II and Specifications 2, 3 and 4 thereof, legally sufficient to support the findings of guilty of the Additional Charge and its Specification, legally sufficient to support the finding of guilty of Charge I and only so much of the finding of guilty of its Specification as involves a finding that the accused absented himself without proper leave from his organization, as alleged, from 25 August 1948 to 10 January 1949, legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge II as involves a finding that the accused did, at the time and place and in the manner alleged, present for approval and payment a false and fraudulent claim against the United States in an amount less than $20, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence and confinement at hard labor for four years, four months and twelve days in a place other than a penitentiary, Federal reformatory or correctional institution.

ON LEAVE, J. A. G. C.

J. A. Guriond, J. A. G. C.

John F. Taylor, J. A. G. C.

CSJAGN-CM 336812 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, 82d Airborne Division, Fort Bragg, North Carolina.

1. In the case of Recruit Leonard R. Milano, Jr. (RA 13163387), Company C, 505th Airborne Infantry Regiment, Fort Bragg, North Carolina, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge II and Specifications 2, 3 and 4 thereof, legally sufficient to support the findings of guilty of the Additional Charge and its Specification, legally sufficient to support the finding of guilty of Charge I and only so much of the finding of guilty of its Specification as involves a finding that the accused absented himself without proper leave from his organization, as alleged, from 25 August 1948 to 10 January 1949, legally sufficient to support only so much of the finding of guilty of Specification 1 of Charge II as involves a finding that the accused did, at the time and place and in the manner alleged, present for approval and payment a false and fraudulent claim against the United States in an amount less than $20, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for four years, four months and twelve days in a place other than a penitentiary, Federal reformatory or correctional institution. Under Article of War 50e(3) this holding and my concurrence vacate so much of the finding of guilty of the Specification of Charge I as is in excess of a finding that the accused absented himself without proper leave from his organization, as alleged, from 25 August 1948 to 10 January 1949, so much of the finding of guilty of Specification 1 of Charge II as is in excess of a finding that the accused did, at the time and place and in the manner alleged, present for approval and payment a false and fraudulent claim against the United States in an amount less than $20, and so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for four years, four months and twelve days in a place other than a penitentiary, Federal reformatory or correctional institution. Under Article of War 50 you now have authority to order the execution of the sentence as modified in accordance with this holding.

2. When copies of the published order in this case are forwarded

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

(CM 336812).

THOMAS H. GREEN
Major General
The Judge Advocate General

1 Incl
Record of trial

AADJA CM 336812 2nd Ind
(25 Aug 49)
HEADQUARTERS 82D AIRBORNE DIVISION, Fort Bragg, North Carolina

TO: The Judge Advocate General of the Army, Washington 25, D. C.

Paragraph 2, 1st Indorsement complied with. Six copies of GCMO # 76, Hq 82d Abn Div, dtd 2 September 1949, attached hereto.

EDWARD DUVALL
Lt Col, JAGC
Division Judge Advocate

2 Incls:
1. 6 cps GCMO # 76
2. GCM Record of Milano, L. R.

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

CSJAGQ - CM 336894 July 25, 1949

U N I T E D S T A T E S	UNITED STATES ARMY FORCES IN KOREA
v.	Trial by G.C.M., convened at Seoul, Korea, 19 April 1949. Dishonorable discharge and confinement for two (2) years. Federal Reformatory.
Private ROBERT L. HAVEN (RA 19293400), 207th Military Police Service Company, United States Army Forces in Korea, APO 235	

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

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

2. The accused was found guilty of having herein in his possession on 22 February 1949, and of introducing that narcotic drug into his quarters on the same date (Specs. 1 and 2). He was also found guilty of committing the same offenses on 16 March 1949 (Specs. 3 and 4).

The only question requiring consideration is the lawfulness of the designation of a Federal reformatory as the place of confinement. It has been repeatedly held that a Federal reformatory is authorized as a place of confinement only when confinement in a penitentiary is authorized (CM 226579, Evans, 15 BR 125). In the case just cited it was also held that although the offense therein involved was one for which penitentiary confinement might have been imposed by Federal Civil Authorities, such confinement could not be imposed in a court-martial case when not more than one year of confinement was authorized by the Table of Maximum Punishments. The Table of Maximum Punishments limits the period of confinement for each of the offenses herein to one year (MCM, 1949, par. 117c). It follows that the designation of a reformatory as the place of confinement in the present case was unauthorized.

3. For the reasons stated the Board of Review holds that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the

sentence, and confinement at hard labor for two years in a place other than a penitentiary, Federal reformatory or correctional institution.

_____, J.A.G.C.

_____, J.A.G.C.

_____, J.A.G.C.

CSJAGQ - CM 336894.

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

TO: Commanding General, United States Army Forces in Korea,
APO 235, c/o Postmaster, San Francisco, California

In the case of Private Robert L. Haven (RA 19293400), 207th Military Police Service Company, United States Army Forces in Korea, APO 235, I concur in the holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for two years in a place other than a penitentiary, Federal reformatory or correctional institution. Under Article of War 50e(3) this holding and my concurrence vacate so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for two years in a place other than a penitentiary, Federal reformatory or correctional institution.

(CM 336894)

1 Incl
R/T

THOMAS H. GREEN
Major General
The Judge Advocate General

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

(243)

CSJAGH CM 332151

MAR 25 1949

U N I T E D S T A T E S	FIRST ARMY
v.	Trial by G.C.M., convened at Fort Jay, New York, 22, 23 June 1948. Dismissal and total forfeitures.
Captain BERNARD MISSIK (O-1575472), Quartermaster Corps, Headquarters and Headquarters Detachment, 1201st Area Service Unit, Fort Jay, New York.	

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

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

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

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

Specification: In that Captain Bernard Missik, Quartermaster Corps, Headquarters and Headquarters Detachment 1201st Area Service Unit, Fort Jay, New York, then a patient at Mason General Hospital, Brentwood, New York, did at Mason General Hospital, Brentwood, New York, on or about 4 September 1946 desert the service of the United States and did remain absent in desertion until he surrendered himself at Headquarters Western Base Section, Paris, France, on or about 17 December 1946.

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

Specification: In that Captain Bernard Missik, Quartermaster Corps, Headquarters and Headquarters Detachment 1201st Area Service Unit, Fort Jay, New York, did, at Fort Dix, New Jersey, on or about 11 March 1947, make a claim against the United States by presenting to Major Donald A. LeFace, Finance Department, finance officer at Fort Dix, New Jersey, an officer of the United States, duly authorized to pay such claims, a pay voucher in the amount of $1878.77 for base pay,

Sheet # 2

longevity, subsistence and foreign service pay, which claim was false in that the sum of $907.32 covered pay for which he was not entitled, and was then known by said Captain Bernard Missik to be false.

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

Specification: (Stricken on motion of defense).

He pleaded not guilty to all Charges and Specifications. He was found guilty of the specification of Charge I except the words "desert" and "in desertion," substituting therefor, respectively, the words "absent himself without leave from" and "without leave," of the excepted words, not guilty, of the substituted words, guilty, and of Charge I, not guilty, but guilty of a violation of the 61st Article of War; and guilty of the Specification of Charge II and Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence, remitted so much thereof as relates to confinement and forwarded the record of trial for action under Article of War 48.

3. The pertinent evidence of record is summarized as follows:

a. For the prosecution.

Accused is in the military service of the United States (R 34,60,127).

On 4 September 1946, accused absented himself without leave from Detachment of Patients, 9961st Technical Service Unit - Surgeon General's Office, Medical Department, Mason General Hospital, Brentwood, New York (Pros Ex 1; R 22; Pros Ex 8). He remained in that status until he surrendered himself to military control on 17 December 1946, at Headquarters, Western Base Section, Paris, France (Pros Ex 2 and 3; R 23,24). He accomplished his surrender by reporting to Major Francis C. West, the Executive Officer to the Adjutant General, Headquarters Western Base Section, whose deposition was introduced in evidence by the prosecution. Major West deposed that when accused surrendered he stated that he had overstayed his authorized leave which he had been granted by his unit "by some sixty-odd days." Deponent advised the G-1 of the Base Section that accused had reported to him from an unauthorized leave status and was instructed to make further report about the matter to Headquarters United States Forces, European Theater. Major West did so and the latter command directed that accused be picked up on the morning report. Accordingly, accused was attached to Headquarters

Command, Western Base Section, and picked up on the morning report of that organization (Pros Ex 9).

Major West in his deposition further stated that while Western Base Section would not furnish billets, messing facilities or transportation to military personnal on leave status in Paris, and that such personnel were considered to be "on their own," nevertheless, these services would be provided when requested in worthy cases. Major West further deposed that on 17 December 1946 accused's mannerism and behavior appeared to be normal; that accused's conversation was not disjointed; and that accused did not seem restless or nervous (Pros Ex 9).

The prosecution also introduced a deposition of First Sergeant Daniel W. Bloodworth, Sr., in which this deponent stated that between 17 December 1946 and 10 January 1947 he was billeting sergeant at Camp Genmervillers, Paris, France. Accused was introduced to him as the temporary new billeting officer. Deponent knew accused and worked with him for approximately two weeks in either December 1946 or January 1947. During this association, accused stated to deponent that he had been "AWOL since September 1946" from a hospital at Long Island, New York. Deponent observed accused's attitude and behavior during this period. Both were good. Accused was a willing worker and anxious to help but was extremely restless and nervous. In conversation with him, deponent noted that although accused was coherent, his mind indicated an inability to concentrate for any length of time and would wander from one subject to another (Pros Ex 10; R 50).

Captain Thomas C. Grissom, Assistant Chief, Receipts and Disbursements Division, Finance Office, First Army, identified Prosecution's Exhibits 4 and 5 as copies of two letters dated 13 February 1948 and 18 February 1948, respectively, which had been sent by the First Army Finance Office to the General Accounting Office. He stated that these letters were requests for photostatic copies of certain pay vouchers; that he had personally written the letter dated 18 February 1948; and that the said exhibits were true copies of the original letters sent to the General Accounting Office (R 26-30).

Prosecution Exhibit 6, a letter from the General Accounting Office, dated 16 March 1948, was identified by Captain Grissom as the reply received to letters, copies of which had heretofore been marked Prosecution Exhibits 4 and 5 (R 31). The witness stated that inclosed with the letter from the General Accounting Office was Prosecution Exhibit 7 (Photostatic copy of W.D. Form 336, Pay and Allowance Account) (R 32).

Prosecution Exhibits 4 through 6, inclusive, were admitted into evidence over the objection of the defense. Prosecution Exhibit 7 was

provisionally admitted, subject to Prosecution's satisfactorily showing that the signature thereon was that of the accused (R 32,33).

Chief Warrant Officer Edward T. Renak testified that on or about 18 February 1948, at the Adjutant's office at Fort Jay, New York, he certified to accused's signature on a pay card which accused had signed in his presence (R 34,35). Upon being shown Prosecution Exhibit 7 (War Department Form #336, Pay and Allowance Account) the witness stated that in his opinion the signature on the exhibit "looks similar to the one I saw him /accused/ right" and that to the best of his knowledge the signature on the said exhibit was that of the accused (R 36,37).

On cross-examination, the witness admitted that his acquaintanceship with accused prior to February 1948 was only for one day; that he had no training in handwriting comparison; that at least fifty persons signed their names in his presence in any given month; and that there was nothing unusual about accused's signature which would cause him to remember it (R 35,36). He further stated that his testimony with reference to accused's signature was based on his having examined accused's pay card which was in the Finance Office and that on only one occasion in February 1948 had he seen accused write his name (R 37,38).

Captain Grissom was recalled as a witness and testified that Prosecution Exhibit 7 was a voucher of a captain with over five years service for base and longevity pay from 1 August 1946 to 28 February 1947, for subsistance allowance for the same period and for additional pay for foreign service from 10 December 1946 to 1 February 1947 (R 41,42).

On cross-examination, Captain Grissom stated that he had no knowledge of accused's signature and did not know whether or not the signature on Prosecution Exhibit 7 was that of accused. When asked if he would be able to identify accused's signature on an instrument if he had seen accused write his name during the previous February, he replied that he did not think that he could definitely do so (R 43). The withess further stated that Major LaFace (Donald A. LaFace, Major, F.D.) at Fort Dix, New Jersey, and not he, was the person who had official connection with the pay voucher in its original form (R 44).

On redirect examination, the witness testified that the voucher was paid by check, but not necessarily by Major LaFace, since it was possible that it might have been paid by one of his several "Class B" accounts (R 45,46).

b. For the defense.

By Paragraph 38, Special Orders Number 58, Headquarters, Reception Station #2, 1262d Area Service Unit, Fort Dix, New Jersey, dated 11 March

1947, accused was released from attached unassigned Reception Station # 2 and was attached unassigned pending reassignment to 100th Air Force Base Unit, Headquarters, Air Defense Command, Mitchel Field, Long Island, New York. The effective date of change of morning report was 12 March 1948 (Def Ex Q). He reported to Mitchel Field on 13 March 1948 and continued as a member of a unit under the Air Defense Command until 21 May 1948 (R 55). At the time accused reported, he brought with him his 201 file, which upon examination disclosed an unaccounted-for period of time in his term of service.

Lieutenant Colonel Harold L. Fuller, Assistant Adjutant General, Air Defense Command, and Unit Personnel Officer, testified that he personally interviewed accused at Mitchel Field concerning this discrepancy, during which interview accused frankly furnished information requested of him, and, thereafter, on 7 May 1947, he prepared and sent a letter to the Adjutant General making inquiry as to accused's status during the period 4 September 1946 to 17 December 1946 (Def Ex A; R 55,56). Lieutenant Colonel Fuller further testified that by Paragraph 10, Special Orders 94, War Department, dated 13 May 1947, accused, by "direction of the President," was assigned to the Department of State, Washington, D.C., for duty in the office of the Foreign Liquidation Commissioner (Def Ex B; R 57,58).

On examination by the court, Lieutenant Colonel Fuller testified that the Adjutant General's Office replied to his letter of 7 May 1947 by first indorsement dated 22 May 1947; that by the time said reply was received, accused had already complied with the order transferring him to the Department of State; that said reply stated that accused's status during the period 4 September 1946 to 17 December 1946 was that of absence without leave from Detachment of Patients, Mason General Hospital, Brentwood, New York; and that the Air Defense Command informed the Adjutant General by indorsement dated 28 May 1948 that accused had been transferred to the Department of State and cited the War Department Special Orders directing the transfer (R 58,59).

Dr. Lawrence H. Gahagan, a psychiatrist with eminent qualifications as an expert in this field of medicine, testified for the defense (R 60-62). He stated that he had examined accused on Wednesday preceding the trial (16 June 1948) from 2:30 p.m. to 5:30 p.m., and in conjunction with his examination of accused, used what was apparently a complete series of photostatic copies of accused's Army hospital and medical records, a report of X-ray examination of accused dated 25 May 1948, and an electroencephalographic report of accused dated 11 June 1948 (Def Exs C,D,E1 through E10, F1 through 11; R 62-64).

Dr. Gahagan's examination of the accused consisted of a study of accused's hospital and medical records, the taking of a history from

accused of his injury (shown by the records to be a multiple skull fracture sustained as a result of an accident), and a complete clinical neurological examination of accused, the latter being an examination of the twelve cranial nerves, "the motility and coordination of the patient, his reflexes, and his sensory status." (R 65)

Based on his examination, it was the opinion of the witness that accused was "mentally clear" at the time of trial but that evidence existed of sequela, the after effects of a severe head injury (R 65,66). Accused was in a nervous state which was manifested by slight tremors, quick speech and stuttering, and a slight degree of unsteadiness when changing positions quickly (R 66).

Dr. Gahagan further testified that accused had almost no hearing on his right ear, which when considered in conjunction with accused's history, was indicative of severe permanent brain injury, and that accused's condition of nystagmus /oscillating movements of the eyeball, R 78/ of the eyes on extreme right and left gaze indicated generally damage or disease of the mid-brain (R 66,67).

The witness interpreted the defense exhibits which he used in his examination of accused, namely, Defendant's Exhibits E1 through E10 and F1 through F11. Defendant's Exhibit F4, Report of Physical Examination, made at Halloran General Hospital, Staten Island, New York, on 22 July 1946 summarizes accused's hospital and medical records to the date of said report from the date of his accident. The pertinent paragraphs are as follows:

"12. MEDICAL HISTORY. In October 1944 this officer /accused/ was riding in a jeep on authorized mission in Italy. When jeep slipped off the road, he was thrown onto the pavement striking it with his head. He awakened (3) days later in the hospital with hemorrhage from right ear accompanied with complete deafness. He had severe headaches for at least one month, was hospitalized for six weeks at the 17th General Hospital, and for one month at the 225th Station Hospital, from where he was sent to general duty with provision that that he be given light duty for 6 months as he was particularly anxious to stay with his unit in Italy. Since that time he had headaches, particularly on exertion, fatigue and worry. He is very nervous, complains about vertigo /marked degree of dizziness, R 84/ and tinnitus /buzzing in the ears, R 82/ and complete deafness in the right ear. He also stutters slightly, although this was much worse after the accident. He states that his condition has been gradually improving since the accident occurred. Patient was admitted to Tilton General Hospital on 17 May 1946 from the Dispensary,

Fort Dix, where he was waiting for separation. There diagnosis of post-concussion syndrome secondary to head injury as a result of jeep accident in October 1944 in Italy was made, and transfer to a neurological center for final evaluation and disposition was decided upon.

"17. EARS (Include Membrana Tympani) Conversational voice: Left, 20/20; right 0/20, ENT consultant made a diagnosis of deafness, mixed type, right, secondary to head injury in jeep accident October 1944 in Italy. Line of duty -yes.

"47. NEUROLOGICAL. Normal except total deafness right. EEG /electroencephalogram/ normal. Consultant made diagnosis of encephalopathy, post traumatic, moderate /diffuse injury to or disease of brain due to conditions other than infection, R 85,86/, manifested by headaches, defective memory and concentration, secondary to head injury a.i. in jeep accident October 1944 in Italy. Line of duty - yes.

"48. PSYCHIATRIC. Anxiety reaction with conversion and obsessive features, chronic, moderate manifested by tension, tremulousness, dizzy spells and persistent headaches. External precipitating stress: severe stress of prolonged overseas duty and head injury. Predisposition, mild, tense, insecure personality. Disability moderate.

"53. CORRECTIVE MEASURES OR OTHER ACTION RECOMMENDED. Six months temporary limited duty."

Dr. Gahagan further testified that the psychiatric paragraph of the above report was a diagnosis of existing psychoneurosis (R 86) and that the remainder of Defendant's Exhibits, namely, F5 to F11 inclusive, which were employed by him in conjunction with his examination of accused and consisted of Disposition Board Proceeding at Halloran General Hospital 29 July 1946, Clinical Abstract, Ear Nose and Throat Examination, dated 9 August 1946, Transfer Card on transfer of accused from Halloran General Hospital to Mason General Hospital for further observation and treatment dated 31 July 1946, audiogram dated 12 August 1946 and Transfer Cards (WDAGO Form No. 8-24) Tilton General Hospital, dated 4 February 1947 and 4 March 1947, contained the same information as that set forth above in Defendant's Exhibit F4 (R 86-88).

Upon the conclusion of Dr. Gahagan's identification and interpretation of accused's hospital and medical records, he stated that he had formed an opinion. Defense Counsel then requested that Dr. Gahagan state that opinion based on the assumption of certain facts in or to be

included in the record (R 88,89). The facts which the defense counsel asked Dr. Gahagan to assume related to the civilian education and civilian employment record of accused; accused's history and duties as an enlisted man; accused's recommendation to attend Officers Candidate School and his completion of the course; accused's appointment to the grade of second lieutenant and his subsequent excellent performance of his assigned military duties with a Quartermaster Service Company in Air Forces overseas; accused's jeep accident, the resultant injuries sustained by him and his subsequent hospitalization and medical treatment administered therefor; accused's return to duty with his unit and the difficulties he experienced in their performance; accused's love affair with a foreign woman and his having been granted official permission to marry her which marriage had never been contracted; accused's hospitalization and treatment overseas and in the United States after having been relieved from military duties at his own request; accused's requests for and attempts to obtain leave while an ambulatory hospital patient in the United States, his possession of permission from the Adjutant General to visit France on "authorized leave of absence" and the eventual refusal by military hospital authorities to grant him leave for more than six days; accused's trip by commercial air line to Paris when he was advised by letter from his prospective bride that she would be in France during his six-day leave; and accused's inability to arrange for or obtain return military or civilian transportation when his leave expired (R 89-92). Following the defense counsel's narration of the above events in accused's history, the following testimony was adduced from the witness:

"Q. Assuming all those facts, and assuming the medical facts that this head injury was so severe that it blocked off the nerves to the right ear, rendering him almost totally deaf in the right ear, that there was an encephalopathy or widespread, diffuse brain damage, and that there was a complicating psychoneurosis precipitated by a long period of overseas duty and the jeep accident of 1944--assuming the existence of all those facts which I have just related, Doctor, is it reasonable and highly probable to conclude that Captain Missik's personality was so far affected by his skull fracture and consequent widespread brain damage, complicated by psychoneurosis, as to adversely affect his judgment and to produce unwise, impulsive behavior?

A. Yes, I think that is a reasonable assumption.

Q. Will you explain your answer to this court to the best of your ability?

A. Well, to answer yes to such a question indicates we have to take in the total situation. You have to take into account Captain Missik's personality and behavior and reputation and performances before the injury, the severity of the injury, the objective evidence of the persistence of severe sequela of the injury, his presenting of numerous complaints of dizziness, poor sleeping, inability to concentrate, fatigue, and so on, and take into account the persistence of these symptoms after the injury that are non-existent before the injury, the time factors, knowing that the effects of a severe head injury may not show themselves for months or years later, the evident impulsiveness, the loss of judgment which has characterized some of his behavior since the injury--I think, taking the whole thing altogether, it is very likely that it is a consequence of this head injury.

Q. You say, then, sir, that it is your opinion that Captain Missik's judgment is adversely affected by those factors I have related in the hypothetical question; is that correct?
A. Yes, sir.

Q. Now, again assuming the facts I have related, Doctor, is it reasonable and highly probable to conclude that Captain Missik's encephalopathy or an extensive, diffuse brain damage, complicated by psychoneurosis, rendered him incapable of adhering to the right at the time of the offenses charged in this trial?
A. Yes, sir.

Q. That is your opinion, sir?
A. That is my opinion." (R 92,93)

On cross-examination, Dr. Gahagan admitted that he could not definitely say whether the symptoms manifested by accused were the result of encephalopathy rather than psychoneurosis. He inferred that they were due to the former because personality changes occurred in accused following his severe head injury which sequela was well recognized by the medical profession as being an aftermath of the type of head injury under consideration (R 94,95). The witness also admitted that psychiatric individuals are rarely declared to be legally irresponsible since their personalities are not sufficiently disorganized so as to render them unable to understand and appreciate the nature of their acts and that accused realized the recklessness of his acts. It was the witness's belief, however, that accused could not adhere to the right by reason of the fact that impulsive behavior, indiscretions and loss of judgment followed his head injuries (R 95,96,97). This conclusion, the witness stated, was arrived at by him only after he had examined accused and

considered accused's medical history and his reputation before and after his injury (R 97,98). He explained that inhibitions in a person retard and control impulses but that severe head injury frequently causes the loss of inhibitions (R 98,99).

On examination by the court, Dr. Gahagan stated that at the time accused followed his impulse to go to France, he probably knew that he was taking a risk and what the consequences would be if he overstayed his leave but that accused did not possess the inhibitory power to resist by reason of his post traumatic state (R 101,102).

During February 1947, accused who was attached unassigned to Reception Station #2, Fort Dix, New Jersey, became a "command patient" of said organization at the Tilton General Hospital. He went to the hospital's military personnel officer to determine what his pay status was during his sojourn in Paris. He related voluntarily and without evasion to the personnel officer how he had obtained a six-day sick leave at Mason General Hospital and had gone to Paris, where he had overstayed his leave because he could not get transportation back, and how he had been returned through channels. The personnel officer determined the accused's personnel records were not at Fort Dix and initiated correspondence to obtain them (Def Ex G; R 105-108).

Accused made similar disclosures to a warrant officer in the Finance Office at Tilton General Hospital some time in March 1947 when he went there to try to get paid. Said disclosures, however, were of a general and not specific nature. Accused did not reveal the number of days he had over-stayed his leave or describe his actions during this period. The warrant officer explained to accused that he could not be paid at the hospital since he was not assigned there and advised him to see the finance officer at his organization (R 109-113).

Stanley R. Zukowski, a former Ordnance major, testified that he had known accused since April 1942, at which time they were together as officer candidates at Camp Lee, Virginia (R 113,114). Accused and the witness saw one another, on occasion thereafter, at their overseas staging area, as well as in England, Wales, Africa and Italy. It was in Italy in 1944 that Mr. Zukowski learned of accused's jeep accident. He went to see accused at the hospital where accused had been taken but was informed that accused was unconscious. Finally, on the fourth day following the jeep accident when accused had regained consciousness, he was permitted to see accused who "absolutely couldn't speak at all." Two days later he visited accused again. During this visit, accused "was able to get sentences out with extreme difficulty, just like a baby learning how to speak." Accused was restored to duty about five weeks later and the witness visited him at his organization. Accused's first sergeant and junior officers were performing accused's administrative functions for him. Accused's physical condition at this time was

such that he "couldn't hear except with extreme difficulty" and "couldn't hold a pencil in his hand to sign a form." (R 115-117).

Mr. Zukowski visited accused twice more during the following month and then accused's organization moved from the area. He did not see accused again until 1946 when accused called upon him at his place of business in the States. On the occasion of this visit, accused's "stuttering wasn't too noticeable" but "his general condition was fidgidty and definitely high strung." Accused could not sit still or concentrate his thoughts on conversation for more than a moment or two. In contrast to accused's condition which was calm and steady before his accident, "after the accident he was very fidgidty and distraught and seemed never to take any interest or concentrate on any subject" of conversation. Accused's speech, however, was coherent at the time that he visited the witness (R 117-120).

The oral testimony of John E. Erickson (R 120-124) and the stipulated testimony of Captain Thomas C. Haywood (R 120; Def Ex G) substantially corroborated that of Mr. Zukowski.

Accused, after being fully apprised by the court concerning his right to testify under oath, make an unsworn statement, or remain silent elected to testify under oath in his own behalf (R 125,126).

He stated that he was in the military service of the United States and that prior to his entrance into the military service, he pursued a course in accounting at New York University and was graduated from that institution of learning with the degree of Bachelor of Commercial Science (R 127). During the five years following his graduation, he was employed by three different firms. He left the first position, which he had held for two years, for a better paying one, and he took his final civilian employment two years thereafter when his firm moved its offices from New York to Detroit. He retained his last job for about one year, until his induction into the military service in August 1941 (R 128-131).

Following two or three weeks of basic training at Camp Lee, Virginia, he was assigned to the handling of cost records in the motor shop. He remained at this assignment until he was shipped to Puerto Rico on Thanksgiving Day in 1941. He served in Puerto Rico for five months and was returned to Camp Lee, Virginia, where he attended Officer Candidate School and was commissioned a second lieutenant (R 131). He was then assigned to a Quartermaster Service Group, Aviation, with which he went to England in August 1942 and to Africa in December 1942. He remained in Africa until July 1944 at which time he moved up to Italy with his organization (R 132,133).

On 17 October 1944, while he was being driven to Naples on official business, the jeep in which he was a passenger was in an accident. He was rendered unconscious and awoke in a station hospital. When he regained consciousness, he could recognize the faces of his many visitors but could not remember their names or anything else. He tried to talk but was unable to do so. He quivered a lot. About a week elapsed before he could talk or carry on some conversation, and thereafter when his ability to recognize faces and remember names returned slowly, he felt a bit better. He remained in this hospital for approximately one month (R 133,134).

He was removed to a second hospital where he was informed that whether or not he would be able to hear again would be determined only by the passage of time (R 135).

After he had been hospitalized for a period totaling two months, the medical authorities wanted to return him to the United States for further treatment and observation as he was complaining of headaches, of inability to walk around and of restlessness. However, he prevailed upon the medical authorities to permit him to return to his organization on a limited duty status, in the belief that this return would serve as a therapy to aid his recovery (R 135). He was given a short sick leave and then returned to his unit. In February 1945, he moved with his unit to Southern France. His first sergeant and Captain Hayward did his work for him and he stayed with his unit until September 1945 at which time he again was hospitalized because of headaches and physical inability to perform his duties. After about a month of further hospitalization, consisting in the main of sitting around and resting, the medical authorities wanted to send him to a general hospital, but when he again desired to go back to his unit, he was permitted to do so. Thereafter, his unit was disbanded and he was given successive duty assignments in Africa and in Germany as a quartermaster supply officer (R 136-138).

Accused was shown a WD AGO Form Number 66-1 which he identified as his own (Def Ex J; R 139). It showed that his adjectival efficiency ratings between 26 October 1942 and 7 September 1945 consisted of nine "Excellents" and that thereafter he was "not rated."

Accused further testified that in 1943 when stationed in Oran, Algeria, he met Jacqueline Deltour and desired to marry her. On 23 May 1945, he initiated a written request for permission to marry Miss Deltour, and after an extensive investigation, this permission was granted him (Def Ex K; R 141). The marriage, however, was never contracted. He stayed at his assignment in Africa for about five or six months and was then transferred to Erlangen, Germany, where he remained about one month. He was then returned to the United States (R 141).

At Fort Dix, New Jersey, while awaiting separation from the service, he went to the Tilton General Hospital seeking medical aid for the relief of his headaches and the improvement of his hearing before his return to civilian life. He stayed at Tilton General Hospital for about a month and a half and was assigned to Halloran General Hospital. At both hospitals he was an ambulatory patient and was treated by a neuropsychiatrist (R 141,142).

At Halloran General Hospital he asked for a leave of absence. He had at least 120 days of accrued leave as he had had no leave during almost four years of continuous foreign service. He desired this leave so that he could return to Africa to be married. When he was told that he would get his leave at the end of his consultation and treatments at Halloran General Hospital, he wrote to the Adjutant General requesting permission to go to Africa for the purpose of being married (R 143,144). He was granted permission by telegram from the Adjutant General "to visit France while on authorized leave" (Def Ex L) but did not receive the telegram until after he had been transferred to the neuropsychiatric section of Mason General Hospital. He showed his ward doctor at Mason General Hospital his authorization to visit France and requested leave (R 145,146). His ward doctor spoke with the section chief who refused to grant leave. He then asked to speak with the section chief but an interview was refused him (R 147).

Accused, however, did not let the matter of his leave drop at this point. He attempted to see the hospital's commanding officer, Colonel Odom, but was told that Colonel Odom was away and that he would have to await Colonel Odom's return. Also, in a further endeavor to get his desired leave, accused went to the G-1 of First Army at Governor's Island, New York, to whom he displayed his authorization to visit France. Colonel Turner, the G-1, after speaking with a Colonel St. John of the First Army surgeon's office, penciled on accused's authorization to visit France a notation requesting Colonel Odom to get in touch with Colonel St. John (R 147,148).

When Colonel Odom returned he sent for accused. Accused requested leave of Colonel Odom and stated the purpose therefor. Accused showed Colonel Odom his permission from the Adjutant General to visit France and Colonel Turner's notation thereon. Colonel Odom replied that he, Colonel Odom, was in charge of the hospital, refused to grant accused any leave, and informed accused that if he did not do as he was told, he "would be upstairs in the penthouse" /closed ward/. The following day, however, accused was granted leave for six days (R 148,149).

Accused's leave of absence commenced on 26 August 1948. He went to his home where he found a letter from his fiancee in which she informed him that she had just arrived in Paris and would be there

for some time. As he had his six day sick leave and believed that he would be able to go to France and return before his said leave expired, accused called Trans World Airlines and was able to obtain a plane reservation to Paris which someone else had cancelled (R 152). He was flown to Paris the following day. Upon arrival he reported to the "Adjutant General's Section of Western Base Section" where he displayed his authority to visit France (R 153). He was advised that while in Paris on leave time he would be "on his own" with regard to billeting and messing (R 154).

He met his fiancee, as he had planned, and before his six day leave expired, accused tried to secure return transportation to the United States. His efforts, however, were unsuccessful. At Trans World Airlines' Office in Paris he was told that they had a back-log of three or four months and at the Air Forces processing station he was advised that he could not obtain transportation because he did not have orders. He checked with Air France and Trans World Airlines in the mornings and afternoons "to see if there would be a cancellation" (R 155).

At the termination of his leave, when it appeared that he would be unable to return to Mason General Hospital in time, accused called his home in the United States and asked his brother to get an extension of his leave for him. The next day he called his home again and was informed by his brother that an extension had been refused although subsequently he found out that a two day extension of his leave had in fact been granted (R 157).

Accused took further steps to obtain transportation to get back to the United States when it became apparent to him that he was going to be unable to be back at the time his leave expired. Inquiry of an officer recently returned from Brussels indicated that return passage to the United States from Belgium might be available, and at the suggestion of this officer, accused traveled by train to Brussels and there sought air transportation from Pan American Airlines but found out that they, too, had a heavy backlog (R 158).

Accused did not return to Paris from Brussels immediately. He messed and billeted at an engineer depot outside the city. During his stay at the depot, he mentioned to some of the officers and civilians there that he was stranded and unable to obtain return transportation to the United States and had overstayed his leave. Thereafter, he was joined in Brussels by his fiancee who was returning to Paris from Liege by way of Brussels. They proceeded to Paris together, where accused again made inquiry and was advised by the commercial air lines and the Air Force that space to the United States was not available (R 158,159,160).

Upon his return to Paris from Brussels accused billeted in a room at the Ambassador Hotel which had been loaned to him by an officer temporarily in Germany on business. Accused also messed at the hotel where he was in contact with military personnel (R 160).

Having had no luck in his personal efforts to obtain transportation back to the United States, accused reported to Western Base Section. He was told by the officer to whom he reported that some correspondence had been received pertaining to him. He fully related to the officer his movements since his arrival in Paris and his attempts to obtain return transportation. He was attached to Headquarters, Western Base Section, and without guard or restriction, was assigned to help set up the billets at Camp Geunervillers, a military installation, in the suburbs of Paris. He performed this assignment until Western Base Section received orders to return him to Mason General Hospital via 17th Major Port, Bremerhaven, Germany (R 161,162; Def Ex O; R 163; Def Ex P; R 164).

On his arrival in the United States, accused was sent to the Separation Center at Fort Dix, New Jersey, where he was informed that since Mason General Hospital had been closed, he could not be returned to that military installation. He was placed on sick call and sent over to Tilton General Hospital which is located on Fort Dix. Here, Captain Reaves interviewed him and accused related to Captain Reaves that as a patient at Mason General Hospital he had been granted leave; that he had gone to France and had been unable to procure return transportation; and that he had been returned through Western Base Section and was supposed to go back to Mason General Hospital which was closed. Captain Reaves stated to accused that he would try to get his records (R 165,166).

While at the Tilton General Hospital, accused's finances became almost depleted. He went to the Finance Office at the hospital and asked Major Craley, the Finance Officer, and Warrant Officer McIsaacs for a partial payment of the pay and allowances due him. He told them that he had been returned from France where he had overstayed his leave; that he was a patient at Tilton General because Mason General had been closed; and that he was only on active duty "since about the middle of December." (R 166,167).

Mr. McIsaacs and Major Craley told accused that he could not be paid at the hospital since he was in separation center status. They sent him to the separation center finance office where he again asked for a partial payment and made known to a buck sergeant and a staff sergeant the facts he had narrated at the hospital finance office. After consultation with "the Captain who was back there, pretty busy," the sergeants returned to accused and informed him that a partial payment would be made to him pending the receipt of his records (R 167).

Subsequently, and while in possession of the foregoing information, the pay voucher, "War Department Pay and Allowance Account" dated 11 March 1947, /in evidence as Prosecution Exhibit 7/ was prepared for and signed by him at Fort Dix, New Jersey, and he was paid the amount called for thereon by check dated 18 March 1947 (R 166,167,168).

By paragraph 38, Special Orders 58, 1262d Area Service Unit, Reception Station #2, Fort Dix, New Jersey, dated 11 March 1947, accused was transferred from the reception station at Fort Dix, New Jersey, to the 100th Air Force Base Unit, Mitchel Field, New York (Def Ex Q; R 168) where he remained for about three months and performed duties with the Quartermaster Division of the Air Defense Command as a quartermaster officer (Def Ex R; R 170). Some time after his arrival at Mitchel Field; in an interview regarding his service between 4 September 1946 and 17 December 1946, he made full disclosure to Lieutenant Colonel Fuller of the facts concerning said period, and it was after this interview had taken place that he was assigned to duty with Air Defense Command Quartermaster (R 169).

From Mitchel Field, accused was assigned by paragraph 10, Special Orders 94, War Department, dated 13 May 1947, to the Department of State for duty in the Office of the Foreign Liquidation Commissioner. Said orders were "By Direction of the President," and "By order of the Secretary of War" and were signed by Dwight D. Eisenhower, Chief of Staff (Def Ex B; R 170,171). His departure from Mitchel Field was delayed, however, in an attempt to get his records straightened out. Finally, he was permitted to leave on his change of station and was told that upon receipt, the reply to the correspondence regarding his status would be forwarded to his new headquarters, and that "it would be all right" (R 171,172). Upon arrival in Washington, he was reassigned to the Office of the Foreign Liquidation Commissioner in Paris, France, by paragraph 46, Special Orders 163, War Department, dated 26 May 1947 (Def Ex S; R 171). In Paris, he performed the duties of an auditor in the fiscal division until his return to the United States pursuant to a telegram from the Adjutant General dated 9 January 1948 and 1st indorsement thereon dated 26 January 1948 approximately eight months later (Def Ex T; R 172,173).

When the transport upon which the accused arrived in the United States docked, it was met by a provost marshal officer who took accused from the boat to First Army Headquarters at Fort Jay, New York. Accused signed in at the Post Adjutant's Office and was placed in restrictive custody and has remained in such custody continuously (Def Ex V; R 173, 174).

The direct examination of accused was concluded after he stated that he was entitled to wear four bronze service stars and five "decorations" (R 174).

On cross-examination, accused substantially repeated the same sequence of events which he had related on his direct examination with regard to his hospitalization upon his initial return to the United States; his endeavors to obtain leave; and the final culmination of these efforts in his obtaining leave for six days (R 175-180). He stated that he had purchased a one-way ticket to Paris at an approximate cost of $400.00, and upon arrival in Paris billeted at a small civilian hotel and messed at various officers' messes. He maintained that he checked with the air lines for return transportation on the day of his arrival and asked for a reservation within the week but admitted that when he was advised that air transportation was not available he did not think to nor did he try to get return transportation by water (R 180-182).

Accused asserted that he had reported to the Adjutant General's Section of Western Base Section on the day his leave expired but further examination revealed that it was to obtain another Post Exchange Card and the exchange of some of his United States money into foreign currency. He admitted that he did not request return transportation at this time and that the only disclosure that he made was to the effect that he was expecting an extension of his leave (R 185,186).

Accused further admitted that while at Fort Dix, he received not only partial payment of pay, but the pay indicated on Prosecution Exhibit 7; that he signed said pay voucher; that he received the money upon his release from the hospital; and that said voucher specified pay and allowances for the period August 1946 through February 1947 (R 186,187). He denied having read the certificate contained in paragraph 16 of the pay voucher on the day he signed it but stated that he was acquainted with its contents and that it meant that the officer signing the voucher was entitled to the pay indicated as due thereon (R 188).

On examination by the court, the following testimony was elicited from the accused:

"Q. When you knew you were overstaying your leave, why didn't you turn in for duty?
A. When I reported there the first time, they told me I was on my own.

Q. I'm talking about the second time, after you knew--
A. The same thing. They told me I had to get back on my own, I was on leave time.

Q. Did you know the regulation that when you are absent without leave or overstaying a leave, you are to report to the nearest military establishment for duty?
A. I didn't think about that, sir.

Q. Did you know that?
A. No, sir. I guess I might have known, but I didn't even think about it then, sir.

Q. What was the reason for their picking you up on the morning report the last time?
A. I reported in, sir.

Q. For duty?
A. Yes, sir.

Q. That was the first time you thought about doing that?
A. No, sir.

Q. You thought about it before?
A. I tried to get back in the hospital over there, too, sir. They refused to let me in there. That was down at a field hospital right near Orly Field.

Q. Did you report in and tell them you were absent without leave and wanted to be picked up?
A. In the hospital?

Q. Any place.
A. Yes, sir. They told me I couldn't do that. I wasn't a patient. They told me to go downtown and report into Western Base Section.

Q. Did you do that?
A. Yes, sir. After I reported to that hospital, I did, sir. That was about--I don't remember the first time. I think it was about December, the second time I reported down there. (R 189,190)

* * * *

Q. The letter you found waiting at home from your fiance, do you have that letter?
A. No, sir, I don't. I broke with her and I just destroyed all of her correspondence. (R 191)

* * * *

Q. How do you explain the days from the time your leave was up in France until you reported into the Base Command for duty?
A. I went to Normandy, near Rouen. After I checked with the air-lines, I went to Normandy, Rouen, to see what the ship lines had. I came back to Paris and I went to Brussels to try to check with Pan-Am, and I stayed over there, trying to see if I could get back, hoping and praying there would be a cancellation just as there had been before with TWA.

Q. You spent a period from in August sometime until December sometime--that's when you turned in, in December?
A. Yes, sir.

Q. You spent most of your time looking for air transportation? You didn't do anything else?
A. No. I went to visit some friends there in Paris. I met my fiance.

Q. Did you spend about half of your time with your fiance during that period?
A. During that period of time, sir? Yes, I believe about half, about a month. (R 192)

* * * *

Q. Did you realize at that time that it might not be possible to return within the six day period?
A. Well, I thought--I was an Air Corps officer, sir. I figured I was lucky to get that one trip East so I thought I might be able to get one West, too. There might be a cancellation like on that one. Then if I needed any help--I had been overseas, I had worked with four air forces. I thought I would run into somebody over there who would help me get air transportation.

Q. Upon arriving in France, you say you reported to the base section. Did you go there for assistance in order to obtain transportation?
A. I reported in there because the instructions I had received from Washington--

Q. You refer to the telegram you received?
A. Yes, sir, report by letter. I had reported by a letter, and when I got over there I referred to that and I showed that telegram I had gotten that I was supposed to report to Western Base Section.

Q. The telegram, Defendant's Exhibit L, reads: 'Permission is granted Captain Bernard Missik to visit France while on authorized leave', am I right?
A. Yes, sir.

Q. When you obtained the six day leave from your station, did you tell them that you intended to visitFrance?
A. Before that, sir, I had told them that I wanted to.

Q. At the time you received your leave?
A. No, sir, I don't believe I did.

Q. Now, pointing out Prosecution's Exhibit Number 7, at the time that you signed the pay voucher, you knew, did you not--did you or did you not know that it covered the period 1 August 1946 to 28 February 1947?
A. Yes, sir.

Q. Now, after you had reported into Western Base Section, what did you actually do? Did you meet up with your fiance?
A. Yes, sir, I met her.

Q. Did you go out with your fiance?
A. I went out with her a couple of times and she went to Normandy.

Q. You accompanied her to Normandy?
A. No, not the first time. I stayed over there trying to make arrangements so I would be able to get back to the United States.

Q. Then, when you found out you had difficulty in getting back, you tried to return by making arrangements in Brussels?
A. Yes, sir.

Q. How long after you had arrived in Paris did you go to Brussels, in a period of days or weeks?
A. I don't know, sir. It might have been a couple of weeks. I don't remember how long. It might have been a couple of weeks. I don't remember, sir.

Q. How long did you stay in and around Brussels?
A. I think it was about three weeks I stayed in Brussels.

Q. Then you returned to France again?
A. Yes, sir.

Q. Paris?
A. Yes, sir.

Q. At that time did you return to the command of the Western Base Section?
A. No, sir, I didn't.

Q. After returning from Brussels, what is the next time you reported back into Western Base Section?
A. I went up to Rouen first. I think I went up in Normandy to see about the lines there. That's when I couldn't get any ship lines there. I came back and I reported to Western Base Section. Before that I tried to get in the hospital around Orly Field.

Q. That was around December?
A. Yes, sir, around December.

Q. Of what year?
A. 1946." (R 193,194-195-196)

On redirect examination, accused maintained that at every headquarters he "reported to" until the 17th of December, he was advised that he was on his own and that it was up to him to get his own return transportation, and that on 17 December 1946, when he went to Western Base Section, he was put on the morning report because correspondence concerning him had been received (R 200).

On re-examination by the court, accused stated that he had not reported to a person in authority at Western Base Section when he realized that he was "absent from leave" because he had previously been told that he was "on his own" (R 201).

4. At the outset of accused's trial, before pleading to the general issue, the defense interposed several special pleas in bar of trial. Of these, only the pleas relating to the jurisdiction of the trial court, the mental responsibility of accused and the questions of constructive pardon and condonation of desertion are considered of importance in connection with the disposition of the case. The above pleas were made and renewed at three different stages of the proceedings, namely, before arraignment, at the termination of the prosecution's case and at the end of the defense's case. The rulings thereon by the court were consistently adverse to the accused.

a. Jurisdiction of the trial court.

The defense contended that accused was not afforded a thorough and impartial pretrial investigation in accordance with the provisions of Article of War 70 and, therefore, the trial court did not have jurisdiction over accused for the offenses alleged. Specifically claimed was that a youthful junior officer (and by inmuendo, incompetent and inexperienced) who was appointed to investigate the charges failed and neglected, when he conducted the pretrial investigation and when the defense so requested, to procure and provide evidence (accused's medical records) and witnesses (Finance personnel at Fort Dix, New Jersey), pertinent and material to the issues under investigation.

With respect to the effect of noncompliance with Article of War 70 on courts-martial jurisdiction, the Board of Review has held time and again that these provisions of the Article which pertain to the pretrial investigation are directory in nature only and not mandatory, and that a failure to comply therewith does not affect the jurisdiction of a general court-martial (CM 229477, Floyd, 17 BR 149,153; CM 280385, Warnock, 17 BR (ETO) 163,179; CM 287834, Hawkins, 13 BR (ETO) 55,71; CM 319858, Correlle, 69 BR 183,196; CM 323486, Ruckman, 72 BR 267,272-274; CM 324930, Henry, 74 BR 13,21; CM 328248, Richardson, 77 BR 1,23; CM 328857, Cockerham, 77 BR 221,241). Those cases which held to the

contrary or were inconsistent with this interpretation were expressly overruled by the Floyd case.

In the Hawkins case, supra, the Board of Review stated at page 74:

"* * the requirements of the first three paragraphs of the 70th Article of War are directory and not mandatory and the failure to observe all or any of them neither deprives the court of jurisdiction nor do such defects and imperfections in the pre-trial procedure necessarily prejudice the substantial rights of an accused."

A later cogent expression on the subject (August 1947) is contained in the Ruckman case, supra, as follows:

"* * * A contrary view would allow a defect in a purely administrative and preliminary hearing to vitiate the judicial proceeding. Analogies cannot be effectively drawn between the investigation required by Article of War 70 and the grand jury procedure required by the Fifth Amendment to the Constitution of the United States. The Fifth Amendment specifically excepts cases arising in the land and naval forces from the grand jury requirement. The state and federal courts empanel grand juries and, within the purview of the various statutory and code provisions, supervise the conduct of such bodies. In military jurisprudence, the court-martial ordered to try a given case may not have been in existence during the investigation and as has been stated has no relation thereto. To be sure, an accused, upon representations made to the court that due to inadequacy of the investigation he is unable to properly prepare his defense and is not ready to proceed, may justly be entitled to a continuance for the purpose of securing witnesses or producing evidence, for the court must safeguard accused's right to a fair trial. But a plea in bar of trial upon the ground of defective investigation, if granted, would amount to an unauthorized invasion of the prerogatives of the appointing or referring authority. The function of the court is to 'well and truly try and determine, according to the evidence, the matter now before' it, between the United States of America and the person to be tried, and '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 ***' (AW 19). Its function does not include a determination of whether the appointing or referring authority ordered trial without a fair and impartial investigation.**"

And a further statement regarding Article of War 70 is contained in CM 206697, Brown (quoted in the Floyd case, supra, at page 156) as follows:

> "If * * * a thorough and impartial investigation is not had /and/ nevertheless the charges are referred for trial, a fair trial is had which results in conviction, and the sentence is approved; all that accused has suffered is injuria sine damno, a technical wrong which did him no harm. The law ought not to admit that a guilty man is harmed if tried, convicted and sentenced; and, if he has had a fair trial and has been convicted, the law, if it does not stultify itself, must assume him to have been guilty. The case, therefore, falls within the exact language of A.W. 37. * * * It was no part of the purpose of the authors of A.W. 70 to prevent the trial, conviction, and punishment of a guilty man."

Examination of the record of trial in the instant case, in light of the above-cited authorities, shows that all of accused's medical records were available to and used by him at his trial. It also appears that those finance office personnel at Fort Dix, New Jersey, who were desired by the defense as witnesses in accused's behalf were present and testified for the defense. There is complete absence in the record of trial of claim that any witness, whether available or not, whose presence was desired by the accused at the trial, was denied him or that he was in any way prejudiced in his defense and no claim is advanced by accused that his trial was unfair. Since there is no showing or claim by the defense that by reason of the alleged deficiencies in the pretrial investigation, if any in fact existed, accused was deprived of some of his substantial rights so as to render his trial unfair, and since it further appears that accused was afforded all his rights at a fair and impartial trial in accordance with existing statute, it is the opinion of the Board of Review that no error is present which has injuriously affected or prejudiced accused's substantial right so as to nullify the proceeding of the properly constituted trial court which had jurisdiction over the accused and the offenses (Waite v. Overlade, 164 F2d 722; Henry v. Hodges, 171 F2d 461; DeWar v. Hunter, 170 F2d 993).

b. Mental responsibility of the accused.

The question of accused's ability to adhere to the right was squarely put in issue by the defense. This was accomplished by the testimony of lay witnesses, Zukowski, Erickson and Haywood, who knew accused immediately prior to and at the time he sustained his head injury in the jeep accident and who observed his actions and demeanor thereafter, and the expert testimony of Dr. Gahagan.

Paragraph 78a, Manual for Courts-Martial 1928, sets forth the standard of mental responsibility applicable in the administration of military justice thus:

"A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right." (Underscoring supplied).

From the foregoing it is indicated that the military concept of the mental state which excuses an accused from criminal responsibility includes the so-called "irresistible impulse" principle (CM 319168, Poe, 68 BR 141,168) and in this respect, at least, it is similar to the rule applicable in our Federal Courts (Smith v. United States, 36 F2d 548).

The definitive views of the Judge Advocate General and the Boards of Review regarding irresistible impulse is clearly and fully set forth in the Poe case (supra) at pages 170-171:

"Even in those jurisdictions which recognize the doctrine of irresistible impulse, such irresistible impulse must be the result of true insanity, that is, mental disease or disorder which completely robs the actor of his will, in order to be a defense to crime. A so-called 'irresistible impulse' which is merely the result of a deterioration of the moral fibre or stems from some personality defect is not sufficient (Wharton's Criminal Law, 12th Ed., secs. 60-64; 70 A.L.R. 659; Smith v. United States, supra; Commonwealth v. Rogers, supra; CM 289355, Smith, supra). In his first indorsement to CM 271889, Barbera, 46 BR 212,215, The Judge Advocate General said,

> 'Whatever may have been the purpose of the disjunctive use of the words "mental defect", "disease", and "derangement" in the sanity test of the Manual for Courts-Martial, it must be conceded that the defense of irresistible impulse is limited solely to one who has a diseased mind and that "diseased mind" does not comprehend a flighty, capricious, and undisciplined mind ***.
>
> 'In order that a person may be exempt on the ground of irresistible impulse, the impulse must be the result of disease of the mind, and it must be irresistible, or, in other words, the disease must exist "to such an extent as to subjugate the intellect, and render it impossible for the person to do otherwise than yield thereto." The act must have been the product of the disease solely.'

We understand the term 'diseased mind,' as used in the above implicit definition of that type of 'insanity' which alone can be

considered as a complete defense to crime, to comprehend only those thoroughly irrational states of mind which are the result of a deterioration, destruction or constitutional malfunction of the mental, as distinguished from the moral, faculties. (See Black's Law Dictionary, 3rd Ed., p.588; TB MED 201, par. 4b(2))."

In the trial of an accused by court-martial, he is presumed to have been sane at the time of the offense charged until a reasonable doubt of his sanity appears from the evidence (Par 112a, MCM 1928); and if reasonable doubt exists as to mental responsibility of an accused, he cannot legally be convicted of the offense charged (Par 78, MCM 1928). Thus, it appears that the accused must come forward with sufficient evidence of his lack of mental responsibility to overcome the presumption that he is sane. We recognize that the burden of proof of sanity, when placed in issue is part and parcel of the offense, and must, as all other elements, be borne by the prosecution (Davis v. United States, 160 U.S. 469), but we do not agree that by merely putting the question of sanity in issue, the defense thereby creates a reasonable doubt thereof. In our opinion, when evidence is adduced by accused tending to show his lack of mental responsibility, the matter of accused's sanity is thereby put in issue and it becomes a question of fact to be determined by the court as to whether or not all the evidence in the case establishes beyond a reasonable doubt that accused was sane at the time the offenses were committed (Lee v. United States, 91 F2d 326, CM 291191, Balfour, 21 BR (ETO) 237,241). Upon appellate review it becomes necessary to determine the soundness of such findings of fact by the court and also to make a determination as to the sanity of the accused on the basis of the record of trial.

Examination of the evidence pertaining to accused's mental responsibility shows that in October 1944, the accused sustained a skull fracture which resulted in dizziness, buzzing in the ears, oscillation of the eyeballs on extreme lateral gaze, impairment of auditory sense, stuttering, nervousness and inability to concentrate. Lay witnesses who knew accused intimately before his accident and saw him thereafter were impressed by the post-accident changes in accused's personality. Immediately following his accident and as late as 1946, the previously normal, dependable and hardworking accused appears to have deteriorated into a person who was fidgety, high strung and distraught and who could not concentrate on any subject of conversation. The testimony of the lone expert witness, Dr. Lawrence Gahagan, was predicated on a three hour examination of accused conducted six days before the trial and approximately fifteen months after the alleged commission of the most recent of the offenses charged. The examination consisted of an interview at which was elicited from accused his personal history as a civilian and member of the armed forces and his subjective post-accident

symptoms; a study of a complete set of accused's hospital and medical records; and a complete clinical neurological examination of accused. From the foregoing, Dr. Gahagan was of the opinion that although accused was mentally clear at the time of trial, he was unable to adhere to the right at the time of the commission of the offenses charged by reason of extensive widespread brain damage, the result of accused's jeep accident complicated by psychoneurosis which adversely affected his judgment causing loss of inhibitions and produced unwise and impulsive behavior. Dr. Gahagan, however, was not positive that accused's behavior was the result of encephalopathy rather than psychoneurosis. That its causation lay in the former was inferred by him from the fact that accused's personality changes occurred subsequent to his severe head injury.

In opposition to the testimony of lack of mental responsibility of accused, the record of trial shows that when on 17 December 1946, accused reported to Headquarters Western Base Section, and was picked up on its morning report, his mannerisms and behavior were normal. His speech was coherent and he did not appear restless or nervous. Later in January 1947, accused's attitude and behavior were both good. Although he was nervous and restless, and manifested an inability to concentrate, he was coherent and a willing worker at his temporary duty assignment. Also to be considered, is accused's voluntary judicial statement in which he furnishes the court with a detailed account not only of his civilian and military history but also of his actions during the periods of time set forth in the specifications of the charges. He admits the commission of the acts alleged and essays to excuse himself from criminal liability therefor. At no place or time, during his lengthy testimonial discourse, however, does accused assert or claim that his unauthorized absence in Europe or his making of the claim for pay and allowances were motivated by irresistible impulse with the knowledge of their wrongfulness. Also of note is that the medical and hospital records of accused used by Dr. Gahagan as one of the bases for his opinion show that the diagnosis of encephalopathy made at Halloran General Hospital (Def Ex F4,F5,F8) was not concurred in at Mason General Hospital (Def Ex I).

The body of evidence set out above discloses with forceful clarity that a conflict of testimony to be determined by the court was presented. By its findings of guilty, the court implicitly found that accused was sane beyond all reasonable doubt at the time he committed the alleged offense. The only question for the Board of Review to examine is whether the findings are supported by competent substantial evidence (CM 291191, Balfour, supra, 241).

Dr. Gahagan, the psychiatrist, was of the opinion that by reason of encephalopathy complicated by psychoneurosis, accused was unable to

adhere to the right at the time he committed the offenses. If the record of trial were otherwise barren of evidence tending to show that accused was mentally responsible, except for the continuing rebuttable presumption of sanity, we would be confronted, in view of Dr. Gahagan's expert testimony that accused was unable to adhere to the right at the time of the alleged offenses, with the principle annunciated in the Judge Advocate General's first indorsement to CM 260194, Collett, 50 BR 231,234, concurred in by the Acting Secretary of War, to the effect that in such cases the prosecution has "failed to discharge its burden of proof on the vital issue of the accused's mental responsibility." As we have noted, however, there was present in the record evidence of a substantial nature which tended to prove and from which it could have reasonably been inferred that accused was mentally responsible at the times and places that the offenses were alleged to have been committed. This consisted of lay testimony that accused appeared to be normal in December 1946 and January 1947, a period much closer in point of time to the commission of the alleged offenses than Dr. Gahagan's examination; accused's testimony describing minutely his actions and his reasons therefor; and the diagnosis at Mason General Hospital opposing the diagnosis of encephalopathy made at Halloran General Hospital. This conflict in testimony created a question of fact for the court to resolve and it was not bound to give preference to the expert testimony (CM 298814, Prairiechief, 21 BR (ETO) 129,134). The Judge Advocate General stated the following with respect to the effect of expert testimony in his indorsement to the Barbera case, supra, page 212:

> "In my opinion the decision of this matter rests not so much upon a determination of whether the medical testimony created a reasonable doubt of the accused's sanity as upon whether, in the first instance, it was sufficiently persuasive to impair the presumption of his sanity. * * *."

And in Halloway v. United States, 148 F2d 665,667, a statement applicable to the instant case is as follows:

> "A complete reconciliation between the medical tests of insanity and the moral tests of criminal responsibility is impossible. The purposes are different; the assumptions behind the two standards are different. For that reason the principal function of a psychiatrist who testifies on the mental state of an abnormal offender is to inform the jury of the character of his mental disease. The psychiatrist's moral judgment reached on the basis of his observations is relevant. But it cannot bind the jury except within broad limits. To command respect criminal law must not offend against the common belief that men who talk rationally are in most cases morally responsible for what they do.

"The institution which applies our inherited ideas of moral responsibility to individuals prosecuted for crime is a jury of ordinary men. These men must be told that in order to convict they should have no reasonable doubt of the defendant's sanity. After they have declared by their verdict that they have no such doubt their judgment should not be disturbed on the ground it is contrary to expert psychiatric opinion. Psychiatry offers us no standard for measuring the validity of the jury's moral judgment as to culpability. To justify a reversal circumstances must be such that the verdict shocks the conscience of the court." (Underscoring supplied)

In view of the foregoing it is our opinion that there was sufficient evidence of record to justify the court's implied finding that accused was mentally responsible beyond reasonable doubt at the time of the alleged commission of the offenses charged and that the findings of the court should not be disturbed.

c. Constructive pardon.

It is claimed for accused that he was constructively pardoned with respect to the offenses alleged. The basis for this claim is that subsequent to the commission of the alleged offenses accused was unconditionally assigned to duty in the Office of the Foreign Liquidation Commissioner under the jurisdiction of the Department of State "by order of the President."

We are of the opinion that the evidence that accused was assigned to duty "by direction of the President" does not constitute proof that he was constructively pardoned (par 69a, MCM 1928). More than mere assignment of an accused to duty subsequent to the commission of offenses and the performance of that duty by him must be proved. Winthrop in his Military Law and Precedents, 2d Ed, states at page 270:

"* * * a promotion or appointment to a new office, of an officer of the Army, while under arrest and charges for the commission of a certain military offense, will operate as a constructive pardon of such offense * *." (Underscoring supplied).

Opinions of the War Department, The Judge Advocate General and the Board of Review have limited the applicability of the defense of constructive pardon by holding that it does not apply to the following categories: persons who were promoted subsequent to the commission of an offense while not under sentence or to persons who were promoted while awaiting trial (Dig Ops JAG 1912, p 838); persons whose promotion after commission of an offense was a routine matter and was made without any knowledge of the commission by accused of the criminal acts (CM 217580, Kane, 11 BR

265; CM 145848, Overcash; Dig Ops JAG 1912-30, Sec 1435(4)); and to persons under sentence when promoted, but whose sentence and promotion was not inconsistent (Op JAG C14389, supra).

From the foregoing authorities, it is clear that in order for the plea of constructive pardon to be a valid defense in bar of trial, it must appear that while accused was under sentence, competent authority with full knowledge of all the circumstances of his offense, promoted him, unconditionally assigned him to duty, or otherwise changed his status, and that the duty assignment, promotion, or status change was inconsistent with his said sentence (CM 280227, Stirewalt, 53 BR 115,123). Since the record is wholly devoid of such proof, the court properly denied the motion.

d. Constructive condonation of desertion.

With respect to the special plea in bar of trial on the ground that the offense of desertion was constructively condoned the record of trial shows that after accused terminated his prolonged unauthorized absence by surrender to military authority, he was returned from Europe to Separation Center, Fort Dix, New Jersey (Def Ex O and P); that thereafter he was transferred "attached unassigned to 100th Army Air Forces Base Unit, Mitchel Field, Long Island, New York" (Def Ex Q) where on 28 March 1947 "by Command of Lieutenant General Stratemeyer" he was "detailed to duty with the Quartermaster Division" Headquarters Air Defense Command, Mitchel Field, New York (Def Ex R). Subsequently on 13 May 1947, "by direction of the President" and "by order of the Secretary of War," he was transferred from Mitchel Field to the Office of the Foreign Liquidation Commissioner, Washington, D.C. (Def Ex B) and thereafter, on 26 May 1947 to the Office of the Foreign Liquidation Commissioner, Paris, France (Def Ex S). It further appears from the record that during the time that accused was at Mitchel Field (13 March 1947 - 21 May 1947) he was interviewed concerning his status from 4 September 1946 to 17 December 1946. He related why he had overstayed his leave in Europe and on 7 May 1947 a letter was sent to the Adjutant General, Washington, D.C., requesting clarification of accused's status during said period (Def Ex A). The reply thereto which stated that the status of accused for the period was that of "absence without leave", however, was not received until after accused had departed Mitchel Field for Washington. The Adjutant General's reply was not forwarded to accused's new duty station but was returned to the Adjutant General with indorsement setting forth the facts of accused's transfer (R 58-60).

Under the evidence set forth above, assuming that the Air Defense Command had general courts-martial jurisdiction and General Stratemeyer had authority to convene a general court-martial (War Department records verify this to be so), it is our opinion that accused's assignments to

duty did not constitute "unconditional restoration to duty by an authority competent to order trial" and, thereby, make effectively available to accused the defense of constructive condonation of the desertion charged (par 69b, MCM 1928).

The defense of constructive condonation, although long recognized in military law, is a defense only to the single offense of desertion. (CM 232968, McCormick, 19 BR 263,279; CM 269349, Coldiron, 6 BR (ETO) 239; CM 298568, Schultz, 24 BR (ETO) 127,132). When interposed as a special plea in bar of trial, it must be supported by the accused by a preponderance of the proof (par 64a, MCM 1928, p.51).

Nowhere in the record does it appear that any of accused's assignments to duty without trial subsequent to his unauthorized absence were made with the knowledge of facts that would have spelled out that he was guilty of desertion. Quite to the contrary, accused contended at all times that his absence was unavoidable and excusable; the eventual reply from the Adjutant General which was received at Mitchel Field after accused was assigned to duty stated that his status during the period 4 September 1946 to 17 December 1946 was that of absence without leave, and he was found guilty of absence without leave although originally charged with desertion.

For a plea of constructive condonation of desertion to be available to an accused as an effective special plea in bar of trial, it must appear that accused, upon his return to military control from an unauthorized absence, the circumstances of which were indicative of desertion, was unconditionally restored to duty by an authority competent to order his trial by general court-martial who was chargeable with or who actually had full knowledge of the facts and circumstances of the said absence. In the instant case the proof is that accused was absent without leave. He was never regarded as a deserter by anyone in the chain of authority that assigned him to duty after the commission of the alleged unauthorized absence. The fact that he was ultimately charged formally with the offense of desertion does not, of itself, make the plea available to him. Since it did not appear that accused's restoration to duty without trial was from a status indicative of desertion, the denial of the plea of constructive condonation of desertion was proper, and it becomes unnecessary for us to determine whether the restoration to duty was "unconditional" or accomplished "by an authority competent to order his trial."

5. With respect to the proof of the offenses of which accused was found guilty, the competent evidence contained in the record of trial leaves no reasonable doubt that accused committed the acts alleged in the charges and specifications of which the trial court found him guilty. Relative to the specification of Charge I alleging desertion the court properly found accused guilty of absence without leave in violation of Article of War 61. In support of this finding it was shown that at the

termination of a six day sick leave which was extended for two days through efforts he initiated, the accused absented himself from his station, Mason General Hospital, Brentwood, New York, on 4 September 1946 and remained absent without authority from anyone competent to give him leave until he surrendered himself to military authorityat Headquarters Western Base Section, Paris, France, on 17 December 1946. Accused's disavowal of culpability and responsibility for the commission of this military offense consists of his assertion of inability to obtain return transportation from Paris at or after the expiration of his sick leave even though exhaustive unsuccessful efforts were made by him to obtain commercial return transportation and that the policy of Western Base Section to regard military personnel on leave status in Paris as "on their own" and to refuse assistance to those stranded within their command prevented him from returning to military control at the expiration of his authorized leave. However, the evidence of record does not factually substantiate these contentions which we do not concede as legally sound, but affirmatively refutes them. Major West's deposition clearly shows that on 17 December 1946, when accused surrendered and stated that he had overstayed his authorized leave, Headquarters Western Base Section, returned him to military control, such action being in full accord with that organization's practice to render requested assistance to military personnel in worthy cases. On the other hand, the accused in his testimony, while admitting almost constant association with military personnel and visits with and to military organizations from the moment of arrival in Paris until his actual surrender on 17 December 1946, failed or neglected, intentionally or otherwise to assert that he, at any time during the alleged period of unauthorized absence offered himself to the control of competent military authority or that a competent military authority refused to take and exert military control over him when he so offered himself. Thus, there being a showing of the commencement of a status of unexcused and avoidable absence without leave (par 4c, AR 605-115, 9 Nov 45; par 7c, AR 600-115, 20 Aug 46), such status is presumed to continue until accused is returned to, or by his own sincere bona fide act returns to military control (CM 314935, Gift, 64 BR 285,288; MCM 1928, par 130a; CM 276461, Lehmkuhl, 48 BR 345, 348), and the lack of transportation facilities which caused, as accused claimed, his enforced or involuntary absence, did not operate to change his status of absence without leave (MCM 1928, par 132; CM 248509, Lewis, 31 BR 331,334); nor did his associations with, visits to or presence among military units and personnel constitute a termination of the unauthorized leave status since the evidence does not show that accused intended thereby once again to become subject to military control (CM 251208, Cox, 33 BR 169,173).

In next considering the specification of Charge II and Charge II which alleges that accused made a false claim against the United States

by presenting a voucher for pay and allowances to which he knew he was not entitled, the competent evidence of record and the judicial admissions of accused show that accused signed a pay voucher claiming pay, allowances and foreign service pay to be due to him in the sum of $830.47 for a period which included a term of absence without leave and received payment of said claim. Significant also in this regard is accused's assertion that he initiated inquiries concerning his entitlement to pay because his finances had become depleted. Examination of the pay voucher in which accused allegedly made his false claim shows that he claimed and was paid base and longevity pay and subsistence allowance for the period 1 August 1946 to 28 February 1947 and foreign service pay from 10 December 1946 to 1 February 1947 (accused was absent without leave from 4 September 1946 to 17 December 1946). It further appears from said pay voucher that deduction was made for Class "N" allotment (National Service Life Insurance) and for partial payments previously made on the dates and in amounts as follows: 23 August 1946, $200.00; 28 October 1946, $150.00; 19 December 1946, $300.00; 12 February 1947, $150.00; 3 March 1947, $200.00. Noteworthy, too, is the fact made patent from examination of said pay voucher that accused made his claim for pay and allowances on the basis of services performed and not on the basis of leave accrued.

In disclaiming guilt of this offense, accused admits making the alleged claim and receiving payment. He asserts, however, that he made full disclosure of his enforced, involuntary, overstaying of leave in France and the circumstances surrounding it, to the military agency which paid him and to others; that the Finance Office at Fort Dix prepared the voucher and paid him after he signed it while in full possession of these facts; and that he was entitled to payment since his accrued leave in excess of 120 days more than offset the length of his unauthorized absence and the pay for which he made claim and received payment. In effect, accused denies fraudulent intent.

In light of the clearly demonstrated proof adduced that accused was inexcusably absent without leave on a purely personal European adventure from 4 September 1946 to 17 December 1946 and that he made claim of and received payment from the United States for the period of such absence on the basis of services performed, we are unable to agree that the foregoing showings by the defense, separately or collectively, constitute grounds which exculpate accused of guilt of the offense.

Ignorance or mistaken interpretation of the law, if this was the underlying cause of accused's dereliction, does not excuse the commission of his criminal act (MCM 1928, par 126a, p.136) and it is fundamental that the accused, as an officer of the Army of the United States, is

chargeable with the knowledge that his absence was without authority and therefore wrongful, and that neither pay nor allowances accrue to military personnel while absent without leave (par 3a, AR 35-1420, 15 December 1939; par 9a(1), AR 605-300, 14 September 1944; par 4c, AR 605-115, 9 November 1945; CM 307047, Ambrosini, 60 BR 147,151). In a recent case presenting a similar situation the Board of Review made the following pertinent statement:

> "* * * Army Regulations (par. 3a, AR 35-1420, 15 Dec. 1939, and par. 9a(1), AR 605-300, 14 Sept. 1944) provide that pay and allowances do not accrue during such unauthorized absence [AWOL] 'unless excused or unavoidable' but even aside from such regulations, it is fundamental that a man is not entitled to compensation for the period while he is voluntarily absent without leave from his work and performs no services for his employer. A voucher claiming pay and allowances under such conditions is a false and fraudulent claim against the United States. (CM 246591, Graham, 30 BR 95)" (CM 318507, Hayes, 71 BR 391,397) (Underscoring supplied).

With reference to accused's contention that by virtue of his accummulated leave, he was entitled to the pay and allowances claimed by and paid to him for the period of his unexcused and avoidable unauthorized absence, it may be stated without citation of authority that accrued leave and payment therefor is not a matter of vested right to military personnel. Accrued leave may only be taken by military personnel on active duty when granted by competent authority. The right to pay and allowances in lieu of accrued leave is only available to accused upon separation from the service in the manner and under the condition prescribed in pertinent Army Regulations (Sec IV, AR 600-15, 20 August 1946). In the instant case, as we have previously pointed out, accused made unqualified claim and was paid, not for accrued leave but for services performed during a period of unauthorized leave. The making of such a claim knowingly is a violation of the 94th Article of War.

6. At the close of the prosecution's case in chief, and before the opening of the case for the defense, the defense moved for directed findings of not guilty of each of the Charges and their respective specifications which motions were denied by the law member, subject to objection by any member of the court. The right to review these motions at the end of the trial was not reserved by the defense (R 53).

We find that the motion with respect to the specification of Charge I and Charge I was without legal merit, since the evidence in the record pertaining to it, at the very least, established proof of the commission of the lesser and included offense of which the court ultimately found

accused guilty (CM 264581, Neville, 2 BR (ETO) 135,139; par 71d, MCM 1928, p.156). The court, by its action in striking Charge III and its specification, as multiplicious, on motion of the defense at the end of the case, renders unnecessary a discussion as to whether or not the denial of the motion for a finding of not guilty of the specification of Charge III and Charge III was inappropriate. We believe, however, that the court's action in denying the motion for a finding of not guilty of the specification of Charge II and Charge II on the grounds that the prosecution had not established a prima facie case by competent proof is deserving of some comment.

The record of trial shows that at the end of the prosecution's case, the evidence adduced in support of Charge II and its specification consisted of a photostatic copy of a pay voucher totally lacking authentication (par 116a, b, MCM 1928, pp.119,120), and incompetent and inadequate testimony as to the genuineness of the accused's signature thereon, all of which were admitted over the objection of the defense. Although there is a very serious doubt as to whether the evidence thus limited established a prima facie case at this point, and as a result the propriety of the court's action in overruling the defense's motion, the Board concludes that the substantial rights of the accused were not injuriously affected. In this connection it is necessary to observe that the accused elected to be a witness in his own behalf, and as such a witness judicially furnished the missing evidential essentials of the offense alleged which had previously been supplied to the record by incompetent evidence as aforementioned. Legal sufficiency of a record of trial after denial of a motion for a directed finding of not guilty is tested by considering all the evidence in the record, and if the accused, after denial of a motion for directed findings of not guilty, has voluntarily elected to testify or offer evidence by others in his own behalf, and the record is thereby furnished with competent essential evidence previously lacking, that evidence, too, must be considered as part of the whole in the later considerations of accused's guilt or innocence. The improper denial of an accused's motion for a directed finding of not guilty neither forces him to become a witness in his own behalf nor deprives him of his right to be presumed innocent until proven guilty, nor is the burden of proving innocence shifted to him. The effect that evidence voluntarily offered by an accused, after the denial of a motion for a directed finding of not guilty, has on said accused and the record of trial, is succinctly stated in the case of Leyer v. United States, 183 Fed Rep 102 at page 104, as follows:

> "*** If the whole record indicates that a verdict of guilty was justified, it is immaterial that evidence essential to conviction was voluntarily introduced by defendant himself. There is no force in the contention that the denial of the motion to direct

acquittal at the close of the case for the prosecution 'would in effect shift the burden of proof, and the defendant would be compelled to go forward and prove his innocence before the prosecution had succeeded in proving his guilt.' Defendant was not compelled to go forward. If the prosecution failed to make out its case, he could quite safely rest upon his exception, knowing that, even if the jury should find a verdict against him on such incomplete proof, it would be promptly set aside."

7. The records of the Department of the Army show that accused is 34 years of age and unmarried. He was graduated from and awarded the degree of Bachelor of Commercial Science by New York University in 1935. Thereafter, until induction into the Army of the United States on 6 August 1941, he was employed as a junior accountant and auditor. He served in an enlisted status at Camp Lee, Virginia, until 27 November 1941 when he shipped to Puerto Rico. On 6 April 1942, he was returned to Camp Lee, Virginia, to attend Quartermaster Officer Candidate School. On 3 July 1942, having successfully completed his officers candidate course of study, he was commissioned a second lieutenant. He was promoted to first lieutenant on 22 February 1943 and subsequently, on 17 May 1944, was promoted to captain. He departed the United States for the European Theater of Operations on 6 August 1942 and arrived in England on 17 August 1942. He remained in England as a quartermaster officer until 2 January 1943. Thereafter in the same capacity, he served successively in Africa, Italy, France and Germany until he was returned to the United States on 20 May 1946. He had subsequently had foreign service with the Office of the Foreign Liquidation Commissioner in Paris, France, from 31 May 1947 to 14 February 1948, where he served as an auditor. He is entitled to wear the American Defense Ribbon with bronze star, the American Theater Ribbon, the Victory Ribbon and the European, African, Middle East Ribbon with three bronze service stars for "Air Offense, Europe," "Rome-Arno" and "Rhineland" campaigns. His efficiency reports of record show ten ratings of "Excellent," fifteen of "Not rated," and two of "Unknown."

8. In arriving at this, its opinion in the instant case, the Board of Review has carefully considered the brief submitted by defense counsel in behalf of accused, the oral argument presented by William J. Rooney, Esquire, before it in Washington on 19 August 1948, and Mr. Rooney's letter dated 8 February 1949.

9. 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 and to forfeit all pay and allowances due or to become due is authorized upon conviction of a violation of Articles of War 61 and 94.

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

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

J. V. Lynch, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 332,151

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

In the foregoing case of Captain Bernard Missik (0-1575472), Quartermaster Corps, Headquarters and Headquarters Detachment, 1201st Area Service Unit, Fort Jay, New York, the sentence is confirmed but is commuted to a reprimand and a forfeiture of $100.00 of his pay per month for six months. Upon the concurrence of The Judge Advocate General the sentence, as commuted, will be carried into execution.

Franklin P. Shaw, Brig Gen, JAGC

C. B. Mickelwait, Colonel, JAGC

12 May 1949

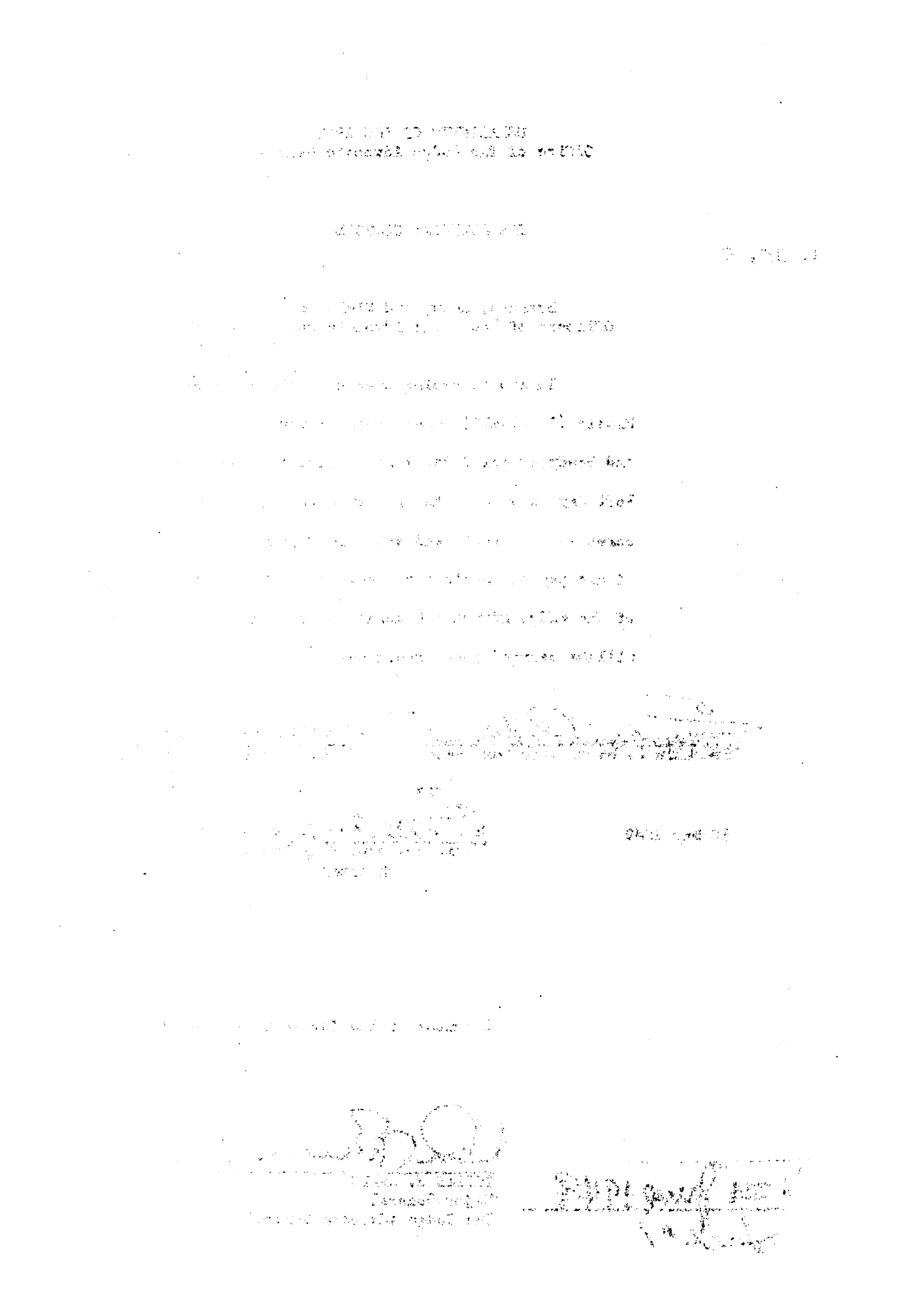
E. M. Brannon, Brig Gen, JAGC
Chairman

I concur in the foregoing action.

24 June 1949

THOMAS H. GREEN
Major General
The Judge Advocate General

Incl #1



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

CSJAGK - CM 335138

27 APR 1949

U N I T E D S T A T E S	UNITED STATES CONSTABULARY
v.	Trial by G.C.M., convened at Fuessen, Germany, 11-13 January 1949. BRIGHT: To be hanged by the neck until dead. CARINELLI: Dishonorable discharge and confinement for twenty (20) years. Penitentiary.
Recruit JOSEPH D. BRIGHT (RA 44120702) and Recruit GEORGE CARINELLI (RA 13154037), both Troop B, 15th Constabulary Squadron.	

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

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

2. Pursuant to authorization by the appointing authority, the accused were tried in a common trial. Bright was tried upon the following charges and specifications:

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

Specification 1: In that Recruit Joseph D Bright, Troop "B", 15th Constabulary Squadron, did, at Fuessen, Germany, on or about 14 November 1948, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Erika Lotte Buckmann, a human being, by strangling and beating her to death.

Specification 2: In that Recruit Joseph D Bright, ***, did at Fuessen, Germany, on or about 14 November 1948, forcibly and feloniously, against her will, have carnal knowledge of Erika Lotte Buckmann.

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

Specification 1: In that Recruit Joseph D Bright, ***, did, at Fuessen, Germany, on or about 14 November 1948, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per anum with Erika Lotte Buckmann,

a German national.

Specification 2: (Stricken on motion of defense).

Specification 3: In that Recruit Joseph D Bright, ***, did, at Fuessen, Germany, on or about 14 November 1948, with intent to commit a felony, viz, sodomy, commit an assault upon Erika Lotte Buckmann, by willfully and feloniously beating her with his hands.

Carinelli was tried upon the following charges and specifications:

CHARGE I: Violation of the 92nd Article of War. (Finding of not guilty).

Specification 1: (Finding of not guilty).

Specification 2: In that Recruit George (NMI) Carinelli, Troop "B", 15th Constabulary, did, at Fuessen, Germany, on or about 14 November 1948, forcibly and feloniously, against her will, have carnal knowledge of Erika Lotte Buckmann.

CHARGE II: Violation of the 93rd Article of War. (Finding of not guilty).

Specification 1: (Finding of not guilty).

Specification 2: (Stricken on motion of defense).

Specification 3: (Finding of not guilty).

Each accused pleaded not guilty to all charges and specifications. Specification 2 of Charge II, as to each accused, was stricken on motion of the defense. Bright was found guilty of the charges and of the remaining specifications. Carinelli was found not guilty of Charge II and Specifications 1 and 3 thereof, and not guilty of Specification 1 of Charge I. He was found guilty of Specification 2 of Charge I "except the words 'forcibly and feloniously and against her will have carnal knowledge of', substituting therefor, the words: 'with intent to commit a felony, to wit: rape, commit an assault upon.' Of the excepted words: Not guilty; of the substituted words: Guilty." He was found "Not Guilty of a violation of the 92nd Article of War but Guilty of a violation of the 93rd Article of War." Evidence of two previous convictions by special courts-martial was introduced as to accused Bright.

Evidence of one previous conviction was introduced as to accused Carinelli. All the members present at the time the vote was taken concurring, accused Bright was sentenced to be hanged by the neck until dead. Three-fourths of the members present at the time the vote was taken concurring, accused Carinelli was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for twenty years. The reviewing authority approved the sentence as to each accused, designated the U.S. Penitentiary, Leavenworth, Kansas, as the place of confinement as to Carinelli and forwarded the record of trial under the provisions of Articles of War 48 and 50½.

3. Evidence for the Prosecution

At about 1900 hours on Sunday evening, 14 November 1948, the accused Bright and Carinelli, members of the same organization then stationed at Fuessen, Germany, procured a cab and went to a nearby place known as the Wiesbauer, or Children's Home, where they met a 27-year old woman named Erika Lotte Buckmann, who appears to have been employed as a governess in the home. The accused escorted her in the cab to the enlisted men's club located in the kaserne of their unit at Fuessen where they procured a table and ordered some drinks.

Martha Iven, a waitress assigned to the table selected by the parties, testified that the three arrived at about seven-thirty and departed between ten and ten-thirty. During the evening she served them "8 doubles" of whiskey and 10 or 12 beers. Miss Buckmann drank "only one double whiskey with Coca-Cola." Another waitress at the club, Anita Neumeier, testified that she also served drinks to the accused on the evening in question. She visited their table on three occasions, serving a total of "Nine double shots of whiskey, nine beers and nine Coca-Colas." As the evening passed both accused became "tipsy" or drunk. When asked if Miss Buckmann also became drunk, Miss Neumeier replied, "Nein - No." This waitress had talked with Miss Buckmann before the parties left the club and was positive that the "girl" was sober but that the accused were drunk. On cross-examination, Miss Neumeier asserted that "I have worked long enough to know who is drunk and who is not drunk, and I had the impression that they /accused/ were drunk" (R 57-64).

Wilhelm Nassal, driver of "ET taxi, Number 3", Fuessen, Germany, testified that at about "10:15 or 10:20" on the evening of 14 November 1948 he drove to the kaserne where he received as passengers in the rear seat of his cab two American soldiers and a girl. In accordance with instructions given him by one of the passengers, he drove to the snack bar but the "girl" refused to get out of the cab. She asserted that it was very late and said, "To the Wiesbauer." Nassal thereupon "drove back" and started toward the Wiesbauer. As he made a turn near a small stream one

of the soldiers ordered him to stop. He stopped the cab and "hereupon it was said, 'Drive on!'" Shortly thereafter "one soldier" reached over his shoulder and ordered him to stop. Then the girl, "after a short stop" told him to drive on. When he came to the road "which leads up to the Wiesbauer House" the girl told him not to proceed to the house, but to stop short at a place which she would point out to him. He stopped the third time and the girl took her handbag, opened the right door and got out saying, "good night." The two soldiers remained seated in the car. After a few seconds one soldier left the cab and then the other soldier also got out of the vehicle, saying, "I come back." Nassal assumed from what had occurred that the soldiers and the girl "would be walking up to the Wiesbauer House" and that the soldiers would return to the cab. He had not been paid for the trip. Nassal waited for a minute or more and then began turning his cab so as to head in the direction of the kaserne. As he made the turn the lights of the vehicle reflected upon "the three persons - two soldiers and one girl." They were about "35 or 40 meters" from the vehicle in the direction of the Wiesbauer House and in a meadow about three or four meters off the main road. The witness described what he saw as follows:

> "*** One soldier was kneeling above the head and one soldier below the feet, to the left ... or to the right of the legs, I could not say ... he was kneeling. The hands of the soldier who was kneeling above at the head were laying, as far as I could see, on the shoulders. I opened the car ... the door of the car ... and called outside, 'I go back to Fuessen.' Nothing was answered to me. I drove back the same stretch with my car and waited, probably for a short moment, if something would come up, and then departed for Fuessen. I arrived in Fuessen four minutes to twenty-three hundred, at the taxicab office. I had seen that in the rear of my car, two caps were laying. The same were given to the taxicab office by myself immediately and I said to this effect: 'These must be the two caps of the two soldiers who I drove out to the Wiesbauer.'" (R 65-66)

The witness could not positively identify the accused in court as being the soldiers to whom he referred and he could not say that two caps which were offered for identification as Prosecution Exhibits 25 and 26 were the same ones which were left in his cab. By the testimony of various witnesses, including the admissions made by the accused, which is hereinafter set forth, it was established that Prosecution Exhibit 25, being one overseas cap with markings "B-0702", was the property of accused Bright but was being worn by Carinelli on the evening in question, and that Prosecution Exhibit 26, being one garrison cap, was the head piece which Bright wore on the same night. It was also established that these were the identical caps which Nassal, the cab-driver, had found in his cab when he left the scene of the aforementioned occurrence. The court thereupon received the caps in evidence with permission that they be withdrawn at the conclusion of the trial (R 97-103,114).

Josefa Boeck, a "housedaughter" residing on a farm near Fuessen, testified that as she and her sister were returning to their home from the railroad station at about "eleven o'clock" on the night of 14 November 1948 they passed an American soldier in the vicinity of the Wiesbauer Farm who inquired the way to the kaserne. She pointed to accused Carinelli in court, stating, "I think that is the man -- that this is the man" (R 78-79).

Private First Class Leslie Dunco, Service Troop, 70th Field Artillery Battalion, was on guard duty at the ammunition dump in Fuessen, Germany, on the night of 14 November 1948. At about midnight he observed unusual circumstances at the gate, causing him to believe someone had entered the area. He made an investigation and found accused Bright sitting on his (Dunco's) cot in the guard tent. Bright appeared to be drunk and had a pair of "woman's drawers" in his hands. Dunco asked Bright what he was doing and the latter replied, "drying out a pair of pants." The garment was "ripped right down the bottom of the crotch" and Bright had blood on his hands which Dunco stated, "I would say he got coming through the gate, the barbed wire" (R 73-75).

Private Elmer P. Rossi, 70th Field Artillery Battalion, was asleep in the guard tent when accused entered and engaged in conversation with Private Dunco. Rossi was awakened and observed that Bright, "Well, he was drunk and his pants were bloody and he had a pair of girl's pants." Bright said "something about falling in the creek or swimming in it" and requested Dunco to show him the way out of the dump (R 76,77).

Corporal Thomas J. O'Connor, of the same organization as the accused, was in the orderly room at about 0100 hours on 15 November 1948 where he observed Carinelli who was "quite drunk and he had passed out in the orderly room and I put him to bed." Carinelli's uniform was "pretty mussed up and he had blood around the fly of his pants." At reveille on the same morning (Monday) accused Bright offered to return to Corporal O'Conner some fatigues which O'Conner had loaned to him on Sunday. O'Conner stated that when he looked at the fatigues he noticed "that the things had blood on them, I wouldn't take them." Bright told O'Conner that "he had killed the girl and I said I didn't believe him." The prosecution offered in evidence a pair of fatigues which the witness identified by proper markings as being his property previously loaned to accused Bright. These items were received, without objection, as Prosecution Exhibits 29 and 29A (R 80-82). On cross-examination O'Conner testified as follows:

"Q Now you testified about having talked to Bright the next morning and he told you he killed the girl, is that right?
A True.

Q Did he say anything about Carinelli?
A Well, after chow when I questioned him further I asked him was he jokin' or not and I asked him who was with him and

he said he and Carinelli had been out drinkin' and they were out with this girl but Carinelli had taken off.

Q Carinelli had taken off?
A Yes, sir." (R 83)

Upon being questioned by a member of the court, Corporal O'Conner stated:

"Q Will you please state to the court the condition of Bright as to sobriety at the time you first saw him in the morning?
A Well, he was ... still had half a load on, and he looked ... he didn't have any expression on his face whatsoever, a complete blank expression, like he was in a daze.

Q Was Bright a particular friend of yours?
A Not anything in particular. He was in my gun section.

Q You are normally his gun commander, is that correct?
A It's just that I'm second in command of the gun.

Q Was this report by Bright made to you as a personal remark or do you think ... or as an official report?
A I believe it was a personal remark." (R 84)

Recruit Gerald R. Borth, Baker Troop, 70th Field Artillery Battalion, testified that "between one-thirty and two o'clock" on the morning of 15 November 1948 accused Bright came to his room, No. 55, and said, "I beat up a girl and I believe that I killed her." Borth said that he did not believe him, although he noticed blood on Bright's tie and that he was "pretty well drunk" (R 85). Private Wayne W. Pierce was also in Room 55. He asserted that Bright "said he beat up a girl and he said he might have killed her." There was a small spot of blood on Bright's jacket. On cross-examination Pierce stated that Bright had a white pair of lady's gloves and, "Well, sir, he couldn't talk very - he couldn't talk plain and I couldn't hardly understand him, he was talking crazy to me, sir." In response to further questioning, Pierce stated that he did not believe Bright knew "what he was doing" (R 88).

At about 0300 hours on the same morning accused Bright told Recruit Wayne D. DeHart that he had killed a girl. DeHart testified that he had seen Bright and Carinelli with a girl in the enlisted men's club on the previous evening, but that "I didn't believe him at first and he tells me again, the same way and I says *** I asked him whereabouts did it take place then and he said, 'Down by the ammunition dump,' and I says, 'Bright, I don't know whether you did it or not, but if it was me, I know what *** I'd better do something about it.' So *** and he says *** he asked me if I'd help him and I says yeah, so we took off out to the woods there" (R 91). Continuing with his testimony, DeHart stated that they found the girl "laying"

on the ground. Witness identified Prosecution Exhibit 2 as being a photograph of the girl they found and who was also the same person with whom he had seen Bright and Carinelli at the enlisted men's club on the previous evening. Witness stated that he helped Bright "put this girl up on his shoulder and we moved her about 75 - a hundred yards *** something like that." DeHart identified Prosecution Exhibit 12 as a photograph of "the place where the girl was." Witness stated that after they had moved the girl, "I told ... t-t-t told Bright then that I was going back to the barracks. I asked him what was he going to do, and he didn't say nothing." DeHart stated further that he mentioned Carinelli to Bright and "he says that Carinelli was not with him at that time, when it happened." On re-direct examination witness stated that "I helped him get her up on his shoulder and we moved it about, I guess about *** about 75 yards, and then we drug her the remainder of the way." On re-cross examination the following testimony was elicited from witness:

"Q Was the girl that you went back to assist Bright to carry a short distance dead or alive?

A I don't know for sure, but I think she was dead." (R 90-94)

The following exhibits offered by the prosecution were properly identified by Mr. Ernst B. Martin of the 15th Criminal Investigation Division and received in evidence without objection: Prosecution Exhibits 1, 2 and 3, being enlarged photographs of what appears to be the body of a dead woman lying on the ground. Clothing on the body is disarranged and there are bruises and blood clots about the face. Prosecution Exhibits 4 and 5 are photographs of a wooded area near an unimproved road. Prosecution Exhibit 6 is a diagram showing the ammunition dump at Fuessen, a wooded area, the Wiesbauer building, the highways, a railroad track and other landmarks. Prosecution Exhibits 7 to 13, inclusive, are further photographs of the dead woman and the scene where the body was found. Mr. Martin had visited the place where the body was found and personally made the photographs which constituted the exhibits mentioned (R 24-32).

Johann Wenninger, an officer of the Landes Police in Fuessen, stated that he found the "dead body" of the girl shown in Prosecution Exhibits 1, 2, 3 and 7 at the place shown in Prosecution Exhibits 4, 5, 6 and 8. Exhibit 8 showed the shrubbery and a birch tree where the body lay. This place was near the "street" leading to the Wiesbauer house. By reference to Prosecution Exhibit 2 the witness explained that the face of the girl was bloody and swollen, legs spread apart and "skirts of the deceased were pulled up to about here" (indicating about three inches below the hips). Wenninger had seen this same girl, Erika Buehlmann, several times during her lifetime (R 13-16).

Two other German policemen, August Baumgartner and Andreas Hiemer, testified that they had seen the dead body of the girl and had made an inspection of the area. In a meadow near the place where the body was

found the earth was "torn up." Blood stains and two combs were found at this place (R 33-37).

Elsie Roettenbacher, a children's nurse at the Wiesbauer, testified that Joseph Bright, whom she identified in the court room, "picked up" Erika Buckmann at the Wiesbauer on the evening of 14 November 1948. Witness identified Prosecution Exhibit 24 as being the "kennkarte" of Miss Buckmann and this exhibit was received in evidence without objection. Miss Roettenbacher was shown Prosecution Exhibit 11 and stated, "This is Erika Buckmann" (R 55-57).

Dr. Wolfgang Laves, a professor of legal medicine and the director of the Institute for Forensic Medicine at the University of Munich, appeared as a witness for the prosecution. The qualifications of Dr. Laves were admitted and he testified in the English language. He had been called by the state police in November and directed to go to Fuessen, where he performed an autopsy on the body of a young girl named Erika Buckmann. Dr. Laves identified Prosecution Exhibits 16 to 20, inclusive, as being photographs of the body of the girl which were taken at the time of the autopsy. He also examined Prosecution Exhibits 10 and 11, asserting that these exhibits portrayed the same girl. Referring to the exhibits (photographs of the body of Miss Buckmann), Dr. Laves stated that -

> "*** The cheeks were thick and showed traces of suffusion at both sides. The eyelids were suffused too and bleedings were found within the conjunctiva ... the white skin of the eyebulbs. Then, at the left eyebrow I found a wound about two centimeters long, and parallel to the eyebrow. The wound showed traces of bleedings and suffusions in the surroundings. ***" (R 42-43).

The doctor explained in detail his other external findings, stating that "The most important findings were situated at the throat and chest and the neck muscles. The muscles were suffused and the right process of the tongue bone was broken. The fracture was bloodshot" (R 46). With respect to the internal findings, Dr. Laves testified as follows:

> "*** The organs of the genital area were examined very exactly. At first, the hamen, the entrance of the vagina, was examined. I could state two small excoriations with bloodshots left and right from the columna-regarum-posteria...that is the rear part of the entrance of the vagina...and the hamen was relatively white. I could not...could find a small laceration at this place, I mentioned this moment. The vagina contained slime, bloody slime--slimish masses. I took samples for microscopical examination. Then the uterus was examined. The mucosa of the uterus showed a little reddish color and in one ovarium there was a mass of yellow corpuscles, indicating that the state of menstruation was finished. Then the different places of subcutaneous contusions were examined,

for instance at both thighs. They showed suffusions of blood... both thighs as well as different places of the upper forearms; and then, for further examinations, I took samples of blood for blood determination, and slime from the rectum for examination, if there would be found sperm cells. All these specimens were taken to Munich. In Munich I performed the general histoligical rules, the examination of the vagina and the rectum slime, and I could state, with the microscope, from the unstained object... later with the stained object, that there were clear and normal, distinct cells, corresponding to human spermatazoa, as well as in the slime of the vagina, also in the slime of the rectum. I took micrographs.

"Q Sit down, Doctor...I hand you Prosecution's Exhibits P-22 and 23 for identification, (indicating). Will you state what they are, please?

"A Number P-23 corresponds to the findings in the vagina... of the vagina... and 22 corresponds to the findings in the rectum.

"Q Did you take these photographs?

"A Yes, I took them with the corresponding apparatus.

"Q Through a microscope?

"A Through a technic...through a microscope, yes.

"Q Are they true representations of what you saw through the microscope?

"A Here and there, (indicating), in these pictures, the corresponding cells have been encircled with red ink, and these cells represent normal spermatazoans, consisting of head, middle-piece and tail and no other cells in the organism correspond with this... to this form of the cells, so that I can state these are surely human... male spermatazoa." (R 46-47)

Prosecution Exhibits 22 and 23 being respectively the photographs of the specimens described as having been taken from the rectum and the vagina of Miss Buckmann's body were received in evidence without objection. Defense questioned the propriety of the numbers given these exhibits, it appearing that they had also been numbered 21 and 22 (R 47-49). On cross-examination the witness testified that he had examined the specimens he took from the body, in the laboratory at Munich, while they were yet moist, but that the spermatozoa found were dead. Life would be limited to two or three hours outside the body. He could not determine whether the cells came from one or more than one person. On re-direct examination Dr. Laves stated, with respect to Erika Buckmann: "The cause of the death was in this case strangulation, violent...it was a violent death, caused by strangulation." In response to a question as to whether sexual relations had occurred while the victim was alive, Dr. Laves replied,

"A Yes, sir.

"Q Will you—

"A This conclusion is based upon the findings at the entrance of the vagina and findings...the rectum smear. First,

the rectum smear contained blood and spermatazoa. The findings at the vagina proved that there were lacerations of the hamen and of the mucosa at the entrance of the vagina, and these findings proved that their insertion...the attempted..the insertion of... probably of a penis, or a penis-like instrument which had caused these...these lacerations. The diameter of the vagina...the entrance of the vagina was apparently smaller than the instrument which was introduced. In correspondence with the findings of spermatazoa in the vagina smear and in the rectum smear, it is very probable that an intercourse has happened." (R 49)

On recross-examination the witness answered the same question as follows:

"A Yes...anatomical findings proved that during...during the life of this Erika Buckmann was...an attempt was made to introduce into the vagina...into the vagina. That is proved by the lacerations at the entrance of the vagina and at the..and of the hamen. I cannot state if this attempt was a sexual attempt or if it has been done with some stick of wood or other instrument of such a size, as it was proved by the lacerations. But it is a probability that this instrument was a penis, because the spermatazoa were found.

"Q Now, as to the findings relative to the injuries at the rectum, what is your conclusion from that, Doctor?

"A I did not find wounds or lacerations at the rectum. I found only a bloody stain...slime...in the lower part of the rectum and this slime contained spermatazoa and that proves that apparently a penis was...has been introduced into the vagina.

"Q Now, at what time? Before or after death?

"A I cannot state that." (R 50)

In response to questions by the law member the doctor stated that he found a bloody liquid in the brain of the body which was indicative of injuries about the head (R 54).

Mr. Charles Bolgiani, an agent of the 15th Criminal Investigation Division, testified that on 17 November 1948 he had occasion to remove some articles from a latrine on the second floor of Building Number 7 of "this kaserne .. Burnett Kaserne." The building was occupied by troops of "Baker battery of the 68th Field Artillery, which is now the 70th Field Artillery." Witness stated that the commode in this latrine had become "stopped up" and by use of plumbing tools he had removed therefrom one torn pair of woman's panties, a small re-leather pocket purse, two pair of lady's gloves - one pair being of leather and the other wool, several pieces of a German note book and one or two German Sunday School cards. Inside the pocketbook were a few German coins and other items. Mr. Bolgiani identified Prosecution Exhibit 27 as being the panties, Prosecution Exhibit 28 as the pocket purse, Prosecution Exhibit 31,

the woolen gloves, each of which he had removed from the latrine in question. These exhibits were received in evidence subject to being further identified (R 106-108).

Mr. Francis J. McDonnell, agent for the Criminal Investigation Division, testified that on 15 November 1948, at about 1530 hours, he received information that the body of a girl had been found in a wooded area near Fuessen. He and other agents went to the area, which was near the "Wiesbauer," and found the body. About 200 yards from the place where the body lay he found two combs, blood spots and numerous footprints on the ground. The investigators then went to the "Land Police Station" where they were handed "two soldiers' hats." By checking the records of the personnel section, it was found that a serial number in one of the hats was that of accused Bright. McDonnell and Mr. Boyle then proceeded to "Munsingen, in the French Zone" where they arrested Bright and Carinelli and returned them to Augsburg where "we again warned them of their rights and Major Niehaus read and explained to them, in our presence, in their presence, the 24th Article of War." No threats, promises, coercion or undue influence was exerted upon the accused. Mr. McDonnell testified that the following statements were voluntarily made to him by accused Carinelli and Bright:

"Q All right, continue.

"A At this time, we first questioned Carinelli. He told us that at about 1900 hours, Sunday evening, 14th of November, he and Bright went to Wiesbauer and...in a taxi, an ET taxi... They picked up a girl...he referred to as being named 'Bucks,' or something similar; they went with her to the EM club in the kaserne and stayed in there, drinking until around ten--ten-fifteen or ten-thirty; from there they drove to the snack bar for a minute, and they did not go in...they left in the same taxi, in the direction of Wiesbauer where they picked her up; in the taxi Carinelli made advances toward the girl; he struggled with her slightly and in the course of the struggle...perhaps the car hit a bump...or in some manner not exactly known to him...she scratched the end of his penis with her fingernail, causing him to bleed profusely; the taxi stopped at a little... near a little shack, close to her home and the girl got out; he and Bright got out and in some manner or other, he remembered struggling with the girl and being on the ground with her... and this lasted a short...very short time, and he just got up and left and went back to the kaserne. Bright told us he remembered picking the girl up, going to the EM club, and that's all. The next thing he remembered was over...he said, 'I woke up and she was lying at my feet.' He looked down at his feet, saw the girl lying there and thought that she was dead. He picked her up and moved her to where the body was eventually found. He then went back to the kaserne. He stopped in the guard tent at the ammunition dump, talked to a GI there, went back to the kaserne and

found that he had the girl's pocketbook and her panties in his pocket and he flushed them down one of the commodes in the barracks of 'B' Troop and then he went to bed. Well, we gathered up what evidence we could and their stories didn't exactly seem right, so they were requestioned on the 18th. They were...and at this time, Bright--

"Q Just one minute. Were they warned of their rights prior to this requestioning?

"A On this requestioning, I reassured---or I told them they were still under the 24th Article of War and the 24th Article of War was explained to them and read to them by Lieutenant Henry of the Constabulary at Augsburg. And at this occasion, Bright told us that his original story was not altogether true, that when he did come to the realization that he was out there on the ground and the girl was at his feet and he went back to camp and he enlisted the aid of someone else and took him out there and together the two of them moved the body to where it was found. And then, on the 19th, I brought Bright and Carinelli to Fuessen. And they were placed in a lineup with four or five other men and identified by Dunco and Rossi. Bright was identified by Dunco and Rossi as a soldier he had seen at the ammunition dump...they had seen at the ammo dump in the early morning of 15 November.

"LAW MEMBER: Just one minute. Is there objection to this testimony, relative to the identification?

"MR. CONNER: I don't believe so, sir, as far as I'm concerned.

"LAW MEMBER: All right, proceed.

"A (Continued)...They were both identified by the waitress at the EM club as having been in the club on the night of 14 November. I then asked...before all this they were again warned of their rights under the 24th Article of War, and I asked them if they could point out the approximate scene or location...the incident scene. They said they thought they could. I asked them how... 'How do you go there?' and then...and they explained...I believe it was Bright who explained...I can't say for sure...Bright or Carinelli... probably both of them...they explained that they had gone over the fence through the back of the kaserne. I asked if it was possible to get there by means of the road and they said yes and then I said, 'How do you get there?' and they gave me approximate directions of how to get down the road and where to turn. So, they were.. they were taken near the scene and at this time there was Captain Dove, from the Constabulary here, and Recruit McLaughlin and Recruit Scott were present. Carinelli was taken near the scene and asked if he could identify the surroundings. He pointed to the small shack and said, 'Here's where I believe the taxi bearing me and Bright and the girl stopped.' He pointed to an area about 50 yards or so from the shack and he said, 'Here's where I think we were struggling with the girl...and he said, 'Here's where I think we were struggling with the girl and then I got up and went to the kaserne.' Bright was brought out and he couldn't remember the shack. He did remember the same spot...approximate same spot, as

pointed out by Carinelli and said, 'Here's where I believe I came to and saw the girl at my feet,' and then he pointed to a wooded area about a hundred and fifty or two hundred yards away and said, 'I think that's where we moved the body of the girl and left it,' and that was about all." (R 110-112)

The witness identified Prosecution Exhibit 6 as depicting the scenes where the body was found and where the ground had been disturbed. He made markings thereon to illustrate the places to which he referred and asserted that the accused had also directed him to these places. McDonnell identified Prosecution Exhibits 25 and 26 as being the hats the accused had admitted wearing on the evening in question, Prosecution Exhibits 32 and 32-A as an "ETO" jacket and wool trousers which had been taken from Bright's locker and sent to the laboratory for examination (R 109-114).

On cross-examination, agent McDonnell testified that when Bright stated that "we moved the body" he referred to himself and DeHart. Carinelli did not specifically name the persons he referred to when he said, "We were struggling on the ground." Bright asserted that he himself had killed the girl and that Carinelli "had taken off" before he killed her. It was stipulated by the parties, with the consent of accused Carinelli, that the blood on the front of a pair of pants admittedly worn by Carinelli on the evening in question and which were presented in court, was the blood of Carinelli and not that of Miss Buckmann. Carinelli had denied striking the girl, saying in effect that he "was monkeying around with the girl a little too much" when he became injured in his private parts. He was "cooperative" when questioned, answering freely the questions propounded to him. Further cross-interrogation of McDonnell included the following:

"Q And he [Carinelli] said that Bright took off and then when he found out that the girl wouldn't do anything with him, why he hollered for Bright and got up and left?
"A That's true." (R 117).

Upon being interrogated by Mr. Rex W. Van Atta, special counsel for accused Bright, it was revealed that both accused had been interrogated on the "16th, 18th and 19th" and that on the first two occasions the questions asked and the answers given by them had been reduced to writing at the time the interrogation was had but that the accused had not signed any written statements. Mr. Van Atta thereupon moved to strike all the testimony of Mr. McDonnell on the ground that it was not the best evidence and contained opinions and conclusions. The trial judge advocate concurred in the motion and asserted that he would presently submit in evidence the transcribed questions and the answers thereto given by the accused. Mr. Robert E. Conner, special counsel for Carinelli, objected on behalf of his client, asserting that Carinelli was "perfectly satisfied with it." The law member sustained the motion as to accused Bright only, admonished the court to not consider such testimony against him, but allowed the

testimony of McDonnell to stand with respect to accused Carinelli (R 120). Agent McDonnell was recalled to the witness stand and testified that no transcription had been made of Bright's last statement to him. The law member then ruled that the witness could testify concerning any oral admissions made by Bright on the "19th." McDonnell thereupon recited briefly that he and Bright had gone to the scene of the incident (Pros Ex 6) where Bright pointed out the place where he first remembered seeing the girl on the ground, and the place to which he and DeHart had moved the body. The law member asked the witness to describe the body when he first saw it. McDonnell answered this question as follows:

> "Q What did you observe, if anything, relative to what clothing was there?
>
> "A I observed the girl to be wearing a sort of a mole-skin jacket; it was pushed, (indicating), well up on the body; and there was a scarf, purplish-colored scarf; she had a blue blouse, and I believe there was a brown skirt, and the skirt was pushed well up above the knees. She was not wearing any underpants.
>
> "Q Were there any in the vicinity?
>
> "A No, no underpants in the vicinity." (R 124)

The witness identified Prosecution Exhibits 34, 35 and 36 as being the jacket, blouse and scarf, respectively, which were on the body of the girl when she was found. Without objection these exhibits were received in evidence (R 124-126).

Captain John C. Dove, 70th Field Artillery Battalion, testified that he witnessed the interrogation of each accused by Mr. McDonnell on a date which he believed to have been the 19th of November. He stated that the accused were warned of their rights under Article of War 24 and that their statements were freely and voluntarily given (R 127).

Erika Schlien, a nurse in the "kindergarten at Wiesbauer" stated that she was acquainted with Erika Buckmann, that Prosecution Exhibit 11 was a picture of Miss Buckmann, and that Prosecution Exhibits 33, 34 and 35 were articles of her clothing which she wore "when she left." The defense thereupon stipulated that the "balance of the clothing belonged to her," including the "pants" (R 129-130, Pros Ex 27).

Major Joe C. Niehaus, FA, Second Armed Cavalry, Augsburg, Germany, testified that he was present during the interrogation of accused by the "CID." He could not remember the day when the interrogation occurred, but it was "around the middle of November." Witness stated that he "was there" for the specific purpose of warning accused of their rights, which he did, with each accused stating that he understood his rights. At about ten o'clock the questioning began, first with Bright and then with Carinelli. The interrogation was finished at about "a quarter to twelve." The accused were told to return at one-thirty in order to sign the statements. When the parties returned, Major Niehaus asserted that both accused

asked him if they must sign their statements. He told them, "absolutely not!" and they did not sign. Witness stated that the oral statements were voluntarily made and that no force or threats were employed (R 132). The parties stipulated, accused Bright joining therein, that Prosecution Exhibits 37 and 38 were true transcriptions of statements made by accused Bright to the Criminal Investigation Division on the dates recited therein. These exhibits appear in the record as Prosecution Exhibits 38 and 39. Prosecution Exhibit 39 is a transcript of the questions propounded to the accused Bright and his answers thereto taken in the presence of Major Niehaus on 16 November 1948. Bright stated that he thought he had killed "the girl." He knew her by the name of "Buck." He saw blood on her face and thought she was dead. Prior to that he only remembered being with her at the club where he asserted that "I drank until I did not know anything." He was scared as he stood in front of the girl, and that he then moved her body "down to a wooded place." He did not remember striking her and got the blood on his jacket when he moved her body. He did not remember having sexual relations with the girl. In response to most of the questions propounded, Bright replied merely that he did not remember, or words to that effect. Prosecution Exhibit 38, a transcript of statements taken on 18 November 1948, recites that it was a continuation of the prior examination. Bright stated that he guessed it was more than a mile from the place where the girl was found to the "camp"; that when he got back he told DeHart the story and at DeHart's suggestion they went back and moved "her down to a bushy place." The girl was dead. This statement closes with the following:

"Q How did you kill her?
A I don't know how."

Upon objection being interposed, all reference to Carinelli in the exhibits mentioned was stricken from the consideration of the court (R 136).

4. For the Defense

At the close of the case for the prosecution Mr. Robert E. Conner, counsel for accused Carinelli, made a motion and extended argument for a finding of not guilty with respect to Carinelli which was overruled, and, after being duly advised of their testimonial rights, each accused elected to be sworn and to testify concerning all offenses charged. Carinelli testified as follows:

"QUESTIONS BY MR. CONNER:

"Q Carinelli, will you please tell the court what happened on the night of the 14th of November, from about seven or seven-fifteen, until you got back to camp that night?

"A Well, around seven-fifteen, Sunday, November the 14th,

me and Recruit Bright went up to pick up a girl. She got in the cab with us and we took her to this enlisted men's club in the kaserne here. Well, we stood there and...we sat there and drank until about...I don't know the time, but about a quarter after ten, ten-thirty. Then we went and went out and got a cab. We went to the snack bar and from there, she said she wanted to go home, so we turned around and started on our way home. During the time we was on the way home, I made advances toward the girl... well, we stopped once, or twice, I don't remember, but during the time that I had been makin's advances toward the girl, sometime I had been scratched in my privates. We got out of the cab and I then walked with her up the road. I was putting my arm around her and trying to make love to her and I was pretty drunk and we tripped and fell and I was trying to make love to her when she was on the ground and she started to complain and started to kick all over.

"LAW MEMBER: A little louder, please.

"WITNESS: Yes, sir...

"A (Continued)...And around that time there I was wondering why she was complaining. I hadn't known what kind of a girl she was. I looked around at that time and I noticed that the cab was taking off. I called Bright over and I told him the cab was taking off and that the girl had complained that she didn't want me abothering with her and I told him that I was going back to camp, and from there on I took off and headed back to camp." (R 141-142)

The witness stated further that he had blood on his pants but that it was his own blood. He denied having any intention to rape the girl or to commit sodomy upon her. On cross-examination Carinelli reiterated that "We tripped and fell. I fell and held onto her and we fell onto the ground." On redirect examination Mr. Conner asked the witness, "Did you ever succeed in having intercourse with the girl?" He replied, "No, I didn't" (R 143). Accused Bright testified as follows:

"QUESTIONS BY MR. VAN ATTA:

* * *

"A On the evening of the 14th, about...about, I'd say, fifteen after seven...between seven and seven-thirty, Carinelli and I got out of the kaserne and took a taxi and drived out to Wiesbauer, or whatever you call it, and picked up a girl, only name I knew was 'Bucks,' and we brought her to the EM club, and we came through the gate up here and Captain Dove was officer of the day, and this girl had left her kennkarte at the..at home, and so I asked Captain Dove if I could take it...take her into the EM club and he says yes, I could, so I takes her in and Carinelli and I and the girl sit down at a table and begin drinkin'. Further on in during the evening, why I get...I'd got where that I couldn't remember anything and the next thing

I remember was comin' to over on the hill here, at Wiesbauer, and the girl was layin' at my feet, and then I left there and went by the ammo dump. There was just two or three guards there ...I don't know exactly, and then from there I went, and came back to the village, and met De Hart and I told him I thought I'd killed a girl. And he didn't believe me, so De Hart and I went back out to where this girl was, and he said that if it was him he'd do something with the body and so we picked her up and moved her down to this wooded area." (R 144-145)

Witness stated further that he "had drinked a little that evening" but he did not remember the amount. He had some schnapps before going to the club. He asserted that he had "passed out" and did not remember getting out of the taxicab. He remembered being in the meadow with the girl, but did not strike her "as I know of." Bright asserted that he was twenty-one years of age, was born in Tennessee, and had five sisters and two brothers. His mother had "stayed in the insane asylum for awhile" and his grandmother on his father's side "was in an insane asylum." He "went to the 3rd grade in school" (R 145-147).

On cross-examination the trial judge advocate handed Bright Prosecution Exhibit 24 and asked him if he recognized "anything on that." Bright replied, "It's a girl, Erika Buckmann." He stated that she was the girl he knew as "Bucks." The following testimony of the witness was given in response to questions by a member of the court:

"Q Bright, you say you don't remember how you got out to the field where you came to and found the girl lying at your feet. When you came to, did you know where you were?
"A For a minute, I didn't, sir.
"Q You knew where you were...knew how to get back to the kaserne?
"A Yes, sir.
"Q Had you been out there before?
"A Yes, sir." (R 147)

Corporal Thomas J. O'Conner was recalled by the defense and stated that he roomed with Bright, Christian and DeHart. On the morning of 15 November 1948 he observed Bright who appeared to be "in sort of a fog, he looked like he still had a half-a-load on." Since August he had noticed that Bright was "a little peculiar in ways, not like the rest of the soldiers." He was "slow thinking" and a "little hazy" at times (R 149).

Recruit Gerald Borth was recalled and stated that he had known Bright for three and one-half months, during which time they had been associated during off hours. Borth asserted that Bright "goes through crazy motions of all kinds - I don't know if he was just kiddin' or what he was doing." He would "jump up and down and throw his arms around, throw his arms like

that (indicating)." His reputation among the men was "pretty good" (R 150).

Private Wayne W. Pierce was also recalled and in response to pertinent questions stated that Bright was "awfully drunk" on the early morning of 15 November 1948. Witness had associated with Bright almost daily for the past five months. Pierce asserted that Bright "acts funny at times, sir, and sometimes he can ask you something, and you tell him something and he won't know what you said. And he just don't act right at times." Witness had not been out in company with Bright during the evenings (R 152).

Recruits Cullen D. White, Robert E. Christmas and Wayne D. DeHart were each called by the defense and each testified substantially as did the prior witnesses respecting accused Bright's actions and behavior. They used similar expressions, such as "funny at times," "peculiar person" and "different from other soldiers" (R 153-156).

5. Rebuttal

In rebuttal, the prosecution called Captain Norman S. Blumensaadt, Battery B, 70th Field Artillery Battalion, who stated that he had known accused Bright since he was assigned to the unit in August. He had observed Bright in training, formations, inspections and on guard. Captain Blumensaadt stated that -

> "His behavior, that is his response to training, as orders, instructions, on the average, comparing the hundred men, was the same; I would say there wasn't anything peculiar about the way he would respond to orders and training, performing his duties.
>
> * * *
>
> "When this man was training, that is when he wasn't under any influence of intoxicants or drugs or anything, his response to training was the same as any other man. He understood the instructions given to him and orders, and he understood how to take his post on guard and follow the special orders for that post; he understood his duties as a cannoneer, when it was a number two, three, four,five or six-man, and he understood the duties required of that cannoneer, and he performed them." (R 157-158)

Witness asserted further that on several occasions accused Bright was very drunk and "wandered off". The prosecution rested its rebuttal and the following occurred:

> "LAW MEMBER: First, subject to objection by any member of the court, the law member rules that the question of sanity is not an issue in this case. Court will close." (R 158)

The defense called Sergeant Peter Bonovitch, Battery B, 70th Field

Artillery Battalion, Bright's platoon leader, who stated that his "honest observation of Recruit Bright *** I don't think the man is all there, sir." He was unable to "absorb" instructions that even a child could comprehend. "He just couldn't learn." Witness stated that after he had repeatedly explained to Bright the nomenclature of the equipment in the section such as the "hydro-pneumatic constant-recoil long" of the howitzer, Bright would be unable to identify the mechanism by proper name. He would call it "hydromatic or hydroamatic, or something like that." Bright was not present for duty at all times, particularly around pay day, due to his being "inebriated, drunk" (R 159-160).

The court recalled the cab driver, Nassal, who referred to the exhibits and testified further concerning his activities on the night of the tragedy (R 161-167). The court also recalled each accused. When accused Bright was asked if he struck the woman, he replied, "Not that I know of, sir." He was then asked if he had or attempted to have sexual relations with her. He replied, "I don't remember" (R 167). Carinelli asserted that when he followed the girl into the meadow -

> "There was no one there present at that first time when we was down on the ground. *** and when he /indicating/ came over, I got up and told him I was leaving. I'd seen the cab, sir, leave, and I told him I was going. *** I was on the right of the girl, just about (indicating). I was laying down, I wasn't kneeling. *** Well at the time that he was getting down, I was getting up, ready to leave ... and that was Bright."

Carinelli stated further that he thought the girl was getting up when he stopped trying to have relations with her. He did not know whether she ever got up, but he stated that he did not have "relations" or commit sodomy upon her (R 168-169).

6. Discussion

The record shows that, in addition to the regularly appointed defense counsel, each accused was ably and vigorously defended by a civilian lawyer of his choice.

Certain procedural questions merit consideration. The accused stated that they did not object to being tried together in the manner of a common trial and we note that each accused was afforded his individual privilege to challenge any member of the court for cause and one member, except the law member, peremptorily. Each accused peremptorily challenged one member of the court who thereupon withdrew from the proceedings. Subsequent to the arraignment, defense moved for a mistrial "for the reason that there has not been a fair and impartial investigation under Article of War 70, and the letter of the Secretary of War directing such investigation, and we desire to introduce evidence to support the motion." Defense made an offer of proof as follows:

"DEFENSE: Yes, sir. The defense is prepared to offer evidence to the effect that the Trial Judge Advocate accompanied the AW-70 investigating officer when he made his investigation on or about the 20th of November...I do not know the exact date...but about that time, and interrogated witnesses at the same time, both before the prosecution and before the defense, that the trial judge advocate is also the executive officer of the Staff Judge Advocate who prepared the recommendation for the Commanding General that the charges be referred for trial, and that by an order of 4 January...formal order of 4 January...he was named as trial judge advocate, but that he had been designated, or informed, at the time of the AW-70 investigation was taking place that he would be the trial judge advocate in the trial of this case. And for that reason it is our contention that the substantial rights of each of the accused were injuriously affected and it was not a fair and impartial investigation that was conducted at that time." (R 10)

The trial judge advocate then made the following statement:

"PROSECUTION: As I stated to the court before, I believe Major Roberts conducted the AW-70 down here...I conducted my own individual investigation at the same time. Each of the accused were so informed that I would, in all probability, prosecute the case and they knew it at the time. I had nothing whatsoever to do with Major Roberts' investigation as an AW-70 officer." (R11)

The law member overruled the motion for a mistrial, subject to objection by any member of the court, and stated that the ruling was not based on any unsworn statements of counsel. It will be assumed, in considering the propriety of the law members ruling that Major Webb, the trial judge advocate, did accompany Major Roberts, the investigating officer under Article of War 70, when the latter interrogated some witnesses in accused's presence on 20 November 1948 and that Major Webb was the executive officer to the staff judge advocate who recommended action in the case. We know of no rule of law, however, nor any valid reason to assume that the investigation was unfair or impartial merely because the officer who was expected to prosecute the case was present at the investigation and heard the expected testimony. And the fact that he was connected with the office of the staff judge advocate does not give rise to an inference of bias or foul play. The accused did not request a continuance in order to bring to the attention of the appointing authority any asserted irregularity in the investigation. As was stated in CM 323486, Ruckman, 72 BR 267, at page 273:

"If an accused feels that he is not being given a fair and impartial investigation, that is a matter properly to be

brought to the attention of the appointing authority before trial of the case, with such request as the accused deems appropriate. In other words, the sufficiency of the investigation is a matter of primary and vital concern to the accused and to the authority directing such investigation."

The action of the court in overruling the motion for a mistrial was therefore proper.

It has heretofore been pointed out that near the close of the evidence the law member ruled that the question of sanity "is not an issue in this case." This ruling was reiterated at a further time in the trial and appears never to have been challenged by counsel or any member of the court. The meaning and effect of this ruling, as we construe the language used requires some amplification in the light of all the circumstances. It is a general rule of law that a person is presumed to be sane until the contrary is shown. The Manual for Courts-Martial, 1928, paragraph 63, page 49, provides that "The request, suggestion, or motion that such an inquiry be had may be made by any one of the personnel of the court, prosecution, or defense." No plea of insanity, nor request for inquiry into their mental condition was interposed as to either accused, and we have heretofore noted that they were aggressively represented by competent counsel. A failure to plead insanity would not however operate to prevent counsel from introducing any evidence that might have bearing on accused's mental capacity at the time of the alleged offenses and at the time of trial. The law member did not exclude any evidence of this nature and the court heard several witnesses who expressed the opinion that Bright was rather inept as a soldier, that he was unlike the rest of the men and one witness stated that he believed Bright was "not all there." The testimony of his battery commander tended to rebut this testimony but the court heard all of the evidence offered by the accused. The question of sanity may, upon proper evidence, be treated as an interlocutory matter, to be ruled upon by the law member subject to objection by any member of the court, or it may be considered upon the general issue (CM 205621, Curtis, 8 BR 207,222; CM 252628, Earle, 34 BR 111,117). As a practical matter, it is obvious that where the court has found an accused guilty, it must be assumed that it weighed all the evidence in the light of the ordinary presumption of sanity and determined that the accused was sane at all material times. Given its proper and reasonable meaning, the ruling of the law member was, in effect, a determination by him that, subject to objection by any member of the court, such evidence as had been presented touching upon the mental capacity of the accused was not of sufficient probative value to raise a serious doubt as to the sanity of either accused at the time of the offenses or of trial. Counsel do not appear to have been misled by the language used by the law member in making the ruling and we find no prejudicial error resulting therefrom.

The accused Carinelli was found guilty of committing an assault upon the girl, Erika Lotte Buckmann, at the time and place alleged, with intent

to rape her. Irrespective of other incriminating evidence in the case, Carinelli's judicial admissions and the reasonable inferences to be drawn therefrom appear to be sufficient to justify the court in finding him guilty of the aforementioned offense. Carinelli rehearsed the events of the evening and stated in effect that as he and Bright were taking the girl home he made "advances" upon her which she resisted and he became scratched on his private parts. When she got out of the cab he followed and overtook her, still making sexual advances upon her. He got her down on the ground where she kicked and further resisted, whereupon he called for Bright. With these damning admissions the court was fully justified in rejecting Carinelli's further assertion that he did not intend to rape her. There is no other reasonable explanation for these assaults than that they were made with the then intent to have carnal knowledge of the girl forcibly and against her will. Carinelli appears to have been drunk but he did not contend, nor does it otherwise appear, that his drunkenness was such as to deprive him of the mental capacity requisite to entertain the specific intent to have carnal knowledge of her forcibly and against her will (CM 235229, Veloz, 21 BR 349,353). He merely asserted that he did not intend to rape her. It is true that where specific intent is an element of the offense the evidence must establish it, but since intention is a fact which cannot be positively known to other persons, no one can testify directly concerning it and the matter must, of necessity, be an inference which the court is justified in finding from the established facts (CM 239532, Lewis, 2 BR (ETO) 23,28; 1 Wharton's Criminal Evidence, Sec 79, p 96). Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted (MCM 1928, par 148, p 179).

We now consider the evidence with respect to accused Bright. There can be no doubt but that the girl, Erika Lotte Buckmann, attended the enlisted men's club, on the night of 14 November 1948, with the accused Bright and Carinelli; that she was with both of these soldiers in the meadow near the Wiesbauer when she was last seen alive by Nassal, the taxi driver, and that it was the dead body of this same girl which was found in the wooded area near the meadow on the following day. Marks on the body indicated that she had been brutally beaten and choked. Death had been violent and probably caused by strangulation. Her underclothing was missing and tests made by a qualified expert showed conclusively that she had been penetrated by a male sexual organ in both her vagina and rectum. The court, by its findings, has elected to believe the testimony of Carinelli, Bright and others which tended to show that Carinelli left the scene shortly after he and Bright had the girl on the ground in the meadow and that Carinelli did not actually gain sexual penetration of her. Upon this theory of the case, which appears to be supported by the evidence, Bright, who was the only person remaining with the girl, must have been the person who penetrated her sexually in the vagina and rectum and brutally beat and strangled her, causing the girl's death. Sometime after Carinelli had arrived at the kaserne, Bright appeared at the ammunition dump with blood on his hands and clothing. He had a pair of torn panties which obviously came from the body of Miss Buckmann. Bright told Private

Pierce that he had "beat up" a girl and that he might have killed her. He also made similar assertions to other soldiers, including Recruit DeHart who accompanied him to the scene of the crimes in the meadow and moved Miss Buckmann's body to a thicket for concealment. Although accused Bright appears to have been drunk on the evening of these occurrences, and although he testified that he could not remember committing any of the atrocities upon the girl, yet within a period of what appears to have been not more than two hours after the crimes were committed, and while Bright was under the influence of intoxicating liquor, he told three or more of his fellow soldiers that he thought he had killed the girl. He told Private Pierce specifically that he had beaten her and he led Recruit DeHart to the scene of the crime, probably a mile or more from the kaserne, where they moved and concealed the victim. These activities on the part of the accused lend cogent force to the court's factual conclusion that Bright was neither insane nor so drunk at the time he committed the sexual offenses upon the girl and choked and beat her, as to be oblivious to the nature and probable consequences of his acts. As a general rule, drunkenness is not an excuse for crime committed while in that condition. The determination of accused's state of intoxication as affecting his ability to differentiate right from wrong and to adhere to the right was essentially a question to be resolved by the court and where, as in this case, the court's decision is supported by adequate and substantial evidence, it will not be disturbed on appellate review (CM 274678, Ellis, 47 BR 271, 286-287; CM 298814, Prairiechief, 21 BR (ETO) 129,134-135).

It is clear from the evidence that the brutal beating of this woman was inflicted by accused Bright in order to overcome her resistance to sexual penetration. Malice in murder may be inferred from the intent to commit any felony (MCM, 1928, par 148a, p 164), and also where the death results from the doing of any cruel, brutal and unlawful act, dangerous to and indicating a disregard for human life (Evans v. U.S., 122 Fed, 2d, 461, 466; CM 334570, Morales; CM 334752, Wilson). The design of accused and his deliberate acts to effect his design amply sustain the court's finding that the murder was accomplished with premeditation (MCM, 1949, par 179a, p 231).

7. The charge sheet shows that accused Bright is 22 years of age, that he served from 1 June 1945 to 30 November 1945 and on 1 December 1945 enlisted in the Regular Army at Camp Wheeler, Georgia, for a period of five years. Carinelli is about 25 years of age, served in the Army from 19 November 1942 to 7 December 1945. He enlisted in the Regular Army at Philadelphia, Pennsylvania, on 4 November 1947 for a period of three years.

8. The court was legally constituted and had jurisdiction of the accused and the offenses charged. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The

Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as to each accused and to warrant confirmation of the sentence as to accused Bright. A sentence of death or imprisonment for life is mandatory upon conviction of murder or rape in violation of Article of War 92.

Ghesty E. Silver, J.A.G.C.

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

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

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

CSJAGU CM 335138

26 AUG 1949

U N I T E D S T A T E S	)	UNITED STATES CONSTABULARY
	)	
v.	)	Trial by G.C.M., convened at Fuessen, Germany, 11-13 January 1949. Death by hanging.
	)	
Recruit JOSEPH D. BRIGHT (RA 44120702), Troop B, 15th Constabulary Squadron	)	

Opinion of the Judicial Council

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

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

2. Upon trial by general court-martial in common with Recruit George Carinelli, the accused Bright was found guilty of the murder and rape of Erika Lotte Buckmann (Specifications 1 and 2, Charge I) in violation of Article of War 92; of sodomy by feloniously having carnal connection per anum, with the same woman (Specification 1, Charge II); and of assaulting her with intent to commit sodomy (Specification 3, Charge II), both in violation of Article of War 93. These offenses were alleged to have been committed at Fuessen, Germany, on or about 14 November 1948. Evidence of two previous convictions by special court-martial was introduced as to Bright. All the members present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

3. The evidence is reviewed in detail in the opinion of the Board of Review. In broad outline it shows that around 1900 hours on 14 November 1948, Recruits Bright and Carinelli escorted the deceased, Erika Lotte Buckmann, a governess at a children's home

known as the Wiesbauer, from the home to an enlisted men's club at Fuessen. There the two accused drank intoxicants in considerable amounts and became drunk. The deceased remained sober. At about 2215 hours a cab was procured, and the two soldiers and deceased drove toward the Wiesbauer. During the journey Carinelli made sexual advances to the deceased and had a struggle with her during the course of which his penis was scratched and bled profusely. The cab was stopped near the Wiesbauer and deceased alighted first and proceeded through a meadow toward the home. The two accused then left the vehicle, overtook her, and shortly thereafter she was seen by the cab driver on the ground in the meadow with the two soldiers kneeling, one near her head and one near the feet, the hands of the former on her shoulders. Carinelli lay on the ground, struggling with her for a short period of time, and went to his barracks leaving her in the meadow with Bright.

At about 0030 hours, 15 November 1948, Bright appeared at an ammunition dump near the Wiesbauer, with blood on his hands and carrying a pair of women's drawers torn in the crotch. He appeared at the barracks of his unit at about 0130 or 0200 hours and told several members of his unit that he had beaten a girl and might have killed her. One of these soldiers went to the meadow with the accused where they found the body of the deceased and moved it to a thicket nearby, where on the afternoon of 15 November the body was found. In the meadow about two hundred yards from where the body lay were found two combs, blood spots, and numerous footprints, evidently the scene of the crime.

An autopsy showed evidence of severe beating, including numerous bruises and lacerations on the body of the deceased. One on the head was sufficient to have caused unconsciousness. Death had resulted from strangulation. Male sperm cells were found both in the vagina and in the rectum. There was a laceration in the vagina which the autopsy surgeon testified indicated penetration before death; but he stated that he could not give an opinion as to whether penetration of the rectum had occurred before or after death. Numerous articles, including drawers, gloves, a purse, and other items, evidently the property of the deceased, were found in a commode in the barracks of the accused on 17 November.

In a pre-trial statement, and also as a witness in his own behalf, Bright stated that he could remember nothing from the time when he was drinking at the enlisted men's club until "I remember comin' to over on the hill here, at Wiesbauer, and the girl was laying at my feet." He admitted telling DeHart, one of his fellow soldiers, that he thought he had killed the girl. In one of his pre-trial statements Bright indicated that his admissions and other guilty conduct following the crime were the result of "a feeling" that he killed the deceased, which had originated in his mind when he awakened and found himself alone with her body.

4. a. Murder and rape.

That the deceased died as a result of violence inflicted on her at the hands of another on the night of 14 November 1948 is established beyond question. That she was assaulted by the accused Bright, initially acting in conjunction with Carinelli, is clearly proven. The evidence direct and indirect, including the repeated voluntary statements of the accused to his fellow soldiers, his subsequent attempts to dispose of the body, the condition of his person and clothing shortly after the killing, leaves no room for serious doubt that the deceased died at the hands of Bright. That she was sexually violated, and at some time not far removed from the time of her death an unnatural sexual connection was effected, which if she was alive constituted sodomy, is not open to serious question. The testimony of the autopsy physician, coupled with the other facts and circumstances, was sufficient to justify the court in inferring that she was raped. There is unrefuted, and practically overwhelming, evidence in the record of the guilt of the accused of the crimes of murder and rape as alleged in Specifications 1 and 2 of Charge I.

b. Sodomy and assault with intent to commit sodomy.

> "Sodomy consists of sexual connection with any brute animal, or any sexual connection, by rectum or by mouth by a man with a human being." (MCM, 1928, par. 149k)

The term "human being" is synonymous with "person" (Franklin v. States, 33 Ohio Cir. Ct. R 21, 21). A corpse is not a person (Brooks v. Boston and N. Ry Co, 97 NE 760, 211 Mass. 277). There can be no doubt that only a living human being is contemplated by the definition of the crime.

It is obvious that if the deceased had died prior to the penetration of her anus, which penetration is amply established by the circumstantial evidence, the accused is not guilty of sodomy, whatever other offense he may have committed. (See analogous cases involving alleged rape, CM 299379, Brynjolfsson, 26 BR (ETO) 107, 114; cf. CM 295324, Parker, 29 BR (ETO) 395).

The evidence shows that accused was last seen with the deceased at about 2215 hours, 14 November. Accused was next seen in the same vicinity at about 0030 hours, 15 November. The assaults made upon the deceased occurred during this period of time and, inasmuch as the cause of death was strangulation, it is reasonable to infer that her death also occurred during this period. The only evidence bearing on the question of whether or not the deceased was alive at the time

the act of the penetration of the anus consists of the testimony of the autopsy surgeon, who stated that he was unable to express an opinion on this point. We, therefore, conclude that the court's implicit finding that the girl was alive at the time in question is not supported by proof beyond a reasonable doubt. The evidence does not exclude a reasonable hypothesis that she was dead. Accordingly, we are of the opinion that the evidence is not legally sufficient to support the finding of guilty of Specification 1, Charge II.

The doubt which exists as to the exact time of death does not, however, invalidate the findings of guilty of assault with intent to commit sodomy, because the evidence shows that the accused laid violent hands on the deceased while she lived. In this and like situations in which a specific intent is an element of the offense the presence or absence of such intent is an issue of fact in the resolution of which the triers of fact may look to the attending facts and circumstances. An act which would have constituted sodomy, had the deceased been alive, followed the assault by the accused, and the trial court in this case was justified in inferring that the intent to commit that offense existed when the assault was committed.

c. Drunkenness.

In arriving at the conclusion that the evidence is legally sufficient to support the findings of murder (Specification 1, Charge I), and assault with intent to commit sodomy (Specification 3, Charge II), the Council has not overlooked the evidence in the record of the drunkenness of the accused at the time these crimes were committed. While intoxication is no defense to homicide, it has been held under the Article of War 92 in effect at the time this crime was committed, to reduce murder to manslaughter, if sufficiently extreme to render the accused incapable of entertaining the malice aforethought which is an element of murder (CM 305302, Mendoza, 20 BR (ETO) 341, p. 246 and authorities there cited). The same principle applies in respect of the issue of intent arising in connection with the capacity of the accused to entertain the specific intent alleged in Specification 3 of Charge II (MCM, 1928, p. 136).

The evidence of the accused's intoxication may be summarized briefly as follows: Between 1930 and 2215 hours on the evening of 14 November, Bright and Carinelli together drank approximately sixteen double whiskeys and from nineteen to twenty-one beers. One of the waitresses who served them at the enlisted men's club was definitely of the opinion that both Bright and Carinelli were drunk. The witnesses Private First Class Dunco and Private Rossi, who saw Bright at about 0030 hours on the morning of 15 November, both testified that he appeared to be drunk at that time. Recruit Borth, who saw Bright between 0130 and

0200 hours on the morning of 15 November, testified that he was "pretty well drunk." Private Pierce, who was with Borth, testified that the accused could not talk very well, that it was difficult to understand him, and that "he was talking crazy to me." Pierce did not believe that accused "knew what he was doing." Corporal O'Connor, who saw accused at reveille at about 0400 hours on the same morning, testified that he thought Bright "had half a load on", and that he had "a complete blank expression, like he was in a daze."

On the other hand, the statements and actions of Bright during the early morning hours of 15 November indicate a comprehension on his part of what he had done and its gravity, notwithstanding the fact that he was drunk. His attempts to dispose of incriminating evidence and to conceal the body, although not indicative of a high order of thinking, tend strongly to indicate that he had not been inebriated in such a degree as to deprive him of the ability to entertain the malice and intent requisite to murder and assault with intent to commit sodomy, respectively, of which he has been found guilty. The degree of his drunkenness and the extent to which it may have affected him at the time the acts on which the charges are based were committed presented a factual issue for determination, in the first instance, by the trial court. The court was warranted in rejecting the accused's explanation for his inculpatory admissions and actions, and in inferring that the accused was capable of acting with the malice aforethought requisite to murder and with the intent necessary to support the findings of guilty of assault with intent to commit sodomy. The Judicial Council does not feel that it is warranted in holding that the court erred in its findings in this respect (CM 209224, Wagoner, 45 BR 13, 23; CM 294675, Minnick, 26 BR (ETO) 11; CM 325810, Martinez, 75 BR 75, 86-87).

d. Insanity.

Several members of the accused's unit testified that Bright was mentally below average, could not absorb instructions, and that he acted strangely at times particularly while drunk (R. 149-156, 159-160). This testimony was rebutted by the accused's battery commander, who testified that there was nothing peculiar about the accused and that he responded to orders and training in a normal manner (R. 151-158).

The circumstances of the crime and the accused's subsequent conduct in attempting to conceal the evidence indicated clearly that he was able to distinguish right from wrong as to the crime charged. Although the testimony adduced by the defense may have tended to indicate that the accused did not possess high

intelligence, it did not in any way overcome the presumption of sanity. The circumstances of the case and the testimony of the accused's battery commander amply warranted the court in finding that the accused possessed the requisite mental responsibility and capacity.

Prior to the trial the accused was given a mental examination by a board of medical officers who found that he was so far free from mental defect, disease, or derangement at all material times as to be able concerning the particular acts charged to distinguish right from wrong and to adhere to the right. This report was not introduced into evidence and the members of the board were not called as witnesses. Consequently the Judicial Council has not considered the report in connection with its examination of the record for legal sufficiency and has arrived at its conclusion that the court's implicit finding of the accused's mental responsibility was proper on the basis of the evidence independent of the report.

5. The court was legally constituted and had jurisdiction of the accused and the offenses alleged. Except as indicated in connection with the finding of guilty of sodomy (Specification 1, Charge II), no error injuriously affecting the substantial rights of the accused was committed during the trial. The Judicial Council is of the opinion that, as to accused Bright, the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specifications, and legally sufficient to support the findings of guilty of Specification 3, Charge II, and Charge II, but legally insufficient to support the findings of guilty of Specification 1, Charge II; and that it is legally sufficient to support the sentence and to warrant its confirmation. A sentence to death or life imprisonment was mandatory upon a conviction of murder or rape in violation of Article of War 92 at the time of the trial of this case.

Franklin P. Shaw, Brig Gen, JAGC

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

E. M. Brannon, Brig Gen, JAGC
Chairman

CSJAGU CM 335138 1st Ind

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

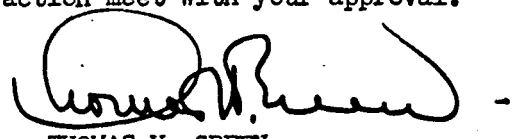
TO: The Secretary of the Army

1. Herewith transmitted for the action of the President are the record of trial, the opinion of the Board of Review and the opinion of The Judicial Council in the case of Recruit Joseph D. Bright (RA 44120702), Troop B, 15th Constabulary Squadron.

2. Upon trial by general court-martial in common with Recruit George Carinelli, the accused Bright was found guilty of the murder and rape of Erika Lotte Buckmann in violation of Article of War 92 (Specifications 1 and 2, Charge I); of sodomy by feloniously having carnal connection per anum, with the same woman (Specification 1, Charge II); and of assaulting her with intent to commit sodomy (Specification 3, Charge II), both in violation of Article of War 93. These offenses were alleged to have been committed at Fuessen, Germany, on or about 14 November 1948. Evidence of two previous convictions by special court-martial was introduced as to Bright. All the members present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. 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. I concur in the opinion of The Judicial Council that as to Bright the record of trial is legally sufficient to support the findings of guilty of Charge I and its specifications (murder and rape), Charge II and of Specification 3, Charge II (assault with intent to commit sodomy), legally insufficient to support the findings of guilty of Specification 1 of Charge II (sodomy), legally sufficient to support the sentence and to warrant confirmation of the sentence. I therefore recommend that Specification 1, Charge II be disapproved. In view of all the circumstances of the case including the accused's low intelligence and drunkenness at the time of the offenses, I recommend that the sentence be confirmed but that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of the natural life of the accused, and that the sentence as thus commuted be carried into execution. I further recommend that an appropriate United States Penitentiary be designated as the place of confinement.

4. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with your approval.



THOMAS H. GREEN
Major General
The Judge Advocate General

4 Incls
1. Record of trial
2. Opinion of B/R
3. Dft ltr for sig S/A
4. Form of Executive action

(GCMO 63, Oct 21, 1949).

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

JUN 27 1949

CSJAGH CM 335526

U N I T E D S T A T E S	YOKOHAMA COMMAND
v.	Trial by G.C.M., convened at APO 503, 17,24-28 January, 1-5 February 1949. Dismissal, total forfeitures, and confinement for five (5) years.
Lieutenant Colonel ARTHUR ERNEST TOOZE, 0460828, Headquarters 5th Engineer Construction Group, APO 503.	

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

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

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

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

Specification 1: In that Lieutenant Colonel Arthur E. Tooze, Headquarters, 5th Engineer Construction Group, Army Post Office 503, did, at or in the vicinity of Tokyo, Honshu, Japan, during the month of March 1947, feloniously take, steal, and carry away, 20 reams of paper, value more than $50.00, property of the United States.

Specification 2: In that Lieutenant Colonel Arthur E. Tooze, Headquarters, 5th Engineer Construction Group, Army Post Office 503, did, at or in the vicinity of Tokyo, Honshu, Japan, during the month of June 1947, feloniously take, steal, and carry away, 50 reams of paper, value more than $50.00, property of the United States.

Specification 3: In that Lieutenant Colonel Arthur E. Tooze, Headquarters, 5th Engineer Construction Group, Army Post Office 503, did, at or in the vicinity of Tokyo, Honshu, Japan, during the month of September 1947, feloniously take, steal, and carry away, 30 reams of paper, value more than $50.00, property of the United States.

Incl #3

Specification 4: In that Lieutenant Colonel Arthur E. Tooze, Headquarters, 5th Engineer Construction Group, Army Post Office 503, did, at or in the vicinity of Tokyo, Honshu, Japan, during the month of November 1947, feloniously take, steal, and carry away, 1300 reams of paper, value more than $50.00, property of the United States.

Specification 5: In that Lieutenant Colonel Arthur E. Tooze, Headquarters, 5th Engineer Construction Group, Army Post Office 503, did, at or in the vicinity of Tokyo, Honshu, Japan, during the month of January 1948, feloniously take, steal, and carry away, 20 reams of paper, value more than $50.00, property of the United States.

Specification 6: In that Lieutenant Colonel Arthur E. Tooze, Headquarters, 5th Engineer Construction Group, Army Post Office 503, did, at or in the vicinity of Tokyo, Honshu, Japan, during the month of August 1948, feloniously take, steal, and carry away, 160 reams of paper, value more than $50.00, property of the United States.

Specification 7: In that Lieutenant Colonel Arthur E. Tooze, Headquarters, 5th Engineer Construction Group, Army Post Office 503, did, at or in the vicinity of Tokyo, Honshu, Japan, during the month of September 1948, feloniously take, steal, and carry away, 85 reams of paper, value more than $50.00, property of the United States.

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

Specification 1: In that Lieutenant Colonel Arthur E. Tooze, Headquarters, 5th Engineer Construction Group, Army Post Office 503, did, at or in the vicinity of Tokyo, Honshu, Japan, during the month of March 1947, wrongfully and unlawfully sell about 20 reams of paper to Senzo Utena, for value, which paper was not the property of Lieutenant Colonel Arthur E. Tooze, and the said Lieutenant Colonel Arthur E. Tooze well knowing that he had no right, title, or interest therein, and had no right to sell or otherwise dispose of it to Senzo Utena.

Specification 2: In that Lieutenant Colonel Arthur E. Tooze, Headquarters, 5th Engineer Construction Group, Army Post Office 503, did, at or in the vicinity of Tokyo, Honshu, Japan, during the month of June 1947, wrongfully and unlawfully sell about 50 reams of paper to Senzo Utena, for

value, which paper was not the property of Lieutenant Colonel Arthur E. Tooze, and the said Lieutenant Colonel Arthur E. Tooze well knowing that he had no right, title, or interest therein, and had no right to sell or otherwise dispose of it to Senzo Utena.

Specification 3: In that Lieutenant Colonel Arthur E. Tooze, Headquarters, 5th Engineer Construction Group, Army Post Office 503, did, at or in the vicinity of Tokyo, Honshu, Japan, during the month of September 1947, wrongfully and unlawfully sell about 30 reams of paper to Senzo Utena, for value, which paper was not the property of Lieutenant Colonel Arthur E. Tooze, and the said Lieutenant Colonel Arthur E. Tooze, well knowing that he had no right, title, or interest therein, and had no right to sell or otherwise dispose of it to Senzo Utena.

Specification 4: In that Lieutenant Colonel Arthur E. Tooze, Headquarters, 5th Engineer Construction Group, Army Post Office 503, did, at or in the vicinity of Tokyo, Honshu, Japan, during the month of November 1947, wrongfully and unlawfully sell about 1300 reams of paper to Senzo Utena, for value, which paper was not the property of Lieutenant Colonel Arthur E. Tooze, and the said Lieutenant Colonel Arthur E. Tooze well knowing that he had no right, title or interest therein, and had no right to sell or otherwise dispose of it to Senzo Utena.

Specification 5: In that Lieutenant Colonel Arthur E. Tooze, Headquarters, 5th Engineer Construction Group, Army Post Office 503, did, at or in the vicinity of Tokyo, Honshu, Japan, during the month of January 1948, wrongfully and unlawfully sell about 20 reams of paper to Senzo Utena, for value, which paper was not the property of Lieutenant Colonel Arthur E. Tooze, and the said Lieutenant Colonel Arthur E. Tooze well knowing that he had no right, title, or interest therein, and had no right to sell or otherwise dispose of it to Senzo Utena.

Specification 6: In that Lieutenant Colonel Arthur E. Tooze, Headquarters, 5th Engineer Construction Group, Army Post Office 503, did, at or in the vicinity of Tokyo, Honshu, Japan, during the month of August 1948, wrongfully and unlawfully sell about 160 reams of paper to Senzo Utena, for value, which paper was not the property of Lieutenant

Colonel Arthur E. Tooze, and the said Lieutenant Colonel Arthur E. Tooze well knowing that he had no right, title or interest therein, and had no right to sell or otherwise dispose of it to Senzo Utena.

Specification 7: In that Lieutenant Colonel Arthur E. Tooze, Headquarters, 5th Engineer Construction Group, Army Post Office 503, did, at or in the vicinity of Tokyo, Honshu, Japan, during the month of September 1948, wrongfully and unlawfully sell about 85 reams of paper to Senzo Utena, for value, which paper was not the property of Lieutenant Colonel Arthur E. Tooze, and the said Lieutenant Colonel Arthur E. Tooze well knowing that he had no right, title or interest therein, and had no right to sell or otherwise dispose of it to Senzo Utena.

Specification 8: In that Lieutenant Colonel Arthur E. Tooze, Headquarters, 5th Engineer Construction Group, Army Post Office 503, did, at or in the vicinity of Tokyo, Honshu, Japan, between the months of March 1947 and October 1948, wrongfully and unlawfully obtain 4,310,000 yen from unauthorized sources, in violation of Circular No. 3, General Headquarters, Far East Command, 10 January 1947, and Circular No. 1, General Headquarters, Far East Command, 7 January 1948.

Specification 9: (Finding of not guilty).

ADDITIONAL CHARGE: Violation of the 96th Article of War. (Finding of not guilty).

Specifications 1 through 3: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and its Specifications and Charge II and Specifications 1 through 8 thereunder. He was found not guilty of Specification 9 of Charge II, and not guilty of the Additional Charge and its Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army might direct, as the place of confinement, and forwarded the record of trial for action under Article of War 48(c).

3. Evidence adduced by the prosecution pertinent to the findings of guilty is summarized as follows:

The accused, Lieutenant Colonel Arthur E. Tooze, assumed command of the 64th Engineer Topographical Battalion at Tokyo, Japan, on or about November 1946 (R 113). Thereafter, and for the period from March 1947 to October 1948, during which it is alleged that he committed the offenses herein charged, he was the commanding officer of the above organization, which periodically received, stored and issued, among other items of supply, several types of paper of a quality designed for use in map reproduction. This map paper was packed in reams consisting of 500 sheets each and came in three sizes: 20" x 22½" and 22" x 29" flat stock, valued at $7.00 per ream; and 35" x 45" flat and rolled stock, valued at $12.50 per ream (R 93,336).

During the period immediately following accused's assumption of command, the supply records of the 64th Engineers were such that they did not accurately reflect the stock status of the paper supplies of the organization. The accused was cognizant of this condition (R 518). As additional shipments were received, and as quantities were tallied out to using units, no inventories other than spot checks were made nor were available figures amended to show the true amounts of stock on hand. The use of stock record cards was, however, initiated about March 1948, nearly eighteen months after the Battalion came under the command of the accused (R 106-B).

The administrative and supply activity of the 64th Engineer Topographical Battalion was centered chiefly in the Isetan Department Store Building, Tokyo, Japan, a seven story structure having a basement and sub-basement. Use of this building had initially been made available to the Allied Occupation Forces on 17 October 1945, through Procurement Demand #TKYC 3965 on the Japanese Government (Pros Ex 10) and with the exception of the first two floors and part of the basement, which was occupied by the department store owner for the conduct of his department store, the building was almost exclusively utilized by the 64th Engineers. As commanding officer of the Battalion, accused with his family, occupied living quarters on the seventh floor. These quarters consisted of a living room, a dining room, a kitchen, a laundry room and three bedrooms (R 246).

In July 1947, a shipment of 88 carloads, approximating 35,000 to 40,000 reams of map paper, was received by the 64th Engineer Topographical Battalion from Guam and other Pacific Islands (R 91), and was stored at the 133rd Engineer Battalion at Kokubunji (R 83). During the following year, through July of 1948, shipments aggregating in

excess of 40,000 reams were received by the 64th Engineers (R 81,90). Most of the first shipment of paper was stored with the 133rd Engineers at Kokubunji (R 83,84), but the subsequent shipments were stored in the basement and third floors of the Isetan Building, pending transfer to the Technical Intelligence Detachment Warehouse, and in the San Puku Building, located directly across from the Isetan.

In addition to the storage facilities of the 133rd Engineers at Kokubunji, the 64th Engineers had available to it, for the purpose of storing paper, the following:

(1) An area 20' x 20', in the basement of the Isetan Building, accessible by means of a ramp. This area, for security purposes, had been converted into four storage rooms which were kept locked after January 1948 (R 121), and the keys to said rooms were in the custody of the battalion supply sergeant;

(2) An area on the third floor of the Isetan Building, formerly used as a barracks, access to which was through a large stairway and an elevator on each side of the building (R 84). Approximately 3000 reams of paper were stored in this area, security for which was afforded by the battalion reproduction company, to whom the third floor had been assigned;

(3) A storage area in the San Puku Building approximately 30' x 40' x 15', the security for which consisted of a Japanese guard during the day, and keeping the building locked at night;

(4) Two sheds in the Battalion Motor Base area approximately 15' x 15' x 10', which were entirely filled with flat paper stock and for which the only security afforded was padlocks on the doors, a patrolling Japanese guard, and one battalion guard at the main entrance to the pool area; and

(5) An isolated warehouse at the base of the 123rd Engineer Survey Battalion, at Tachikawa, between 10 and 13 miles distant from the Isetan Building (R 389-390).

During the period extending from the summer of 1947 through the summer of 1948, paper was tallied out primarily to supply personnel of the 95th Reproduction Company, which used on the average of 1000 to 1500 reams per month (R 87). The actual transfer of the paper, which took fifteen men about two or three hours to handle a single month's supply, was performed by Japanese labor under the supervision of American personnel (R 88).

According to the testimony of Sergeant First Class James G. Akin, 64th Engineer Topographical Battalion Supply Sergeant, the rolled paper stock had to be flattened by storing it with weights, before it could properly be utilized in an offset press (R 115). To accomplish this flattening process, 500 reams of the 35" x 45" paper were sent during January 1948 to one Harumi Tanaka, who owned the Tanaka Printing Company, located near Ueno Station. Other shipments of paper were sent to Tanaka, pursuant to verbal orders of the accused, in November of 1947, and in October of 1948. The November shipment consisted of from three to six truckloads of loose paper in mixed sizes, and the October shipment comprised four truckloads or approximately 270 reams (R 116-117, 122). In January of 1948, a written contract bearing the date, 30 January 1948, was entered into by the Tanaka Paper Company, and the accused, individually, under the terms of which the Tanaka Company was to process an amount of rolled paper not to exceed 500 reams and was to retain ten per cent of the paper, as its fee for this service (Pros Ex 5). Sergeant Akin had a copy of this contract; but the orders from the accused to Akin to ship the paper, were verbal. Sergeant Akin received instructions from the accused that the paper thus sent to the Tanaka Company was to remain after processing at the Company warehouse at Ueno Station until it was issued to the 95th Reproduction Company (R 118). Of the 500 ream shipment sent out, Sergeant Akin testified that approximately 400 reams were returned; but he had no knowledge of how much of the 270 ream shipment was returned (R 120).

At the time that the accused assumed command of the 64th Engineer Topographical Battalion, Takashi Yamamoto was the assistant building custodian for that organization, at the Isetan Building. Thereafter, in January 1947, accused requested Takashi Yamamoto to borrow some money for him, and pursuant to said request "either 20,000 or 30,000 yen" was borrowed by Takashi Yamamoto from an executive of the Isetan Department Store and was delivered by him to the accused (R 131-132). A few months thereafter, the accused desired to effect a settlement of his indebtedness with the Isetan Department Store. Takashi Yamamoto, at accused's request, spoke with Munekazu Yamamoto, general affairs manager of the Isetan Department Store, to see if he "would accept some paper to straighten out the debt." This offer was refused (R 132), but as a result of this conference Takashi Yamamoto ultimately was introduced to one Senzo Utena, of the Utena Paper Company, who signified his willingness to pay 3000 to 3500 yen per ream for the paper. This price was communicated to the accused during the latter part of February 1947, and, being acceptable to him, Takashi Yamamoto was informed by the accused that he would "make arrangement to leave several boxes of paper down in the corridor in the first basement of the Isetan Building" (R 133). This information was conveyed to Utena. As a result of this arrangement, Utena removed quantities of paper from the basement of the Isetan Building

on two or three occasions during March 1947, and on instructions from the accused, Takashi Yamamoto received payment therefor, and turned over the money thus collected, to the accused. On each of these first occasions, five to ten reams were removed from the basement and delivered to Utena (R 134,135). Between March and August 1947, two or three additional deliveries of approximately twenty reams each (R 135) were made to Utena in the same manner. During June 1947, as the amount of payment due from Utena became larger, the accused requested that Takashi Yamamoto keep the money received from the paper sales, and pay the accused as he had need for it. Takashi Yamamoto did as accused requested and thereafter transferred funds to accused when accused requested that he do so (R 136).

In June 1947, pursuant to the request of Utena to get him a document authorizing transportation because Japanese police had detained one of his vehicles, Takashi Yamamoto typed such a document and gave it to Utena (Def Ex B). Although the use of chits had been discontinued in October 1946, the document furnished Utena purportedly was a certification that the 64th Engineer Topographical Battalion had given the Isetan Department Store 100 reams of paper for the purpose of printing food and beverage chits for the Isetan Enlisted Men's Club, and bore the stamp of a Lieutenant Myron H. Frick, Jr., Building Custodian (R 168,169). In his examination Takashi Yamamoto stated that Lieutenant Frick had affixed the signature stamp. On further examination, however, he admitted that he might have affixed Lieutenant Frick's stamp without the latter's knowledge (R 171). In July 1947, Utena again encountered obstacles in transporting paper from the Isetan Building. Lieutenant Coon, Battalion Security Officer of the 64th Engineers, confronted Takashi Yamamoto in the labor office and questioned him with regard to one of Utena's trucks loaded with government paper which he had stopped and was holding outside. Takashi Yamamoto testified on cross-examination that he went and saw it and then "went straight up to Colonel Tooze and told him about it." (R 165) On redirect examination Takashi Yamamoto reasserted that he had in fact informed the accused of the incident and that accused had replied that he, Takashi Yamamoto "would not have to worry about it." (R 189)

In September 1947, another shipment of paper from the Isetan Building basement was made to Utena, and for the first time United States Army transportation was used to accomplish delivery (R 136). In November 1947 Takashi Yamamoto was told by the accused "to get in touch with the battalion supply office, and to take the five or six truckloads of loose paper that was at that time stored down at the motor pool out to Mr. Utena's warehouse and to sell it." In accordance with this instruction, map paper and some typewriting paper aggregating a little over 1000 reams was shipped to Utena. Payment for this

shipment was made by Utena to Takashi Yamamoto who held it until it was completely expended by the accused (R 138,139,158).

According to Takashi Yamamoto's testimony, approximately 250 reams of rolled paper stock were sent to Utena for processing (by the 95th Reproduction Company and the Battalion Supply Office) during the months of August and September 1948, for which, on or about 5 October 1948, he received 300,000 yen from Utena, in partial payment thereof (R 141). On instructions from the accused he paid this sum to one Uyeda, a jeweler located in the Imperial Hotel Arcade, in settlement of the account owed to Uyeda by the accused. The total amount to have been paid by Utena on this transaction was 1,250,000 yen, but part was applied by Utena to liquidate a loan of 500,000 yen made earlier by him to the accused. The total amount received by Takashi Yamamoto from Utena for all paper sales was about four and one-half million yen (R 142) which was either turned over to the accused or his servants in the form of cash, or was expended by Takashi Yamamoto according to accused's instructions (R 136,138,142,143). Takashi Yamamoto admitted that he received 150,000 yen in "thank you money" from Utena for his part in the transactions (R 143).

Takashi Yamamoto further testified that on 12 October 1948, upon learning that the CID was investigating the paper transactions (R 145, 146), he informed the accused. Accused replied that if he became involved he would "deny any facts of selling paper to Mr. Utena," whereupon Takashi Yamamoto suggested a plan which would purportedly explain the presence, in accused's quarters, of such items as a piano, electric phonograph, and electric train, as having been "loaned" to the accused by the Isetan Department Store. The accused tacitly agreed to this proposal (R 146,147).

Mary Kawai, maidservant in the employ of accused from October 1946 until October 1948, was sent by accused on four or five occasions to contact Takashi Yamamoto and receive packages of Japanese yen from him (R 300,301,302,303). She received the first package in accused's behalf in the summer of 1947. The amount of yen per delivery varied from ten to twenty thousand and on one occasion a bundle containing 40 or 50 thousand yen was received from "someone else" and delivered to the accused (R 303). She further stated that she had actually seen the contents of these packages (R 302,303).

Jun Ishigaki worked for accused as a houseboy from April 1947 through March 1948, when he severed his employment. He was thereafter reemployed by accused and was subsequently dismissed during the latter part of August 1948 (R 315,323). On four or five occasions during the term of his employment, he was ordered by accused to contact Takashi

Yamamoto and pick up some Japanese yen and return the same to accused. Ishigaki recalled an occasion when he took two bundles containing 100,000 yen to accused, another occasion when he delivered a bundle containing 50,000 yen, and still another time when the bundle contained 10,000 yen. All of this yen was received from Takashi Yamamoto in the latter's office and taken to the accused (R 315). Ishigaki knew the bundles contained Japanese currency because he admittedly looked into them (R 316).

Senzo Utena, a paper merchant, testified that he had his first business dealings with Takashi Yamamoto on or about January 1947. At that time he received an initial order from Takashi Yamamoto to prepare certain food and drink chits. On or about March 1947 he met Takashi Yamamoto in the corridor of the basement of the Isetan Building where Takashi Yamamoto showed him a sample of paper and inquired whether he could use such an item. Utena replied in the affirmative and asked Takashi Yamamoto if he could sell him some. Takashi Yamamoto stated in reply that he could sell him approximately twenty reams of paper. The paper consisted of flat sheets approximately 2'8"x 3'8", (R 197). Delivery of this twenty ream shipment was made to Utena in the basement of the Isetan Building for which paper he paid Takashi Yamamoto approximately 70,000 yen (R 197,198).

In June 1947, Takashi Yamamoto called Utena informing him that he had left thirty reams of flat paper in the corridor of the Isetan Building. Utena picked up the thirty reams of paper and paid Takashi Yamamoto 135,000 yen (R 198,199).

Around August 1947, 100 reams of paper were delivered to Utena for processing. Utena testified that he returned half of the shipment and kept the other half for himself. Fifty reams were flattened by Utena and this constituted the amount of paper returned. Utena paid Takashi Yamamoto approximately 200,000 yen for the fifty reams of paper retained by him (R 199).

When shown a contract for paper storage (Pros Ex 5), Utena recalled that the contents provided 500 reams of paper would be sent to the Tanaka warehouse for processing, and for this service ten per cent was to be retained by the contractor, Tanaka, who was Utena's brother, and Utena, as the processing fee; however, the 100 reams delivered in August 1947 of which fifty per cent was retained, constituted a separate transaction apart from the contract (R 199,200).

In November 1947 a shipment of small paper was received by Utena, a great portion of which could not be used. The shipment involved some 1300 reams, for which Utena paid Takashi Yamamoto approximately 2,600,000 yen (R 200).

In February or March 1948, 96 or 98 reams of paper were received by Utena at the Tanaka Paper Store for which Utena paid Takashi Yamamoto 480,000 yen (R 201).

In August 1948, Utena received 165 reams of paper for which he paid Takashi Yamamoto 825,000 yen. This amount of paper was not received at one time, but payment was made in advance of full shipment (R 201). However, on cross-examination, Utena admitted making a pretrial statement that he always got the paper before he paid for it (R 213).

Between the months of August and September 1948, Utena received about 846 reams of paper of which he retained 85 reams as his ten per cent, and returned the remainder, after processing. Utena testified that at the time it was received he did not pay for the 85 reams retained. He was to pay Takashi Yamamoto 450,000 yen (Pros Ex 16), the balance owed in view of an amount previously advanced Takashi Yamamoto on account of future delivery of paper. On the 20th or 25th of November, however, when the CID investigated Utena he turned the 450,000 (Pros Ex 16) yen over to the investigating agent, for which he received a receipt (Pros Ex 7; R 201,202,203,209,288,289). By this time, Utena had paid Takashi Yamamoto 140,000 or 145,000 yen "for thanks," and a total of 4,310,000 yen for the paper. When Utena was asked whether he knew "to whom the paper belonged that 'he' /Utena/ purchased from Takashi Yamamoto," he replied in the negative (R 203,205). Utena further testified that there were markings on the wrapping of the paper shipped to him which attracted his attention, but he could not read these markings because they were written in a language unknown to him. A stencil purporting to be markings similar to markings appearing on the paper shipped to Utena was introduced into evidence, and was recognized by the witness (R 207; Pros Ex 6).

Captain Willard C. Hanson, Commanding Officer, 95th Engineer Base Reproduction Company, 64th Engineer Topographical Battalion (R 232), upon being shown Prosecution Exhibit 6, stencil of markings similar to markings on paper shipped to Utena, stated that he had seen similar writing "On wrapping paper on rolled stock 35 by 45, high wet strength paper" for which he was responsible (R 235); that prosecution exhibit 5, (sample of paper 35" x 45") came from his company storage room; and that it was the property of the United States Government (R 237). Captain Hanson then stated that "this paper came from a place where it was flattened," but that the location of this place was unknown to him. "Indirectly, it came from battalion supply" (R 236). Captain Hanson had had a conversation with accused during the early part of 1948 regarding the flattening of this paper. He was told by accused, "that Yamamoto or the labor office would take it out" (R 237). Captain Hanson further testified that paper was stolen from an area on the third floor

of the Isetan Building during the Spring of 1948 in small amounts (R 238); however, all rolled stock that he had sent out for processing had been returned, but not until after the CID had lifted restrictions on the processing transactions (R 241).

During the latter part of October 1948, George Q. Keithahn, an investigator for the Provost Marshal's Office, Tokyo, served a search warrant on the accused (Pros Ex 9; R 245,267). The search warrant was offered in evidence over objection of the defense (R 245). As a result of serving this warrant, a large quantity of articles were seized on the top floor of the Isetan Building, which was in part utilized by the accused as living quarters. An inventory was taken of the items seized, Keithahn calling off the items to his co-investigator, Winebrenner, who typed up the list. Keithahn identified the transcript thus composed as comprising an accurate inventory (R 271,272). It was stipulated by and between the prosecution and defense that the search warrant presented in court constituted the original thereof "signed by General Bradford, by virtue of which Agent Keithahn searched the house and premises" (R 245), described as the "Residence of Lieutenant Colonel Arthur C. Tooze and buildings occupied by the 64th Engineer Topographical Battalion." (Pros Ex 9).

To establish the fact that the area described as part of the Isetan Department Store had been procured 17 October 1945 for use by occupational forces of the Eighth Army, United States Military Forces procurement receipts were introduced into evidence (R 253-255; Pros Exs 10,11). The court then took judicial notice of Circular No. 6, Headquarters Eighth Army, United States Army, Office of the Commanding General, APO 343, dated 26 January 1948, entitled, "Arrest, Entry, Search and Seizure," and Circular No. 59, Headquarters Eighth Army, United States Army, Office of the Commanding General, APO 343, dated 26 August 1948, in which several recisions and alterations are contained with reference to Circular No. 6, 1948 (R 258).

Accused after being informed of his rights testified under oath in his own behalf for the limited purpose of showing the illegality of the search warrant (R 258,259).

He stated that on or about 15 October 1948 he and his family occupied a small section of the Isetan Building, consisting of three bedrooms, living room, dining room, kitchen and laundry. These quarters were separate and apart from the rest of the building and were capable of being locked. No limitations were placed on the accused as to his rejection or admission of persons who might come to the apartment (R 259). Accused then related that on or about 15 October 1948 "A Lt. Colonel from the Eighth Army Headquarters * *, Major Max Phelps, Provost

Marshal of the 1st Cav., and a CID agent, * * Mr. Keithahn, came to my office which is on the 4th floor of the Isetan Building. I was issued an order, a written order, which stated that I was at that time transferred to the Eighth Army 5th Engineer Construction Group. That I would go upstairs, pack a small bag with enough stuff to last me a couple of days, and that would be executed immediately. As I started upstairs Major Max Phelps, the Provost Marshal of the 1st Cav., said, 'This is a search warrant and will be executed now.'" (R 260). Accused denied giving authority to anybody to search his quarters (R 259), however, he accompanied the two officers and CID agent to his quarters and complied with the order to pack his bag and leave immediately. Accused's wife and three children were left in possession of the premises (R 260). Cross-examination by the prosecution elicited that accused's rental allowance was deducted as a result of his occupancy of quarters in the Isetan Building; that such quarters were occupied by accused and his family and were considered as being supplied and furnished by the United States Government (R 261). Accused testified that his quarters were furnished partially by himself, and partially under a procurement demand on the Japanese Government (R 262).

A search warrant signed by General Bradford, was received in evidence with exception thereto waived until the prosecution offered proof of goods secured as a result of the search and seizure (R 267; Pros Ex 9).

Over the objection of the defense on the grounds that the evidence adduced was illegally obtained, Prosecution Exhibit 12, Picture, "Seascape," painted by Oscar Otto Willy Seiler (R 272), and Prosecution Exhibit 13, Silver Dinner Set, 112 pieces (R 278), were introduced into evidence as part of the property seized by George Q. Keithahn pursuant to the search warrant (Pros Ex 9)(R 272,273,274,276). On cross-examination Keithahn testified that prior to serving the warrant he went to General Shaw's office to ascertain his rights under the search warrant and as a result of what he was told he seized the picture (Pros Ex 12; R 273,274) and the set of silver (Pros Ex 13; R 277).

It was then stipulated by and between the prosecution and defense that everything seized pursuant to this search warrant be offered en masse, and it was further stipulated that the seizing officer did not know, or knew nothing about the origin of each and every article so offered. The stipulation further carried defense's general objection to the introduction into evidence of each and every object so seized (R 278,282). Thereupon all of the objects seized in the execution of the search warrant were moved into the courtroom (R 279), and at the

request of the defense pictures of the Exhibit were taken for defense purposes (R 279,280). Prosecution Exhibit 14, consisting of all the items then in the courtroom, including a locked Japanese trunk (R 290, 291), plus twelve barrels of dishes and Prosecution Exhibit 15, a catalogue list of items referred to in Prosecution Exhibit 14, were received into evidence over objection by the defense (R 283,307). Keithahn, upon cross-examination with reference to the items seized under the search warrant and impounding order, admitted the seizure of one set of Quartermaster dishes, which he had reason to believe were packed for shipment to the United States by accused. He further admitted the mistaken seizure of two toasters, and that he took from a bag carried by accused's wife, without her knowledge, a cigarette case and other items which were listed on the original impounding order (R 285,286).

Munekazu Yamamoto, director of the Isetan Department Store, did business with accused through Takashi Yamamoto who made purchases for accused and charged the purchases to the director's account to avoid the handling of cash on every purchase. This was done because the Isetan Department Store was operated on a strictly cash basis. Occupation Forces personnel were not authorized to utilize Munekazu Yamamoto's charge account. In accordance with the arrangement heretofore stated, a piano, electric radio, and some other items were sold, but Munekazu Yamamoto testified he had never seen these items delivered to or in the possession of accused (R 308-310).

Jun Ishigaki during the course of his employment by accused made numerous purchases on the latter's behalf. During the Summer of 1947, he accompanied accused to the Yugendo Art Shop on the Ginza where the accused gave him 80,000 yen to consummate the purchase of a rug and a Japanese table for the accused. During this same period Ishigaki purchased a Cloisonne flower vase and an ivory carving for the accused for 30 or 40 thousand yen at the Toyo Art Shop located within the Imperial Hotel (R 316). At the Isetan Department Store Ishigaki purchased a radio, a safe, numerous toys, household utensils, a guitar, a ukulele, and various other articles for the accused. He did not pay cash for these items but signed "little chits * * made out in duplicate" which at the end of the month were turned over to Takashi Yamamoto who took them to the accused. Accused then acknowledged the chits and the amount owed was paid by Takashi Yamamoto to the director of the Department Store (R 317).

The defense and prosecution stipulated that sometime between June and September 1948 Mary Kawai accompanied accused's wife to the Sakurai Antique Shop on Ginza Street. There she saw Mrs. Tooze purchase a sushi plate referred to in Prosecution Exhibit 15, but the price paid

was unknown to Mary Kawai. About this same time Mary Kawai was present with accused's wife when she paid approximately 5000 yen for a certain metal box. On another occasion in the Spring of 1948 she was present when accused's wife purchased six sterling silver ash trays, a sterling silver sugar bowl, and sterling silver cream pitcher, all listed as a part of Prosecution Exhibit 15. The purchases were made with Japanese yen but the amount paid for these items and the source of the yen were unknown to Mary Kawai (R 336,337,338). Through Takashi Yamamoto, accused purchased from Kanekichi Matsumoto several pearl rings, watches, and some gold Japanese coins (R 350). He also purchased an electric train through Takashi Yamamoto from the Isetan Department Store just before Christmas 1947 for which item 100,000 yen was paid (R 351). Further stipulations were accepted into evidence concerning the various items listed in Prosecution Exhibit 14 and Prosecution Exhibit 15 as to the fact of their purchase on behalf of accused and the amount paid for each item. The defense stipulated that these witnesses would testify as above shown but objected to the admissibility of such testimony on the grounds that the items referred to were seized by virtue of an illegal search warrant and there was nothing showing the source of the yen used (R 338-349).

Ishigaki identified two bundles containing 20,000 Japanese yen as currency received from Takashi Yamamoto on or about September 1948, identification being made by certain markings placed thereon upon receipt of it, and immediately prior to turning it over to the CID (Pros Ex 17; R 334). He explained these funds came to him in accordance with a plan devised by the CID whereby he approached Takashi Yamamoto and told him that he, Ishigaki "had the Colonel by the tail and that he would pay off." (R 317,318,319). Upon receiving the money Ishigaki took it to the CID of the First Cavalry Division. In conjunction with this testimony, Ishigaki related an incident that took place between him and accused during August 1948 when both were in an angry state of mind toward each other. On this occasion he told the accused in English that he knew about his "black market" dealings in paper and that he would report it to the CID or the Japanese police. Accused replied that the CID or Japanese police could do nothing about the matter (R 319-321, 326). Ishigaki admittedly was out to get revenge against accused (R 329).

To fix the rate of exchange applicable to the currency transactions involved in the instant case, it was stipulated by and between the prosecution and the defense "that the indigenous Japanese currency, yen, is now and has been sold at the United States Finance Office installations at the following rate per one American dollar or dollar instrument; from the period July 1946 through March 1947 at the rate of 15 yen to one

dollar. From March 1947 to 5 July 1948, at the rate of 50 yen to one dollar. From July 1948 to the current date, at the rate of 270 yen per one American dollar." (R 360).

The court took judicial notice of Circular 3, General Headquarters Far East Command, dated 10 January 1947, and Circular 1, General Headquarters, Far East Command, dated 7 January 1948, which pertained to the use of military payment certificates in occupied areas and transactions in the indigenous currencies of such areas.

4. Evidence for the defense.

Prior to proceeding to the merits of its case, the defense moved to have excluded from consideration by the court certain items enumerated in Prosecution Exhibit 15, included among which were Prosecution Exhibits 12, 13 and 14, on the grounds that they had been seized pursuant to an illegal search warrant, and had in no way been identified, tied in, or connected with the case (R 363-368, 371-372). The motion was overruled, but subsequently, at the end of the entire case and before the case was turned over to counsel for closing argument, the court ruled that all the items listed in Prosecution's Exhibit 15 which were not properly identified by proof as having been purchased with Japanese yen, were immaterial to the case (R 574).

Proceeding to its defense based on the merits of the case, the defense showed that none of the paper stored in the 64th Engineer Topographical Battalion was of typewriter size, and that due to the lack of space and inability to foresee the demand for map paper, the 95th Reproduction Company of the 64th Engineer Topographical Battalion was incapable of flattening all of the 35" x 45" rolled paper stock to meet anticipated demands (R 391,392). From 1946 through January 1949, however, a total of 500 reams of 35" x 45" map paper was in fact processed and utilized by the 95th Reproduction Company (R 441).

In the fall of 1947 General Loper, Chief of the Intelligence Division, Engineer Office, GHQ, who was then inspecting the 64th Engineer Topographical Battalion, had a conversation with accused concerning the flattening of rolled paper by a Japanese firm (R 382,384,385). General Loper was told by accused of his plan to have the paper flattened by a Japanese contractor and that payment for this service was to be accomplished by giving the said contractor a portion of the paper for his own use. General Loper's comments on the matter, if any, were not overheard (R 382,384). The paper on hand was a high wet strength paper of unusual chemical content. It was not, therefore, suitable for reprocessing since

it could not be mixed with the waste paper normally used. Thus, if it were not fit for printing, under ordinary circumstances, it probably would have been destroyed or disposed of in some other manner (R 390).

During the year 1947 and 1948 the measures taken to insure the security of the paper supplies of the 64th Topographical Engineer Battalion were very poor. Paper was often received in great quantities without any prior notice and of necessity it had to be stored wherever space could be found; this, despite the fact that many of the areas so utilized were not under lock and key. Because the battalion was far understrength, enlisted guards had to be supplemented by Japanese personnel of questionable integrity and trustworthiness (R 388,412).

During the middle of 1947 and for several months thereafter, twenty to forty thousand reams of paper, property of the 64th Engineer Topographical Battalion was stored in a one story frame building at the base of the 123rd Engineer Survey Battalion near a town call Tachikawa, Japan. This storage area was located about a quarter of a mile from the nearest building occupied by American forces and was close to a Japanese road running along the east edge of the base. Due to the shortage of personnel, the 123rd Engineer Survey Battalion could not furnish adequate security to safeguard the paper stored in their area. The entire guard consisted of two guard posts, one at each gate, a sergeant of the guard and an officer of the day (R 390,404). Originally efforts had been made by accused to have the paper stored in a more secure location but such efforts came to naught when the building which would have provided the additional safeguards was destroyed by fire in February 1947 (R 404, 405).

First Lieutenant Harold J. Cleaver, Adjutant of the 123d Engineer Survey Battalion and the person charged with the responsibility for security of the base located near Tachikawa, testified that no guard was furnished by his organization for the building in which the paper belonging to the 64th Engineer Topographical Battalion was stored because of a shortage in manpower; however, the 64th had their own Japanese police guarding this area (R 408).

Zenji Nakatomi, a prisoner confined at the Matsumoto Detention House, testified in behalf of accused for the stated purpose of discrediting the testimony of Takashi Yamamoto (R 446,448). He stated that in August 1948 he attempted to run down a rumor concerning the illegal trafficking of paper. His primary source of information was the Tanaka Printing Company. As a result of what he learned there, he went to Takashi Yamamoto on a Saturday, told him of his suspicions concerning the blackmarketing of paper, and asked him who was the owner of a "baby Ford", as such a person was buying the paper. He then asked Takashi

Yamamoto for a loan of 10,000 yen. Yamamoto told him to come back on the following Monday at which time the loan was negotiated without any mention of paper between the two (R 447,449,450). When Takashi Yamamoto gave the money to Nakatomi, he warned him not to tell anyone about the matter. According to Nakatomi, it was generally known among the Japanese employees of the 64th Engineers that Takashi Yamamoto was blackmarketing in paper (R 452,457). Nakatomi admitted that on several other occasions he had borrowed sums of money from Takashi Yamamoto which he had repaid (R 457).

Hideo Tanaka testified that he knew Jun Ishigaki and corroborated the fact that Ishigaki did not like the accused (R 468,469).

Testimony adduced by the defense from Captain Francis A. Hastie and Master Sergeant Nicholas F. Christofani shows that when accused arrived to assume command of the 64th Engineer Topographical Battalion, beer and soft drinks only were served at the enlisted men's club (R 412). In October 1946, "Suntory", a Japanese whiskey, was made available to the battalion personnel even though the sale of liquor to enlisted personnel was not authorized until April of 1947 when the Eighth Army locker fund was organized in order to permit group purchases of American whiskey. After the month of April 1947 both "Suntory" and American brands of liquor were legitimately available for sale to the enlisted ranks (R 389,395,402,413,434). The normal ration of "Suntory" for the 64th Engineer Topographical Battalion was approximately 50 or 60 cases per month (R 394). From November 1946 through June 1947, Master Sergeant Christofani was placed on battalion orders each month to proceed to the Kotobuki Factory at Osaka, Japan, along with an officer of the enlisted men's club, to procure "Suntory" whiskey for the enlisted men's club, for the officers' club, and for officers, and enlisted men of the first three grades. Japanese yen procured from funds of the aforestated organizations and individuals, in addition to a conversion slip issued by the United States Army Finance Officer, were used to purchase the "Suntory" from the distillery at Osaka. Two receipts were issued by the vendor to cover the total purchase. One receipt covered only those purchases made for the enlisted men's club, the other receipt covered all other purchases. The "Suntory" was purchased at the rate of $1.75 to $2.00 per bottle and retailed at the enlisted men's club for $3.50 or $4.00 a bottle (R 394,430,433,436). It was usually shipped from Osaka to Tokyo by an express company and picked up at the station by Christofani. Accused augmented the authorized whiskey ration for his battalion by arranging with the club officer of the 49th General Hospital in Tokyo to assume part of their liquor allowance. This additional liquor was also picked up and delivered to the battalion by Master Sergeant Christofani (R 389,430,431,434). Christofani stated that

"On a couple occasions the Colonel gave me yen to buy for him. It came to about thirty-five cases. I took that and put it in the storeroom next to the elevator and then we sometimes kept it in the motor pool." (R 432) Accused stored approximately twenty cases of the "Suntory" he purchased in the motor pool. Two shipments approximating thirty-five cases each were stored in the storage room next to the elevator in the Isetan Building (R 400,432); however, at the time the second shipment was received the first was fairly well depleted (R 399, 438). Between November 1946 and June 1947, Christofani removed a total of 35 cases of "Suntory" from the storage room in the Isetan Building to the motor pool at the request of the accused. Fifty or fifty-five cases of "Suntory" whiskey were usually stored in the motor pool but a part of this amount was property of other officers in the Battalion (R 439).

Accused, after being apprised of his rights as a witness, elected to testify under oath in his own behalf (R 506). He stated that he had emigrated to the United States from England in the Fall of 1917 when he was not quite 17 years of age and thereafter, on 12 February 1918, he enlisted in the United States Army. He also described his continuous military service, which included participation in both World Wars, from the time of his initial enlistment to his assumption of command of the 64th Engineer Topographical Battalion (R 507-510).

Accused categorically denied that he had ever, while he was comman ing officer of the 64th Battalion, entered into a deal with Yamamoto or any other person by which paper was to be removed illegally or from whi he was to gain pecuniary benefit (R 511). Then, in response to his counsel's invitation to relate to the court the source from which he had acquired yen, accused completed his direct examination with the following statement:

> "A When I assumed command of the 64th Engineer Battalion, as I said before, the battalion was in pretty bad shape. The men, the officers and enlisted men, were both interested only in going back home and getting out of the army. That was the latter part of 1946 and the army was going through a terrific transition at that time. The morale of the 64th was very low and the enlisted men's club, which was built at a cost of twenty-six or twenty-three million yen, the Diamond Horseshoe Club, was just a joint. The men used to go out there and buy Japanese liquor and Japanese beer and it was just a mess.
>
> "As soon as I assumed command, I fired the entire committee. The committee was elective and while I appreciate the enlisted men should run their own club and elect the president, if the people who are running the club aren't doing a good job, I don't believe they should be there. So I fired the entire crew; made

the Sergeant-Major, who was a Regular Army man, the president of the club. I took six or seven Regular Army First Three Graders, who were going to stay in the Army, who were interested in the army, and put them in charge of the club as the board of governors and tried to start the club on a working basis.

"The Officers' club -- or the battalion at that time was receiving an allotment of twenty-five cases of Suntory a month. That allotment is the regular allotment which comes through channels, through Eighth Army, and is sent to every organization over here. However, there was no State-side or practically no State-side whiskey at that time and it took about five months, when you did get a locker fund, it took five or six months to get it, and when it came it was, oh, maybe five or six bottles of gin and a couple bottles of Scotch, all mixed up.

"The enlisted men's club had about $200 or $250 or $300. The officers' club was broke. The only way the officers' club obtained whiskey was by borrowing money from various officers and then, when the whiskey was sold, pay it back. They had never allowed the enlisted men any whiskey. Under that twenty-five cases it would have been impossible to give the enlisted men any of that whiskey. As General Loper remarked, many of the officers over here then were bachelors and were doing more drinking than they probably do when their families are here.

"So we made arrangements with the 49th General Hospital, with their club officer, to get what they did not need for their allotment. Their allotment, at that time, for some reason or other, was 250 or 270 cases of Suntory a month and they never used more than, maybe, a hundred or at the most a 150 cases.

"I contacted the officer down there. I don't recall his name. He is a big, husky fellow -- served in Chicago as an enlisted man at one time. -- and he agreed if the 64th would supply the transportation, collect his empties, pick the empties up and bring the whiskey back -- do all the work involved, he would allow us to have the whiskey they did not use.

"I agreed to that and I think that first started in November -- or December or January. This continued for about six months and I guess I took about from thirty to fifty cases from that each month for myself because after the second month, we started to get State-side whiskey at the enlisted men's club and I made

the agreement and started to pile it up in my own storeroom. At that time I made an arrangement with Yamamoto -- T. Yamamoto whereby he would take care of the whiskey for me and in turn buy me certain articles or give me yen. This went on, I would say, until about maybe June or July of 1947. I don't think I ever disposed -- in fact I am sure I never disposed of all the whiskey because I still have about a case and a half up in my quarters. Yamamoto would take it as he could use it. Lots of times he stored it in the basement of his store, I believe, but I have never inquired as to his method of handling it. He handled it himself." (R 511,512)

On cross-examination accused stated that his liquor sales had netted him "in the vicinity of three million yen," but at times he had bartered whiskey in exchange for goods. Takashi Yamamoto had retained these earnings for him, and kept him apprised of the amount of yen he had to his credit. He never had any suspicion that the yen might have come from the sale of paper. In the Fall of 1946 liquor was purchased by accused for about 230 yen per case. The price of later purchases ranged between 550 yen and 750 yen per case when the value of the yen dropped from 15 yen to 50 yen per dollar. Approximately 95 per cent of the liquor purchased by accused was sold through Takashi Yamamoto, from which sales the accused realized a gross return of 10,000 to 15,000 yen per case (R 513-517).

Accused assigned as the reason for the negligence of the battalion supply, in accounting for the map paper, to the fact that when he assumed command of the battalion, paper was scattered all over the battalion area under absolutely no safeguard. He further asserted that morale was extremely low, and the mission of the battalion was not being accomplished. He further related that shortly after his assumption of command a large forced issue of map paper was received by the 64th. He had no way of taking care of the shipment because of inadequate storage space and shortage of military personnel for guard purposes. He decided that the accomplishment of his mission was more important than safeguarding the paper and therefore utilized the personnel at his disposal there to the accomplishment of the former (R 518,519). Further cross-examination showed, however, that although all personnel of the battalion were allegedly being utilized to the fullest extent in the performance of their military duties, Master Sergeant Christofani, the plant foreman, nevertheless had time to remove whiskey for the accused from accused's quarters to the Motor Pool. Accused explained this situation by stating that he trusted Christofani and did not care to let everybody else in the battalion know he had quantities of whiskey (R 519).

Accused admitted that he was a signatory to the contract with the Tanaka Printing Company which provided for the processing of 500 reams of map paper and that he had no idea how much paper was shipped and processed pursuant to the said contract. He further admitted that he had never spoken with the manager of the Tanaka Printing plant, or ever visited the plant to determine if there were adequate facilities there with which to perform the processing contract. He had, however, sent Takashi Yamamoto to the plant to see if they had a press. In this regard he stated, "They said they had it; so far as I was concerned, that was all that was necessary" (R 527). Accused also admitted having instructed Captain Hanson, Commanding Officer of the 95th Engineer Base Reproduction Company, to send out his rolled stock for processing and see that it was thereafter returned. After giving these instructions, he took no steps to ascertain the amount of rolled paper on hand, or the amount actually processed and returned to the battalion (R 519,520). He excused his apparent lack of knowledge concerning paper sent from the battalion for processing under the contract by stating, "I wasn't running a company supply or a battalion supply. I was running a battalion and had a hell of a big job to do." (R 521,528).

Further cross-examination of the accused adduced that he had knowledge that some paper stored with the battalion was being illegally removed from the storage areas of the Isetan Building. He obtained two additional guards and also tried to procure heavy wire screening for the windows through which the paper was being removed. No persons were actually apprehended wrongfully removing paper. Accused denied having been informed by Yamamoto of the duty officer's (Lieutenant Koon) alleged discovery of a Japanese truck being loaded with map paper in the basement of the Isetan Department Store (R 541,542).

Accused further admitted that he had called the Battalion Supply Office several times and had instructed Sergeant Akin, the Battalion Supply Sergeant, to send paper out to be processed. Two days after one such call accused spoke to Sergeant Akin and was told that his intructions had not been followed because Lieutenant Leamon, Battalion Supply Officer, had countermanded them. Accused thereupon informed Sergeant Akin "I am the battalion commander and I issue the orders and Lt. Leamon is my supply officer and he will do as I direct." Accused also stated that a few days later he spoke to Lieutenant Leamon about the matter and told Lieutenant Leamon that he desired all the paper on hand to be sent out for processing (R 526,527). Accused further admitted directing Captain Hanson to send his rolled stock of paper to the Tanaka Company for processing and to bring it back when finished.

When Takashi Yamamoto told accused that Captain Hanson was receiving receipts from the Tanaka Printing Company for paper sent there, accused obtained the receipts from Captain Hanson and turned them over to Takashi Yamamoto, explaining to Captain Hanson that the receipts covered map paper, property of the Battalion Supply Office, and since Takashi Yamamoto "was running the detail," he was the proper custodian. When asked if he knew what Takashi Yamamoto did with the receipts, accused replied, "Well up until the time of the investigation I was expecting that he used them correctly." (R 521,522).

Accused conceded as true that Jun Ishigaki, his houseboy, had threatened him with "exposure" but denied that the threat had any connection with the alleged paper shortage. Ishigaki, however, remained in accused's employ after this incident because he believed Ishigaki "was a little off" and because his employment was to be terminated shortly thereafter anyway as the house at Karuizawa was being closed and Ishigaki's services were only needed there (R 522,543). Accused conceded that Ishigaki knew about his whiskey business. In describing what transpired between them at the time of the alleged threat of exposure, accused stated that Ishigaki "got very excited and patted himself on the chest and said, 'I am a Japanese man.' I really didn't understand what he was talking about. He doesn't speak very good English and when he is excited it is worse. I don't think -- I know paper was not mentioned. I know it was never mentioned. If it was, I didn't understand it." (R 545).

The following stipulation was entered into by and between the prosecution, defense and accused:

> "It is stipulated and agreed by and between the prosecution, the defense and the accused that all items listed on Prosecution's Exhibit 15, except Item 1, Page 1, which is a Quartermaster Issue China Set issued for the use of Colonel Tooze in his quarters, and Item 11, page 1, which is another set of Quartermaster Dishes issued for the use of Colonel Tooze in his government quarters, and Item 29, a movie projector which is the property of person or persons unknown, are the property of the accused, Lt. Colonel Arthur E. Tooze. The remaining items not including those previously identified by prosecution testimony were bought by the Tooze family for approximately 800,000 yen; excepting those items brought from the United States, purchased in the PX, and/or received as gifts." (R 539)

Seven witnesses testified as to accused's excellent reputation as an administrator, soldier, and family man (R 383,389,391,405,409,414,

415,467). Defense Exhibits F through X attest to accused's brilliant military career during his more than thirty years of continuous service (R 488-492). He was recommended for the Silver Star for gallantry in action while serving with the 6th Engineer Special Brigade in the European Theater of Operations on 6 June 1944 during the invasion of Normandy (Def Ex I). He also received a letter of commendation from Brigadier General Paul W. Thompson, who was commanding general of the 6th Engineer Special Brigade at the time of the Normandy operation. The commendation extolled accused's professional ability, great courage and complete loyalty while serving under General Thompson's command (Def Ex J). A similar commendation was received from Colonel T. L. Mulligan, accused's immediate superior during his service in Normandy (Def Ex K). Other letters of commendation were signed by Brigadier General Willoughby (Def Ex M), Major General Casey (Def Exs N,O), and Lieutenant General Eichelberger (Def Ex P). Major General Casey testified that he knew accused for almost thirty years and that his general reputation for honesty was excellent; that he performed an outstanding job while serving with the 64th Engineer Topographical Battalion and was well qualified as an administrator (R 503,504).

5. Rebuttal evidence.

a. For the prosecution.

First Lieutenant Nicholas J. Leamon, Battalion Supply Officer of the 64th Engineer Topographical Battalion, testified that he had had no knowledge of map paper being sent from his supply to a processing plant until a date subsequent to accused's relief from command of the 64th. He denied having had any conversation with accused relative to sending map paper out for processing other than one concerning a procurement demand for that purpose (R 549,550). Lieutenant Leamon had issued orders that no paper was to be sent out for processing from his supply because all paper requiring processing was to have been shipped to the 95th Reproduction Company which organization, in turn, would have the necessary processing accomplished. Lieutenant Leamon eventually discovered that his instructions had been violated and that approximately four truckloads of paper had been sent from his supply to the processing plant, none of which was ever returned to the Battalion Supply. Lieutenant Leamon believed, however, that after the Tanaka plant was closed by order of the CID, this paper was picked up by the 95th Reproduction Company (R 551,552,553).

Munezaku Yamamoto, manager of the Isetan Department Store, testified that he had purchased approximately thirty cases of "Suntory" whiskey from Takashi Yamamoto over a period extending from the latter part of 1946 through the spring of 1947. He stated that he was told

by Takashi Yamamoto that the whiskey was being sold for accused. He paid approximately 400 yen per bottle, but the price fluctuated upward to approximately 1000 yen on occasion, and he estimated his total expenditure for the "Suntory" to have been in the vicinity of 200,000 yen (R 554,555,557,558).

Takashi Yamamoto testified that he sold between 40 and 60 cases of "Suntory" to Munezaku Yamamoto and about five cases to enlisted men in the 64th and to friends. This whiskey had been obtained by him from accused (R 559,560). These sales grossed approximately 300,000 yen independent and exclusive of the monetary return from the sale of map paper. Takashi Yamamoto obtained the cases of whiskey from accused's storage room located on the seventh floor of the Isetan Building and removed them with the aid and assistance of some detail workers and K.P.'s, to the first basement of the Isetan Building where they were stored in one of the Department store's storerooms (R 563). He denied that he had ever bartered any whiskey for the accused or that he had removed any whiskey from where it was stored in the Motor Pool area. His sales of the "Suntory" belonging to accused covered a period which commenced in the Fall of 1946 and ended around August 1947. No records were kept of these transactions, nor were receipts given by Takashi Yamamoto to evidence any sale of "Suntory" made by him. He gave the cash realized from the sale of the whiskey directly to accused (R 566).

b. For the defense.

At the conclusion of closing argument by counsel, the defense requested and was granted permission to reopen its case for the purpose of clarification and explanation of Sergeant Christofanis' statement that only 400 reams of 35" x 45" was used by the 64th Engineer Topographical Battalion in 1947 and 1948 (R 598).

Accused testified that the 64th Engineer Topographical Battalion furnished the Historical Section of SCAP, with between 8500 and 10,000 reams of 35" x 45" paper during 1947 and early 1948 upon which to print histories of the campaigns in the Pacific. Accused further testified that during 1947, when certain presses of the 64th were out of commission small printing jobs were sent to Japanese firms and the paper necessary to accomplish them was furnished through the Battalion. This, however, was all flat paper, half coated stock and half high wet strength stock, 4000 reams of which had been requisitioned and received from Hawaii and the Philippines (R 598-600).

Lieutenant Alvin C. Berger testified that the reason only 290 reams of 35" x 45" stock was used in 1947 was due to the fact that at that

time the Battalion had only one press capable of using that size paper and the press was out of commission a great deal of the time. In 1948, an additional press had been obtained which, together with the original press, was in operation and approximately 435 reams of 35" x 45" high wet strength paper was utilized. Only 50 reams, however, was paper that had been sent out for processing since the paper required a drying period of from three to six months after processing before it could be used (R 601-602).

6. Accused has been found guilty of seven specifications of larceny of paper, valued at more than $50.00, property of the United States in violation of Article of War 93; of seven specifications of wrongfully and unlawfully selling paper to Senzo Utena, for value, knowing that he had no right, title, or interest therein or right to sell or dispose of said paper, in violation of Article of War 96; and of wrongfully and unlawfully obtaining 4,310,000 yen from unauthorized sources, in contravention of specified Circulars of GHQ, Far East Command, also in violation of Article of War 96.

The evidence adduced by the prosecution in support of alleged larcenies and sales shows that several months after accused, through Takashi Yamamoto, had borrowed about 20,000 yen from the Isetan Department Store, he sent Yamamoto to his creditor to offer certain paper in payment of the debt. This paper was property of the United States and was stocked in various sizes as an item of supply by the military organization which accused commanded. The value of the different sizes of paper ranged from $7.00 to $12.50 per ream. Although the tender of paper in payment of accused's debt was refused by the department store representative, Takashi Yamamoto nevertheless communicated with a paper merchant named Senzo Utena, who offered to buy quantities of the paper at from 3000 yen to 3500 yen per ream. When Utena's offer was transmitted to accused by Yamamoto, accused acknowledged that it was acceptable to him and stated that he would arrange to leave several boxes of paper in the corridor of the basement of the Isetan Building for Utena. In February 1947, Utena was advised of these arrangements and thereafter, in March, he commenced removing quantities of paper of the particular type and kind stored by accused's organization from the basement of the Isetan Building, one of the places where the 64th Engineer Topographical Battalion stored its paper supplies. In this manner, Utena picked up twenty reams of approximately 32" x 44" flat paper in March for which he paid Takashi Yamamoto 70,000 yen. The next time that Utena received government paper was in June 1947. He obtained the paper after Yamamoto called him at accused's direction. Yamamoto told him that paper was being left for him in the corridor of the Isetan Building basement. On the occasion of this second pick-up, Utena

received thirty reams of paper of the same type and size as before for which he paid Yamamoto 135,000 yen. About August or September 1947, 100 reams of rolled paper stock was delivered to Utena by U.S. Army truck. Of this paper, fifty reams was processed by the Tanaka Company and returned. The balance Utena retained for himself and paid Yamamoto the sum of 200,000 yen therefor. In November 1947, Utena received a shipment of 1300 reams of small paper. It was in such bad condition that a great portion was unusable. He paid Yamamoto 2,600,000 yen for this paper at the rate of 2000 yen per ream. During February or March 1948, 96 or 98 reams of paper were delivered to Mr. Utena at the Tanaka paper store for which he paid Yamamoto the sum of 480,000 yen and in August 1948, 165 reams of paper was purchased by him for which he paid Yamamoto 825,000 yen. Between August and September 1948, about 846 reams of rolled paper were delivered to Utena from the stock of the 95th Reproduction Company and the 64th Engineer Topographical Battalion. This paper apparently was to be processed under the paper storage contract between Tanaka and accused dated 30 January 1948 for Utena retained 85 reams thereof (10%) for himself. Utena made no payment to Yamamoto for this shipment as he was obligated to do since he had previously made advance payments to Yamamoto against future paper deliveries. In November 1948, however, he turned over 450,000 yen to the CID. This represented the balance due for paper delivered to him. In this connection, Yamamoto testified that the amount due from Utena for the 250 reams (shipments of August and September 1948) was 1,250,000 yen. Of this amount, however, only 450,000 yen remained unpaid since 500,000 yen had been borrowed from Utena by Yamamoto for accused during the preceding summer and 300,000 yen, which Utena had given Yamamoto later, had been applied at accused's direction by Yamamoto to liquidate accused's obligation to one Uyeda, a jeweler, at the Imperial Hotel Arcade. All shipments of paper to Utena were made upon instruction from accused either to Yamamoto or military personnel under accused's supervision.

In support of the specification alleging that accused obtained 4,310,000 yen from unauthorized sources in violation of Eighth Army circulars, the record shows that the total sum paid for the paper, stated by Yamamoto to be about 4,500,000 yen and by Utena to be 4,310,000 yen, was collected by Yamamoto from Utena and was either expended by Yamamoto on accused's behalf at the direction of accused or turned over in specie directly to accused or at his request, to his servants.

Accused's defense to the Charges and Specifications found consisted of a direct and explicit denial of personal participation for pecuniary profit in the alleged paper transactions with Takashi Yamamoto or anyone else. Also advanced by the defense were numerous attacks on the credibility of many of prosecution's witnesses by showings that they had made prior inconsistent statements or were prejudiced, biased or mistaken. Accused further introduced proof of his own excellent general reputation for honesty and ability and essayed to explain his possession of the enormous quantity of recently acquired

personal belongings of foreign origin by an admission that through Takashi Yamamoto he had engaged in the sale of Japanese "Suntory" whiskey and thereby had gained 3,000,000 yen for himself.

Our examination of the record convinces us that the legal evidence therein contained adequately establishes the commission of the alleged larcenies and wrongful and unlawful sales of government owned paper. The evidence that the security measures taken to safeguard government supplies from pilferage were ineffective, that petty stealing of paper supplies stored in the Isetan Building was being committed by Japanese nationals and that the stock records of the 64th Engineer Topographical Battalion, by reason of their inadequacy and lack of completeness, would not and could not reflect a true stock status of paper supplies or indicate a shortage thereof, does not lessen in any way the forcefulness of the direct proof in the record supplied by Yamamoto and Utena that paper owned by the United States was feloniously taken by trespass with intent permanently to deprive the United States of its property therein and that it was sold to Utena as alleged. Nor do we conceive it to have been the purpose or desire of the defense to dispute, deny or oppose the proof that established the commission of the alleged larcenies and sales of paper. Rather, the record of trial makes apparent that the aim of the defense was to show circumstantially, by the proof of lack of security, known petty pilferages, and inadequacy of stock records, that there existed ample opportunity for others than the accused to commit the alleged offenses thereby bolstering accused's disclaimer, tantamount to a general denial, of any participation in, connection with or criminal culpability for the alleged paper transactions, and by the unanimous and undisputed proof of accused's good character and reputation, to show the improbability of the commission by him of the alleged offenses.

Thus is seen that the instant case presents, in the main, the sharply defined single contraverted issue of fact, namely, were the larcenies and sales of government owned paper perpetrated at the direction and for the benefit of the accused with his knowledge and consent. The determination of this issue, in the first instance, was the duty and function of the trial court after weighing the competent evidence and judging the credibility of the witnesses before it (CM 325457, McKinster, 74 BR 233,241; Par 124a, MCM 1928; Par 139, MCM 1949). In the court's findings that accused was guilty of the Specifications of Charge I and Charge I and Specifications 1 through 8, inclusive, of Charge II and Charge II is implicit that the court weighed the evidence and judged the credibility of the witnesses before it and determined that with respect to the specifications and charges found, accused was guilty beyond reasonable doubt.

When we invoke the provisions of Article of War 50(g), (10 USCA 1521(g); 62 Stat 635) which gives to The Judge Advocate General and

all appellate agencies in his office express authority to weigh evidence, judge the credibility of witnesses, and determine contraverted issues of fact in the appellate review of records of trial, we conclude, as did the trial court, that the competent evidence of record justified the court's findings of guilty and that they should not be disturbed.

It is to be borne in mind that the trial court, in arriving at its findings of guilty, and we, in deciding to concur therein, of necessity had to give credence to the testimony of Yamamoto and Utena whose judicial statements were somewhat inconsistent with their pretrial statements, and who, because of their personal involvement with accused in the unlawful transactions charged, might have been inclined to testify adversely to accused's interest in order to curry official favor and exculpate themselves.

Well settled are the legal principles applicable in military jurisprudence that one accomplice is competent to testify against another; that although a conviction may be based on the uncorroborated testimony of an accomplice, such testimony being of doubtful integrity, it is to be considered with great caution; and that important factors to be considered in determining the credibility of a witness and the ultimate weight to be given to his testimony are his interest with relationship to the matter in issue and the comparison of his testimony with that of others and of a similar nature (Par 127c, 139a, MCM 1949; Par 124a, MCM 1928).

Examination of all the competent evidence of record shows ample justification for the attachment of credibility to the witnesses of the prosecution and the giving of weight to their testimony. Likewise, the record provides adequate basis for regarding the testimony of accused as unworthy of belief. Specifically illustrative of such portions of the evidence of record which compel us to attach credibility to the prosecution's witnesses are the following:

(a) The testimony of Sergeant Akin that at accused's expressed direction he made substantial shipments of paper from the battalion supply to the Tanaka warehouse in October 1947, January 1948 and November 1948;

(b) The evidence that accused knowingly entered into an unauthorized contract with Utena's brother, Tanaka, for storing and processing of 500 reams of paper and his admission that on the representations of Takashi Yamamoto that Tanaka could perform the contract, he did so without inspecting the suitability of the Tanaka facilities;

(c) Accused's admission that he ordered Captain Hanson, Commanding Officer of the 95th Reproduction Company, to send out his rolled paper stock for processing without taking steps to ascertain the amount of rolled stock on hand or the amount actually processed and returned to the battalion;

(d) Accused's admission that when he was told by Yamamoto that Captain Hanson was receiving and retaining receipts for paper sent to Tanaka, he obtained the receipts from Captain Hanson and turned them over to Yamamoto because Yamamoto was "in charge of the detail;" and

(e) Accused's judicial statement that upon being informed by Sergeant Akin that Lieutenant Leamon had countermanded his instructions to send paper out he stated "I am the battalion commander and I issue the orders and Lt Leamon is my supply officer and he will do as I direct;" and that a few days later he told Lieutenant Leamon that he desired that all the paper on hand be sent out for processing.

The testimony of Sergeant Akin concretely and independently establishes that accused not only had knowledge that government owned paper was being shipped out from the Battalion to the warehouse of Utena's brother, but that the paper was dispatched by Akin on accused's direct verbal order prior to, as well as after, the date of accused's entrance into the unauthorized contract with Tanaka. By accused's judicial admissions, and the proof of his unauthorized contracting with Tanaka to store and process paper, it is probatively fixed that Takashi Yamamoto was his agent and representative and was "in charge" of the shipments of paper to Tanaka. It further forcefully shows that accused ordered all government owned rolled paper stock to be sent to Tanaka without any concern for the amount on hand, or the ability of Tanaka to perform the contract or the amount previously processed and returned. It is also competent to show accused's determination to make the shipments of paper to Tanaka regardless of authorization from competent authority or objection from his battalion officers. The specific admission of accused that he took the receipts for paper delivered to Tanaka by the 95th Reproduction Company away from its Commanding Officer, Captain Hanson, and gave them to Takashi Yamamoto, when considered in the light that accused's contract with Tanaka was known by him to be unauthorized, and the evidence adduced from defense witnesses that 3000 reams of 35" x 45" paper was on hand or received during 1947 and 1948, while only 400 reams or 800 reams was used of which only 50 reams thereof had been previously processed from rolled stock, compels the conclusion that the contract calling for the storage and processing of 500 reams of rolled paper by Tanaka was an artifice and subterfuge to camouflage the felonious takings and sales of government owned paper, and that the purpose of accused's dispossession of

Captain Hanson from the receipts for paper sent out for processing was to effectively erase any record or evidence that paper had been sent to the Tanaka warehouse. In addition, the recovery by the CID from the Tanaka warehouse of government owned paper and Utena's payment of 450,000 yen to the CID, which he asserted represented the balance owed by him for paper purchased, is corroborative that the paper was feloniously taken and sold.

Thus it is seen that accused's denial of complicity in the paper transactions and his assertion that sales of whiskey for his pecuniary benefit by Yamamoto, and not wrongful sales of paper, netted him about 3,000,000 yen, when considered in the light of the entire record, cannot be given credence or weight, despite the abundant and uncontradicted evidence in the record of his good character and reputation. Every fact established mirrors the extreme improbability that the occurrences took place as related by accused, while on the other hand, logic and reason, supported by competent evidence compels the conclusion that accused, through Yamamoto as his intermediary, arranged for sales of government owned paper; that at accused's direction the specified quantities of paper were taken by trespass with intent to deprive the United States permanently of the possession thereof and were sold to Utena as alleged; and that accused received 4,310,000 yen from Utena through Yamamoto in either specie or personal effects.

Having determined that the weight of the competent evidence of record compels the conclusion that the alleged larcenies and sales of government paper were committed by accused, we turn to a consideration of finding of guilty of Specification 8 of Charge II and the legal sufficiency of the record to support it. This Specification alleges, as a violation of the 96th Article of War, that accused "did * * * between the months of March 1947 and October 1948 wrongfully and unlawfully obtain 4,310,000 yen from unauthorized sources, in violation of Circular No. 3, General Headquarters, Far East Command, 10 January 1947 and Circular No. 1, General Headquarters, Far East Command, 7 January 1948."

The pertinent paragraph contained in GHQ Circular No. 3, 1947, is as follows:

> "8. Purchase of Indigenous Currency. a. U. S. authorized personnel requiring indigenous currency will purchase the latter from the United States Army and Navy disbursing officers or their agents with military payment certificates, United States currency or acceptable United States dollar instruments at the official military conversion rate."

The pertinent paragraph of GHQ, Circular No. 1, 1948, is as follows:

> "3. * * d. Finance and banking facilities are provided for the exchange of military payment certificates or authorized dollar instruments into local currencies used in the occupied areas at a military conversion rate. United States authorized personnel will purchase all of their local currency needs, for expenditure in the local economies of these occupied areas, from United States disbursing officers or their official agents. They will not acquire these currencies by exchange of military payment certificates, dollar instruments, foreign currency, or by barter or exchange of gifts from indigenous personnel or from other Allied or United States personnel."

Both circulars designate military personnel of the United States as persons falling within the purview of the provisions of the circulars, and it is patent from a reading of the above extracted paragraphs that between March 1947 and October 1948, the obtaining of yen by United States personnel from any source other than an authorized United States disbursing officer was prohibited.

Evidence of the record shows that accused obtained at least the amount of yen alleged from sources other than authorized United States disbursing officers during the period stated. Such evidence may be found in stipulations received during the course of the trial and the testimony of "Mary" Kawai, Jun Ishigaki, Takashi Yamamoto, and others, and it supplies the legal proof necessary to sustain the findings of guilty of the specification.

It is to be noted that the defense strenuously objected to Specification 8, Charge II, first by a request for a bill of particulars and later by a motion to strike it on the grounds that it was multifarious and indefinite.

A bill of particulars was not authorized in the instant case (CM 257469, Mackay, 37 BR 129,140; CM 319591, Pogue, 68 BR 385,392) and consequently the request was without merit.

With reference to the motion to strike Specification 8, Charge II, we are of the opinion that, aside from the fact that it was not made at the proper stage of the proceedings, it was, nevertheless, properly denied inasmuch as the acts charged extended over the period of time alleged and as accused was continuously subject to compliance with the circulars claimed to have been violated. Furthermore, the specification sufficiently apprised accused of the offense with which he was charged

so that he could properly and effectively defend against it. These pleadings set forth the circulars claimed to have been violated, the inclusive dates during which the violations were claimed to have occurred, and the amount of yen claimed to have been received by him. Accused as an officer was duty bound to comply with the provisions of the specified circulars and chargeable with knowledge that pursuant to them the receipt of yen by him from any source other than an authorized United States disbursing officer was wrongful and unlawful. The proof establishes that accused, during the period alleged, received from Utena through Yamamoto, the amount of yen alleged, and that the yen so received represented the total proceeds of the sales of paper to Utena. Since nowhere in the record does it appear that accused was hampered, misled or prejudiced in his defense of the specification, the court's action in denying the motion was therefore neither arbitrary nor unreasonable. Under the circumstances we find that the form of Specification 8 of Charge II was sufficient and does not require disapproval of the findings thereunder (CM 288901, Delano, 1 BR (POA) 263,268 and cases therein cited).

While attempting to defend against the offenses charged, accused asserted that he had received about 3,000,000 yen from Takashi Yamamoto but that it was the proceeds from unauthorized sales of whiskey. We are not called upon nor do we attempt to decide what result we would have reached with respect to the sufficiency of the Specification had the record failed to reflect that Utena was the source of the 4,310,000 yen alleged to have been received by accused and showed only, by accused's admission, the receipt of 3,000,000 yen from Yamamoto as the proceeds of the sale of whiskey. As the record stands, this admission by accused merely raised an issue of fact of whether his unauthorized source of yen was from liquor sales, paper sales or both. Since the record contains competent evidence that Utena was the unauthorized source of the 4,310,000 yen, the court's findings of guilty of Specification 8 of Charge II were legal and proper.

In the instant case, the articles of personal property comprising Prosecution Exhibits 12, 13, 14 and 15 were seized and impounded by Agents Keithahn and Winebrenner of the CID, under the authority of a search warrant issued pursuant to Circular No. 6, Headquarters, Eighth Army, dated 26 January 1948, as amended by Circular No. 59, Headquarters, Eighth Army, dated 26 August 1948. The search warrant described the objects to be searched for and seized as "illegal obtained property in the possession of Lt Col Arthur E. Tooze * * *." The situs of the search was the residence of accused located in the building occupied by the military organization he commanded. This was the Isetan Building at Shinjuku, Tokyo, Japan, a building used, in the main, for

official purposes, by United States occupation personnel (64th Eng Topo Bn) by virtue of a Procurement Demand upon the Japanese Government.

In our opinion no legal objection exists to the search and seizure in this case. The rule generally applicable to the military service is stated in CM 248379, Wilson, 31 BR 235,236, as follows:

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

This rule has not been questioned in the Federal Courts (see Grewe v. France, 75 F.Supp. 433 (E.D.Wisc. 1948); Richardson v. Zuppann, 81 F.Supp. 809,813 (M.D.Pa. 1949); affirmed per curiam 174 F.2d 829, C.C.A. 3, 1949).

It is common knowledge that Japan is occupied by the victorious Allied Army under the command of United States General of the Army Douglas MacArthur. The quarters of accused were a part of a building which had been requisitioned for and was actually being used for military purposes by United States Occupation Forces. The search warrant directing the search was signed by Brigadier General William B. Bradford, Commanding, First Cavalry Division. The precise relationship in the military chain of command between the Commanding General, First Cavalry Division and the 64th Engineer Topographical Battalion is not disclosed in the record of trial. The situation, however, is taken care of by the pertinent provisions of Circular 6, Headquarters Eighth Army, 26 January 1948, as follows:

> "2. Policy.
>
> "a. It is the policy of the Occupation in Japan that arrests, entries, searches and seizures shall be conducted in a manner reasonably calculated to effect the arrest, entry, search or seizure with the minimum infringement upon rights of privacy, person, property and home, as traditionally protected under American law.
>
> * * *
>
> "4. Exercise of authority for the issue of warrants.
>
> "a. The Commanding Officer of a military or naval camp, post, installation or reservation may prescribe the method with or without warrants to effect an arrest, entry, search or seizure within the bounds of his camp, post, installation or reservation;

"b. In case a warrant or search is to be executed outside the bounds of a military or naval camp, post, installation or reservation:

(1) A warrant of search of a place in possession or control of a person subject to military law will be issued upon the authority of a general officer or a flag officer, as required by paragraph 83 (3), Section II, Circular 90, Far East Command, 27 August 1947.

* * *

"5. Issue of warrants.

"a. By military authorities.

* * *

(2) A warrant of search will be issued upon reasonable cause, stated upon affirmation or oath, describing with particularity the object of the search, the place to be searched and things to be seized. Such warrants will be issued substantially in the form of inclosure 2."

Paragraph 4a of the cited circular authorizes a commanding officer to order a search of premises on a military post or installation with or without a warrant and by Paragraph 4b(1) a general officer to issue a warrant for a search to be executed outside such a post. Accused's quarters were in the Isetan Department Store Building, which was located in the heart of Tokyo. There was also housed in the building a part of the 64th Engineer Battalion. It therefore appears that accused's quarters could properly be considered as either being on or off a military post. Apparently the authorities investigating accused decided to resolve the character of the premises to be searched in the light most favorable to accused and to consider his quarters off a post and obtain a warrant. Brigadier General Bradford, as a general officer was empowered to issue a warrant. We therefore conclude that the warrant was validly issued by competent authority.

The principal ground for the defense's objection to the warrant of search, to the admission in evidence of any of the multitude of items seized in pursuance of its execution, and to any evidence derived from information gained in the alleged illegal search was on the grounds that it failed to describe with particularity the objects of the search in that it directed the searching officers to seize "illegally obtained property in possession of Lieutenant Colonel Arthur E. Tooze, an occupational personnel of the 64th Engineer Battalion," thus delegating to the searching officer unlimited discretion as to the objects he would seize,

The description of the property to be seized will necessarily vary according to whether the identity of the property, or its character, is the matter of concern (47 Am. Jur. p.524; Annotation 3 A.L.R. 1519-1520).

> "Where the purpose of the search is to find specific property it should ordinarily be so particularly described as to preclude the possibility of seizing any other. On the other hand, if the purpose be to seize property of a specific character, which by reason of its character and of the place where and the circumstances under which it may be found, if found at all, would be illicit, a description, save as to such character, place and circumstance would be unnecessary and ordinarily impossible" (State v. Nejin, 14 La. 793; 74 So. 103 (1917)).

Thus it has been held that in a warrant to search for smuggled goods, a general description is deemed sufficient (United States v. Federal Mail Order Corporation, 47 F.2d 164, C.C.A. 2, 1931 and cases there cited).

The obvious purpose of the search in the instant case for all illegally obtained property in the possession of the accused was to enable a showing that through the illegal acquisition of Japanese currency the accused had purchased large quantities of costly goods far beyond the means of his legitimate income. To establish the issue, evidence of the recent acquisition of large quantities of luxury items through indigenous sources would be relevant. So considered, the description of the property as the fruit of illicit activity was not unreasonable. It would have been extremely difficult, if not impossible, to describe with particularity each item to be seized. Counsel for the defense also complained that the lack of particularity in the search warrant resulted in the searching officer seizing all of the property in accused's quarters which appeared to be of Japanese or Chinese manufacture. A somewhat similar question was before the Circuit Court of Appeals of the Second Circuit in the case of United States v. Federal Mail Order Corporation, et al, (supra). That case involved the seizure of Swiss watches which were suspected to have been smuggled into the United States. In approving this seizure which included both watches, legally and illegally in the United States the court declared:

> "The warrant was plain enough, if the power was so broad; it directed the officer to seize the lot, which it described as clearly as the facts allowed. On the main point we have been able to find no authorities, but it seems to us that the power should go so far. The Fourth Amendment required no more than that searches shall be 'reasonable' (Carrol v. U.S., 267

U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790), a word clearly meant to give some latitude for the effective execution of the law. It is impossible to see how the undoubted power is to be exercised at all, if the smuggler can effectively block it by mingling the smuggled goods into a mass of fungibles, from which no one but him can separate them. We think it 'reasonable' to take the whole, and leave it to him who confused them to disentangle the innocent from the guilty. * * *."

We therefore conclude that the warrant was not invalid because of lack of particularity of the articles to be seized, and since it was issued by competent authority, the items seized in pursuance of its execution were properly admitted in evidence.

Moreover, it is our opinion that even if it were assumed that the warrant was defective for want of particularity of the description of the goods to be seized, it does not appear that the substantial rights of the accused were thereby prejudiced. The evidence seized under the search warrant was pertinent only to show the accused's sudden and unexplained enrichment. Thus its only effect was to corroborate the direct evidence pertaining to the illegal sales of paper and the obtaining of Japanese yen from unauthorized sources. The accused did not deny his enrichment, but, on the contrary, admitted it. He contended that he was enriched through the illegal sale of liquor. The seized property introduced in evidence and any evidence obtained as a result of the search had no probative value as to the source of the accused's enrichment and could hardly have prejudiced the accused's rights with respect to the controverted issues in the case.

7. Accused's arraignment and the commencement of his trial took place on 17 January 1949. The trial was not concluded until 5 February 1949. In the meantime, on 1 February 1949, Manual for Courts-Martial, U. S. Army 1949, and the Articles of War therein contained (62 Stat. 635) became effective by virtue of Executive Order 10020. Among the provisions of Manual for Courts-Martial, U.S. Army, 1949, not contained in its predecessor, Manual for Courts-Martial, U.S. Army, 1928, are the following:

> "They /prisoners whose sentences have not been approved and ordered executed/ will be accorded the facilities, accommodations, treatment, and training prescribed for unsentenced prisoners in accordance with Army Regulations, and they will not forfeit pay or allowances during the period of confinement except pursuant to sentences ordered executed. See AR 600-375." (Par 19a, p.14)

and

"After both sides have rested and before the court retires into closed session for the purpose of arriving at its findings the law member of a general court-martial or the president of a special court-martial will, in open court, advise the court that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt, and that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in favor of the accused and he shall be acquitted; and that if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no such doubt; and that the burden of proof to establish the guilt of the accused is upon the Government (A.W. 31). The advice may be in the language of this paragraph; explanatory matter may, but need not, be added." (Par 78d, p. 77)

Since in the instant case the law member did not advise the members of the court with reference to the presumption of accused's innocence and since the sentence includes forfeiture of all pay and allowances due or to become due, the problem confronting us is whether either the former act of omission and the latter act of commission was improper.

We are of the opinion that the provisions above set forth of the Manual for Courts-Martial, 1949, were not applicable during accused's trial. The record shows that accused was effectively arraigned prior to 1 February 1949, and Executive Order 10020 provides in such cases:

"* * * that nothing contained in this manual [MCM, 1949] shall be construed to invalidate any investigation, trial in which arraignment has been had, or other action begun prior to February 1, 1949; and any such investigation, trial, or action so begun may be completed in accordance with the provisions of the Manual for Courts-Martial, 1928: * * *."

Accordingly, we conclude that in the instant case the law member was not required to expressly advise the members of the court of the presumption of accused's innocence and that the form of the court's sentence which included forfeiture of all pay and allowances due or to become due was proper (CM 335328, Scott (May 1949)).

8. Records on file in the Department of the Army show that accused was born in England and is 50 years of age. He is married and has one child and two step-children.

He was graduated from the Royal Naval Training Academy at Greenwich, England, in 1916. Accused came to the United States and entered the Army on 16 February 1918. He served continuously as an enlisted man from that date until 19 April 1942, when he was discharged as a Master Sergeant and accepted the tender of a direct commission in the Army of the United States as a First Lieutenant, Corps of Engineers. He was successively promoted to grade of Captain, Major and Lieutenant Colonel on 3 December 1942, 23 July 1943 and 16 February 1945, respectively. He is presently a Colonel in the Officers' Reserve Corps. In addition to foreign service as an enlisted man in France and Germany (Mar '18 - Nov '21), Philippines (Nov '21 - Jul '24), Hawaii (Nov '30 - Feb '33) and Panama (Jul '39 - Jul '41), he served in the European Theater of Operations from 31 March 1944 to 16 September 1945 and participated in combat. He is authorized to wear the Distinguished Unit Badge, the European, African, Middle East Theater Ribbon with bronze arrowhead and two bronze stars, the Bronze Star Medal, and the Purple Heart Medal. His efficiency ratings from 15 April 1942 to 30 June 1947, inclusive, consist of seventeen (17) ratings of superior and three (3) ratings of excellent.

9. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal, total forfeitures, and confinement at hard labor for five years is authorized upon conviction of an officer of violations of Articles of War 93 and 96. Confinement in a penitentiary is authorized by Article of War 42 upon conviction of the offense of larceny of property of a value of fifty ($50.00) dollars or more.

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

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

[illegible], J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 335526

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

In the foregoing case of Lieutenant Colonel Arthur Ernest Tooze, 0460828, 5th Engineer Construction Group, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks, or one of its branches, is designated as the place of confinement.

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

E. M. Brannon, Brig Gen, JAGC
Chairman

23 September 1949

I concur in the foregoing action.

THOMAS H. GREEN
Major General
The Judge Advocate General

4 October 1949.

(GCMO 60, Oct14, 1949).

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

AUG 11 1949

CSJAGI SP CM 6

U N I T E D S T A T E S	)	ZONE COMMAND AUSTRIA
	)	
v.	)	Trial by SP. C. M., convened at
	)	Camp Truscott, Austria, 15 February
Recruit WILLIAM J. BLOMILEY, JUNIOR	)	1949. Bad conduct discharge
(RA 14273521), Headquarters Company,	)	(suspended), forfeiture of $50.00
Second Battalion, 350th Infantry	)	per month for six (6) months,
Regiment.	)	and confinement for six (6) months.
	)	Disciplinary Barracks.

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

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

2. Upon trial by a special court-martial convened by the Commanding Officer, Land Salzburg Area Command, on 15 February 1949, the accused was found guilty of breach of restriction on or about 11 November 1948, and appearing in civilian clothing without authority on or about 19 November 1948, in violation of Article of War 96 (the Charge and Specifications 1 and 2 thereof), and larceny of various items of personal property on or about 11 November 1948, in violation of Article of War 93 (Additional Charge and its Specification). He was sentenced to be discharged the service with a bad conduct discharge, to forfeit fifty dollars of his pay per month for six months and to be confined at hard labor for six months. The convening authority disapproved a portion of the findings of guilty of the Specification of the Additional Charge, 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, Zone Command Austria, approved the sentence, ordered it executed, suspended the execution of that portion adjudging a bad conduct discharge until the soldier's release from confinement, and designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement. The results of trial were promulgated in Special Court-Martial Orders Number 4, Headquarters Zone Command Austria, APO 541, U. S. Army, dated 13 June 1949.

3. The record of trial is legally sufficient to support the findings of guilty as approved and so much of the sentence as provides for 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 an offense committed prior to 1 February 1949.

4. In a recent case (SP CM 9, McNeely), the Judicial Council held that a special court-martial did not have the power to adjudge a bad conduct discharge for an offense committed prior to 1 February 1949. In its opinion the Judicial Council stated:

> "It is a cardinal principle of statutory construction that if a statute is capable of more than one interpretation, that interpretation which is clearly consistent with the constitution is to be preferred, and one which will bring the statute into conflict with the constitution, in whole or in part, or raise a grave or doubtful constitutional question is to be avoided (Knight Templar's and Mason's Life Indemnity Co. v. Jarman, 187 U.S. 197, 205; Chippewa Indians v. U.S. 301 U.S. 356, 376; National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U.S. 1, 30; 16 CJS sec 98 and cases therein cited). Any law which operates in any manner to the substantial disadvantage of an accused in respect to an offense committed prior to the effective date of the law is an ex post facto law within the meaning of Article 1, Section 9, Clause 3, Constitution of the United States (Medley, Petitioner, 134 U.S. 160, 171; Thompson v. Utah, 170 U.S. 343, 351).
>
> "* * * The Supreme Court has held that a statute which reduced the number of triers of fact, and consequently the number of members who must concur in a finding of guilty or sentence, operated to the substantial disadvantage of the accused (Thompson v. Utah, supra). To authorize trial by a special court-martial which may be composed of a lesser number of members than the minimum competent to adjudge a penal discharge prior to 1 February 1949, would raise a grave and doubtful question which would not arise if the statute were given only prospective operation. The fact that a particular special court-martial may have been composed of five or more members is not considered material. There is nothing in the language used to indicate that the Congress intended the application of the statute to depend upon the facts of particular cases.

"* * * Applied only to sentences based on convictions of offenses committed on or after 1 February 1949 the additional punishing power vested in special courts-martial by Article of War 13, as amended, can be exercised with uniformity and in such a manner as to avoid many and serious complications which would result if it were exercised as to offenses committed prior to the effective date of the amendment. The language used is clearly capable of an interpretation giving it prospective operation only. We find nothing in the Executive Order of 7 December 1948 or in the Manual for Courts-Martial, 1949, which requires, or indicates, a contrary interpretation. Under the circumstances the Council feels forced to the conclusion that the added punishing power of special courts-martial to adjudge bad conduct discharge must be held to apply prospectively, that is, only to offenses committed on and after 1 February 1949."

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

CSJAGI SP CM 6 1st Ind 16 AUG 1949

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

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

1. In the case of Recruit William J. Blomiley, Junior (RA 14273521), Headquarters Company, Second Battalion, 350th 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 as approved by the convening authority and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of $50.00 pay per month for six months. Under Article of War 50g(3), this holding and my concurrence vacate so much of the sentence as is in excess of confinement at hard labor for six months and forfeiture of $50.00 pay per month for six months.

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

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

(SP CM 6)

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

2 Incls
1. Record of Trial
2. Draft of SPCMO

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

CSJAGI SP CM 20

U N I T E D S T A T E S v. Recruit DOUGLAS O. ROGAN (RA 44167037), 736th Engineer Heavy Shop Company, APO 503.	YOKOHAMA COMMAND Trial by Sp. C. M., convened at APO 503, 14 March 1949. Bad conduct discharge, forfeiture of $35 pay per month for six (6) months, and confinement for six (6) months. Disciplinary Barracks.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Recruit Douglas O. Rogan, 736th Engineer Heavy Shop Company, APO 503, having been restricted to the limits of the Company Area, did, at or in the vicinity of Yokohama, Honshu, Japan, on or about 27 February 1949, break said restriction by going to Namamugi, Honshu, Japan.

Specification 2: In that Recruit Douglas O. Rogan, 736th Engineer Heavy Shop Company, APO 503, did, at or in the vicinity of Namamugi, Honshu, Japan, on or about 27 February 1949, violate the provisions of paragraph 3 (d), Section III, Circular Number 87, Headquarters Eighth Army, dated 29 November 1948, in that his duty not requiring, he was found in a Japanese Off Limits Restaurant in Namamugi, Honshu, Japan.

Specification 3: In that Recruit Douglas O. Rogan, 736th Engineer Heavy Shop Company, APO 503, did, at or in the vicinity of Yokohama, Honshu, Japan, on or about 27 February 1949, wrongfully appear at Namamugi, Honshu, Japan, without his Necktie and in an unclean uniform.

Specification 4: In that Recruit Douglas O. Rogan, 736th Engineer Heavy Shop Company, APO 503, was at or in the vicinity of Yokohama, Honshu, Japan, on or about 27 February 1949, drunk and disorderly in Command, to wit, Yokohama Central Police Station.

Specification 5: (Finding of not guilty).

He pleaded not guilty to all Specifications and the Charge. He was found not guilty of Specification 5 and guilty of Specifications 1, 2, 3, and 4 and the Charge. Evidence of two previous convictions was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit thirty-five dollars ($35.00) pay per month for six (6) months and to be confined at hard labor, at such place as the proper authority may 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 approved the sentence, designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement and forwarded the record of trial pursuant to Article of War 50g.

3. The record of trial is legally sufficient to support the findings of guilty of Specifications 1, 3, 4 and the Charge. The only questions to be considered are whether the record of trial is legally sufficient to support the finding of guilty of Specification 2 and whether it is legally sufficient to support the sentence.

4. The provisions of paragraph 3(d), Section III, Circular 87, Headquarters Eighth Army, dated 29 November 1948, which accused was charged with violating, are as follows:

"3. The following areas and installations in Japan are 'Off Limits' to all persons defined in paragraph 2 above:

* * *

d. All private homes except those procured, rented or leased under authority of the Supreme Commander for the Allied Powers, or those owned and/or occupied by members of the Occupation Forces or personnel accredited thereto. Occupation personnel may be guests in private homes other than those excepted above between the hours of 0700 and 2300 upon invitation of the owner and/or occupant. When warranted, exceptions to these time limits may be made in specific instances, by headquarters commanded by general officers, military government team commanders, regimental commanders or the equivalent thereof authorized to issue leave orders, passes or Absence and Travel Authority. Each authorization will contain a statement to the effect that the individual

concerned is authorized, under the authority of this circular, to stay overnight in a specified home on a specified date or dates."

Accused is charged with violating such provisions by being found in a Japanese Off Limits Restaurant. Obviously the act of being found in a Japanese Off Limits Restaurant is inconsistent with the act of being found in a private home and is not violative of the provisions of a circular which are concerned with restrictions applied only to private homes. It is possible that other provisions of the circular pertained to Japanese restaurants, but such other provisions are not made a part of the specification.

Accordingly, the Board of Review concludes that the repugnancy between the allegations purporting to charge the offense renders the specification fatally defective and that the finding of guilty thereof is of no legal effect. (CM 329851, FRANCO, 78 BR 187, 196).

5. The accused was found guilty of breach of restriction, wrongfully appearing in improper and unclean uniform and being drunk and disorderly in command, all on 27 February 1949, in violation of Article of War 96; the maximum punishment authorized for each of these offenses under the provisions of Paragraph 117c Manual for Courts-Martial 1949 is confinement at hard labor and forfeiture of two-thirds pay per month for one month, one month, and three months, respectively.

The authorized confinement without substitution being less than six months, there being no proof of five or more previous convictions, and the punishment of discharge from the service with a bad conduct discharge not being authorized for any one of the offenses of which accused stands convicted, the sentence imposed by the court was excessive.

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Specifications 1, 3 and 4 and the Charge, legally insufficient to support the finding of guilty of Specification 2 of the Charge and legally sufficient to support only so much of the sentence as involves confinement at hard labor for five months and forfeiture of thirty-five dollars ($35.00) pay per month for a like period.

On Leave, J.A.G.C.

Frank C. Allred, J.A.G.C.

Jackson K. Jolley, J.A.G.C.

(360)

CSJAGI - SP CM 20 1st Ind

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

TO: Commanding General, Yokohama Command, APO 503, c/o Postmaster, San Francisco, California

1. In the case of Recruit Douglas O. Rogan (RA-44167037), 736th Engineer Heavy Shop Company, APO 503, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specifications 1, 3 and 4 of the Charge and the Charge, legally insufficient to support the finding of guilty of Specification 2 of the Charge, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for five months and forfeiture of thirty-five dollars ($35.00) pay per month for five months. Under Article of War 50e(3) this holding and my concurrence vacate the finding of guilty of Specification 2 of the Charge and vacate so much of the sentence as is in excess of confinement at hard labor for five months and forfeiture of thirty-five dollars ($35.00) pay per month for five months. Under Article of War 50 you now have authority to order the execution of the sentence as modified in accordance with this holding. It is recommended that an appropriate statement be included in the special court-martial order indicating the finding and part of the sentence thus vacated.

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

(SP CM 20).

1 Incl
R/T

THOMAS H. GREEN
Major General
The Judge Advocate General

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

Board of Review

AUG 24 1949

Sp CM 96

U N I T E D S T A T E S	)	FORT BRAGG, NORTH CAROLINA
v.	)	Trial by Sp CM, convened at Fort Bragg,
Recruit MARION B. O'KELLEY (RA 34827958), Company B, 4th Signal Battalion, Fort Bragg, North Carolina.	)	North Carolina, 8 April 1949. Bad conduct discharge, forfeiture of $50 pay per month for six (6) months and confinement for six (6) months. Post Guardhouse.

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

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

2. Upon trial by a special court-martial convened by the Commanding Officer, 4th Signal Battalion, Fort Bragg, North Carolina on 8 April 1949, the accused was found guilty of absence without leave from about 0630 hours 9 November 1948 to about 1600 hours 17 March 1949, in violation of Article of War 61. 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 47(d). The officer exercising general court-martial jurisdicti the Commanding General, Fort Bragg, North Carolina, on 29 April 1949, 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 withheld the order directing execution of the sentence pursuant to Article or War 50e.

3. The record of trial discloses that Captain John L. Howard, as adjutant administered the oath to the accuser on 4 April 1949 and the following day referred the charges to the trial judge advocate for trial by special court-martial, as adjutant, by order of the battalion commander. Captain Howard sat on the court and authenticated the record of trial as President. During organization of the court, it was revealed by the trial judge advocate that Captain Howard had "forwarded" the charges. Captain Howard was not challenge either for cause or peremptorily. When the court members were requested to disclose any facts believed to be a ground for challenge by either side again any member, Captain Howard remained silent.

4. The record of trial is legally sufficient to support the findings of guilty and so much of the sentence as provides for forfeitures and confinement. The only questions presented by the record of trial are whether by reason of the facts stated Captain Howard was disqualified to serve in the case and whether a special court-martial convened after 1 February 1949, the effective date of Title II, Selective Service Act of 1948 (62 Stat 627), had the power to adjudge a bad conduct discharge for an offense committed prior to 1 February 1949.

5. Prior to 1 February 1949 it was uniformly held that the presence on the court of an officer who had investigated or forwarded the charges recommending trial by court-martial was not ipso facto prejudicial error (CM 278035, Carpenter, 10 BR (ETO) 363; CM 314876, Rollinson, 64 BR 233, 244, and cases there cited). The determining factor is whether after an examination of the record as a whole it appears that the substantial rights of the accused have been injuriously affected within the meaning of Article of War 37 (CM 232229, Parks, 19 BR 23, 29; CM 314876, Rollinson, supra; CM 278035, Carpenter, supra, CM 302074, Traub, 13 BR (ETO 159, 163, 164, and CM 232864, Carse, 19 BR 225).

The 1949 Manual for Courts-Martial in paragraph 58e provides "that he has forwarded the charges in the case with his personal recommendation concerning the trial by court-martial" is a ground for challenge of a member for cause. It is the opinion of the Board of Review that the expression employed in paragraph 58e "personal recommendation" is descriptive of those officers who personally make a recommendation for trial predicated upon an examination of the facts in the case and is without application to those officers who act in a mere administrative capacity for their commanding officer. In the instant case Captain Howard acted as adjutant as a routine duty incident to the reference of the case for trial "by order of" the unit commander. There is no indication that Captain Howard had personal knowledge of the facts or exercised any personal discretion thereon or that his act was other than the accomplishment of the commander's desires which Captain Howard implemented by his manual recording thereof. The act was ministerial only, and in the absence of facts to the contrary or a challenge indicating that he personally had made a recommendation for trial by court-martial or a showing that he had personal knowledge of the facts of the case, the presence of Captain Howard as a member of the court trying the accused did not injuriously affect the accused's substantial rights within the meaning of Article of War 37. The fact that Captain Howard administered the oath to the accuser indicates only that under the authority granted him he had acknowledged the accuser's sworn statement. He was not disqualified to sit on the court upon the facts shown.

6. In a recent case (Sp CM 9, McNeely), the Judicial Council held that a special court-martial did not have the power to adjudge a bad conduct discharge for an offense committed prior to 1 February 1949. In its opinion the Judicial Council stated:

> "It is a cardinal principle of statutory construction that if a statute is capable of more than one interpretation, that interpretation which is clearly consistent with the constitution is to be preferred, and one which will bring the statute into conflict with the constitution,

in whole or in part, or raise a grave or doubtful constitutional question is to be avoided (Knights Templar's and Masons' Life Indemnity Co. v. Jarman, 187 U.S. 197, 205; Chippewa Indians v. U.S. 301 U.S. 356, 376; National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U.S. 1, 30; 16 CJS sec 98 and cases therein cited). Any law which operates in any manner to the substantial disadvantage of an accused in respect to an offense committed prior to the effective date of the law is an ex post facto law within the meaning of Article I, Section 9, Clause 3, Constitution of the United States (Medley, Petitioner, 134 U.S. 160, 171; Thompson v. Utah, 170 U.S. 343, 351).

"* * * The Supreme Court has held that a statute which reduced the numbers of triers of fact, and consequently the number of members who must concur in a finding of guilty or sentence, operated to the substantial disadvantage of the accused (Thompson v. Utah, supra). To authorize trial by a special court-martial which may be composed of a lesser number of members than the minimum competent to adjudge a penal discharge prior to 1 February 1949, would raise a grave and doubtful question which would not arise if the statute were given only prospective operation. The fact that a particular special court-martial may have been composed of five or more members is not considered material. There is nothing in the language used to indicate that the Congress intended the application of the statute to depend upon the facts of particular cases.

"* * * Applied only to sentences based on convictions of offenses committed on or after 1 February 1949 the additional punishing power vested in special courts-martial by Article of War 13, as amended, can be exercised with uniformity and in such a manner as to avoid many and serious complications which would result if it were exercised as to offenses committed prior to the effective date of the amendment. The language used is clearly capable of an interpretation giving it prospective operation only. We find nothing in the Executive Order of 7 December 1948 or in the Manual for Courts-Martial, 1949, which requires, or indicates a contrary interpretation. Under the circumstances the council feels forced to the conclusion that the added punishing power of special courts-martial to adjudge a bad conduct discharge must be held to apply prospectively, that is, only to offenses committed on and after 1 February 1949."

7. For the reasons stated, the 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 (6) months and forfeiture of $50 pay per month for six (6) months.

J.A.G.C.

J.A.G.C.

J.A.G.C.

CSJAGV Sp CM 96 1st Indorsement

JAGO, Department of the Army, Washington 25, D. C. 8 SEP 1949

To: Commanding General, Fort Bragg, North Carolina.

1. In the case of Recruit Marion B. O'Kelley (RA 34827958), Company B, 4th Signal Battalion, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for six months and forfeiture of 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 96). RECORDED.

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

1 Incl:
Record of trial

2d Ind

HEADQUARTERS, Fort Bragg, North Carolina, Office of the Judge Advocate
15 September 1949

TO: The Judge Advocate General, Department of the Army, Washington 25, D.C.

Six copies of Special Court-Martial Orders Number 19, this headquarters, 13 September 1949, are inclosed.

C ROBERT BARD
Lt Col JAGC
Judge Advocate

2 Incls
1 n/c
2 Added
SpCMO #19

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

CSJAGN-SpCM 102

27 JUL 1949

U N I T E D S T A T E S	)	V CORPS
	)	
v.	)	Trial by Sp.C.M., convened at Camp Mackall, North Carolina, 28 April 1949. Bad conduct discharge, forfeiture of $50 per month for four (4) months and confinement for four (4) months. Post Guardhouse.
Recruit MAURICE D. DILLENBECK (RA 36573722), Company B, 4th Signal Battalion, Fort Bragg, North Carolina.	)	

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

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

2. Upon trial by special court-martial convened by the Commanding Officer, Headquarters 4th Signal Battalion, Fort Bragg, North Carolina, at Camp Mackall, North Carolina, on 28 April 1949, the accused pleaded not guilty to and was found guilty of the offense of absence without leave from 5 December 1948 to 3 April 1949, in violation of Article of War 61. He was sentenced to be discharged the service with a bad conduct discharge, to forfeit $50.00 pay per month for four months and to be confined at hard labor for four months. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47(d). The officer exercising general court-martial jurisdiction, the Commanding General, Headquarters V Corps, Camp Mackall, North Carolina, approved the sentence, designated the Post Guardhouse, Fort Bragg, North Carolina, or elsewhere as the Secretary of the Army might direct, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50e.

3. The record of trial is legally sufficient to support the findings of guilty and so much of the sentence as provides for confine-

ment at hard labor for four months and forfeiture of $37.83 pay per month for a like period. The first 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 an offense committed prior to 1 February 1949.

4. In a recent case (SP CM 9, McNeely), the Judicial Council held that a special court-martial did not have the power to adjudge a bad conduct discharge for an offense committed prior to 1 February 1949. In its opinion the Judicial Council stated:

> "It is a cardinal principle of statutory construction that if a statute is capable of more than one interpretation, that interpretation which is clearly consistent with the constitution is to be preferred, and one which will bring the statute into conflict with the constitution, in whole or in part, or raise a grave or doubtful constitutional question is to be avoided (Knight Templar's and Mason's Life Indemnity Co. v. Jarman, 187 U.S. 197, 205; Chippewa Indians v. U.S. 301 U.S. 356, 376; National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U.S. 1, 30; 16 CJS sec 98 and cases therein cited). Any law which operates in any manner to the substantial disadvantage of an accused in respect to an offense committed prior to the effective date of the law is an ex post facto law within the meaning of Article I, Section 9, Clause 3, Constitution of the United States (Medley, Petitioner, 134 U.S. 160, 171; Thompson v. Utah, 170 U.S. 343, 351).
>
> "* * * The Supreme Court has held that a statute which reduced the number of triers of fact, and consequently the number of members who must concur in a finding of guilty or sentence, operated to the substantial disadvantage of the accused (Thompson v. Utah, supra). To authorize trial by a special court-martial which may be composed of a lesser number of members than the minimum competent to adjudge a penal discharge prior to 1 February 1949, would raise a grave and doubtful question which would not arise if the statute were given only prospective operation. The fact that a particular special court-martial may have been composed of five or more members is not considered material. There is nothing in the language used to indicate that the Congress intended the application of the statute to depend upon the facts of particular cases.
>
> "* * * Applied only to sentences based on convictions

of offenses committed on or after 1 February 1949 the additional punishing power vested in special courts-martial by Article of War 13, as amended, can be exercised with uniformity and in such a manner as to avoid many and serious complications which would result if it were exercised as to offenses committed prior to the effective date of the amendment. The language used is clearly capable of an interpretation giving it prospective operation only. We find nothing in the Executive Order of 7 December 1948 or in the Manual for Courts-Martial, 1949, which requires, or indicates, a contrary interpretation. Under the circumstances the Council feels forced to the conclusion that the added punishing power of special courts-martial to adjudge bad conduct discharge must be held to apply prospectively, that is, only to offenses committed on and after 1 February 1949."

5. In the case under consideration it is noted that the accused's unauthorized absence commenced prior to 1 February 1949 and continued for a period of more than sixty days subsequent thereto. Therefore we must consider whether such absence without proper leave constitutes a continuing offense. If so, the last sixty days of the unauthorized absence would constitute an offense for which a special court-martial could properly adjudge a bad conduct discharge (par. 117c, p. 133, 134, MCM, 1949; AW 13). The Manual for Courts-Martial, 1949, provides in pertinent part:

"Absence without leave (A.W. 61) and desertion (A.W. 58) are not continuing offenses for the purpose of computing the time under the statute of limitations or for the purpose of determining whether the offenses were committed in time of war" (par. 67, p. 62) (Underscoring supplied).

This principle has been followed so consistently by this office over a period of many years, as to have become axiomatic (CM 154160; CM 153705; CM 153979; CM 154240 (1922); 014.4, Aug. 27, 1920).

It is appropriate at this point to note that the Manual for Courts-Martial, 1928, paragraph 67, page 52, provided: "Absence without leave (AW 61); desertion (AW 58); and fraudulent enlistment (AW 54) are not continuing offenses and are committed, respectively, on the date the person so absents himself * * *." The authority for such provision in the 1928 Manual undoubtedly had its origin in an opinion of the then Judge Advocate General, Major General E. H. Crowder, 014.4, August 27, 1920, supra, of which the following is quoted from page 4:

"It remains to be considered whether the offense of 'absenting himself' without leave made punishable by the present 61st Article of War is a continuing offense as assumed by the authority above quoted.

"The offense of a soldier, who, without authority, leaves his organization or station, is commonly spoken of as 'absence without leave'. The 61st Article of War, however, which punishes the offense, does not describe it in those words. The language used in the article with respect to the three acts made punishable thereby is significant and indicates that the offense under discussion is therein considered as a single completed act and not a continuing one. Thus it is provided that any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty or goes from the same without proper leave or absents himself from his command, etc., without proper leave, shall be punished. The moment the soldier does any one of these three acts he violates the 61st Article. It does not follow from the mere fact that, after having absented himself without proper leave, - that is to say, after having entered into the state of being away without authority, - he remains absent without authority, that he affirmatively 'absents himself' anew each day that he remains absent, any more than that a deserter commits desertion anew each day he remains absent with the intent not to return. If the words 'absent himself without proper leave', used in the article are construed to mean leaves, or goes away from, or otherwise enters into the state of being away without authority, the offense is complete when the soldier does that thing. After that he does not leave or go away or otherwise enter into the state of being away without authority; he merely remains in the status which he has already assumed. His act of absenting himself was complete the moment he assumed that status and the length of his absence after the offense has once been committed is immaterial in fixing guilt but becomes important in determining the amount of punishment to be administered; or it may be important as a fact from which the court might infer the existence of an intent not to return."

In discussing the application of the military statute of limitations to absence without leave and desertion Winthrop states at page 255 of Winthrop's Military Law and Precedents, 2nd Ed., Reprint 1920:

"A 'continuing offence,' as the maintaining of a nuisance, is one which per se, and without regard to the intent, if any, of the offender, works injury to individuals or the public so long as it is not abated, and is thus viewed as committed indifferently on every and any day of its maintenance. But desertion consists in an offense of which the gist is a particular intent and one which must be entertained at a particular time, viz. at the moment of the unauthorized departure. Thus, in the view of the author, a desertion is, as a legal offence, committed but once, being complete and consummate on the day on which the soldier quits the service with the animus non revertendi; the 'continuing offence' thereafter committed being not the desertion but the simple minor offence of absence without leave involved in it, and which of course continues till the deserter's apprehension or voluntary return.

"It is believed that the most practical and the preferable rule of limitation in military cases that could be adopted would be to prescribe that the period of the limitation should commence in all cases with the day of the date of the offence as consummated and run from that date for a certain term * * *" (Final underscoring supplied).

It must be observed that Winthrop does not categorically state that absence without leave is a continuing offense. It must also be observed that his discussion relates to a continuing offense with respect to a statute of limitations. In any event, as indicated above, it is now well settled that absence without leave is not a continuing offense in so far as the statute of limitations is concerned. Whether it may be regarded as a continuing offense for other purposes is doubtful in view of an opinion by the Chief of the Military Justice Division in a memorandum of this office for the Chief of Administrative Services, dated 3 January 1943, wherein it was stated:

"2. The executive Order applies to offenses committed after its effective date, 1 December 1942. /Relative to removal of the maximum limits of punishment for absence without leave/. Absence without leave is not a continuous offense, and in order to come within the application of the Executive Order, such absence without leave must originate on or subsequent to December 2, 1942" (Underscoring supplied).

Since absence without leave is not a continuing offense insofar as the running of the Statute of Limitations is concerned, it appears to the Board that a like construction must be applied in determining

whether absence without leave is a continuing offense in determining the ex post facto question. As was said by the Judicial Council in the McNeely case, supra:

> "Any law which operates in any manner to the substantial disadvantage of an accused in respect to an offense committed prior to the effective date of the law is an ex post facto law within the meaning of Article I, Section 9, Clause 3, of the Constitution of the United States (Medley, Petitioner, 134 U.S. 160, 171; Thompson v. Utah, 170 U.S. 343, 351)."

To say that an offense is not continuing insofar as the statute of limitations is concerned, but is continuing insofar as authorizing the imposition of an additional penalty by a court not hitherto authorized to impose it, because it extends beyond the date of the law granting such authority, although in both instances commencing on the same date, is sheer sophistry. It is, consequently, the opinion of the Board of Review that absence without leave is not a continuing offense insofar as to legalize a bad conduct discharge adjudged by a special court-martial where the offense had its inception prior to 1 February 1949 and continued for more than sixty days after that date.

6. The remaining question presented by the record of trial is whether the forfeiture of pay adjudged by the court-martial was excessive. While the data pertaining to the accused as shown on the charge sheet does not indicate a Class "F" allotment, the defense counsel stated during trial (R. 5) that the accused had a Class "F" allotment of $22.00. Correspondence attached to the record of trial shows that the accused did have such an allotment but that it was discontinued during the accused's unauthorized absence and that while at the time of trial no Class "F" allotment was in effect, the Class "F" allotment was subsequently reinstated effective 1 April 1949. Paragraph 117c, Manual for Courts-Martial, 1949, provides at page 133 in pertinent part:

> "Unless dishonorable or bad conduct discharge is adjudged the monthly contribution of a soldier to family allowance will be excluded in computing the amount of pay subject to forfeiture."

In the case under consideration, since the court-martial was without authority to adjudge a punitive discharge it was therefore bound to exclude the $22.00 per month from the pay of the accused in computing the amount of pay subject to forfeiture. Since the pay of the accused after deducting the contribution to family allowance was $56.75 per month the maximum forfeiture which the court-martial could

adjudge was two-thirds pay per month (A.W. 13; par. 15, 116b, MCM, 1949) or $37.83 per month.

7. 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 four months and forfeiture of $37.83 per month for four months.

Thos. H. Young, J. A. G. C.

E. Rondeau, J. A. G. C.

John F. Taylor, J. A. G. C.

AUG 26 1949

CSJAGN-SpCM 102 1st Ind
JAGO, Dept. of the Army, Washington 25, D. C.
TO: Commanding General, V Corps, Camp Mackall, North Carolina.

1. In the case of Recruit Maurice D. Dillenbeck (RA 36573722), Company B, 4th Signal Battalion, Fort Bragg, North Carolina, I concur in the holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as involves confinement at hard labor for four months and forfeiture of $37.83 pay per month for four 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 four months and forfeiture of $37.83 pay per month for four months. Under Article of War 50 you now have authority to order execution of the sentence modified in accordance with this holding.

2. When copies of the published order in 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 102).

1 Incl
Record of trial

THOMAS H. GREEN
Major General
The Judge Advocate General

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

CSJAGI SP CM 125

JUN 30 1949

U N I T E D S T A T E S	)	UNITED STATES ARMY, EUROPE
	)	
v.	)	Trial by SP. C. M., convened at
	)	Heidelberg, Germany, 8 April 1949
Private WILLIAM C. IGO	)	Bad Conduct Discharge (suspended),
(RA 13211866), Detachment	)	forfeiture of thirty-five ($35.00)
Medical Department, 130th	)	dollars per month for three (3)
Station Hospital	)	months, confinement for three (3)
	)	months and reduction to the grade
	)	of Recruit. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
JONES, ALFRED and JUDY

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

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

CHARGE I: Violation of the 84th Article of War.
(Disapproved by Reviewing Authority).

Specification: (Disapproved by Reviewing Authority).

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

Specification 1: (Disapproved by Reviewing Authority).

Specification 2: In that Private William C. Igo, Detachment Medical Department, 130th Station Hospital, Rohrbach, Germany, having been restricted to the limits of the 130th Station Hospital, Rohrbach, Germany, did, on or about 13 Mar 1949, at 130th Station Hospital, Rohrbach, Germany, break said restriction by going to Heidelberg, Germany.

Specification 3: In that Private William C. Igo, Detachment Medical Department, 130th Station Hospital, Rohrbach, Germany, Having been restricted for medical purposes to the limits of ward A3, 130th Station Hospital, Rohrbach,

Germany, did, at 130th Station Hospital, Rohrbach, Germany, on or about 14 March 1949, break said medical restriction by going beyond the limits thereof.

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

Specification: In that Private William C. Igo, Detachment Medical Department, 130th Station Hospital, Rohrbach Germany, did, without proper leave, absent himself from his quarters, 130th Station Hospital, Rohrbach Germany, from about 1939 hrs. 19 March 1949, to about 2230 hrs. 21 March 1949.

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

Specification: In that Private William C. Igo, Detachment Medical Department, 130th Station Hospital, Rohrbach Germany, having been duly placed in arrest at 130th Station Hospital, on or about 18 March 1949, did, at 1930 hrs on or about 19 March 1949, break his said arrest, before he was set at liberty by proper authority.

He pleaded not guilty to and was found guilty of all charges and specifications and was sentenced to be reduced to the grade of Recruit, to be discharged from the service with a bad conduct discharge, to be confined at hard labor at such place as the reviewing authority may direct for a period of three months and to forfeit $35.00 per month for three months. The court considered one previous conviction in adjudging the sentence. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47d. The reviewing authority disapproved the findings of guilty as to Charge I and its Specification and Specification 1 of Charge II and approved only so much of the finding of guilty of the Specification of Additional Charge I as involves a finding that accused absented himself without leave at the time and place alleged and remained so absent until 1000 21 March 1949, approved the sentence and ordered it executed but suspended the execution of the bad conduct discharge until the soldier's release from confinement and designated the Branch United States Disciplinary Barracks, Fort Hancock, New Jersey, as the place of confinement. The sentence was promulgated in Special Court-Martial Orders No. 6, Headquarters, United States Army, Europe, APO 403, United States Army, dated 13 May 1949.

3. The evidence is legally sufficient to support the findings of guilty of Specification 2 of Charge II and Additional Charges I and II and their Specifications. The only questions requiring consideration are the legal sufficiency of the record of trial to support the findings of guilty under Specification 3 of Charge II and the legality of the sentence. The discussion of the evidence will therefore be limited to that part of the record pertinent to Specification 3 of Charge II.

4. The testimony introduced by the prosecution with respect to Specification 3 of Charge II is that of Captain Otto S. Matthews and First Lieutenant Edna F. Lichtenstein, both of the 130th Station Hospital. Captain Matthews testified that, while acting in the capacity of ward officer at the 130th Station Hospital on the date of 14 March 1949, he restricted the accused to the limits of Ward A-3 except for meals for medical reasons, "Because he had been given sedation which would make it bad for him physically to be wandering around the hospital, which would make it undesirable to have him going up and down steps and other places of the hospital area." (R 19 and 20). He also testified that accused was aware of the restriction (R 19). The only testimony introduced by the prosecution in attempting to prove that accused broke the alleged restriction is that of Lieutenant Lichenstein which is as follows:

"Ninth Witness: 1st Lt. Edna F. Lichtenstein, 130th Station Hospital, APO 403, U. S. Army, being first duly sworn, testified as follows:

Q. Do you know the accused?
A. Yes I do, his name is Igo, William (witness pointed to the accused)

Q. Will you state to the court what you know concerning the accused on the evening of 14 March.
A. I was the night nurse at the time and told this person was confined to the ward. We made bedcheck of the confined persons every hour, the accused was not there, he was not there on our hourly bedchecks. I reported on duty at 1900 hours.

Q. And you checked the ward at that time?
A. Yes. I checked at 1900 and between 2000 and 2100.

Q. You did not find the accused?
A. I did not find him there.

CROSS EXAMINATION

Q. At the time you checked the ward is it possible that the accused could have been in the latrine?
A. Well I was there long enough for him to have come out again. I sent the corps man to the latrine to check and I sent him to the shower-room.

Q. You personally did not conduct a search?
A. I went into every room except those two.

Q. He could have been there?
A. No because the corps man said he was not there.

Q. The corps man reported to you personally?
A. Yes.

Q. Do you positively know beyond any doubt that the man was not in the latrine?
A. In my mind, yes Sir.

QUESTIONS BY THE COURT

Q. Lieutenant, during this time from the time you came on duty at 1900 hours did you have any occasion to treat the accused?
A. He had some treatment during the afternoon and I wanted to check on him, He had a sedation.

Q. Was the sedation ordered for any particular time of day?
A. We give them at our judgment.

Q. When was your tour of duty ended?
A. It was from 1900 - 0700 hours.

Q. During your entire tour of duty did you see the accused at all?
A. That night yes when he was asleep finally.

Q. At approximately what time?
A. I gathered he came back to that ward between 2.00 and 3.00 in the morning. At that time he was asleep and the corps man reported at 0400 that he was awake.

The witness was excused." (R 20).

5. Obviously, the statements of the witness, Lieutenant Lichtenstein, that the corps man reported to her personally that the accused was not in the latrine or shower room and that the accused came back to the ward between 0200 and 0300 were based on hearsay and are, therefore, not evidence. (Par. 126a, MCM 1949). Merely because no objection was made to this testimony, the objection is not waived, and it does not become admissible as evidence (CM 330993, Ranguette, 79 BR 241, 249). Disregarding the hearsay, the nurse's testimony shows that she searched for accused at 1900 and between 2000 and 2100 throughout the ward except in the latrine and the shower room and did not find him. Her statement that she was "* * * there long enough for him to have come out again," referring to the two rooms not searched by her cannot be accepted as anything more than an opinion of the witness. We must therefore consider the fact that there is no evidence in the record of trial that accused was seen outside the limits of his restriction and no competent evidence that he was not within them. The Board of Review has held that where there is no competent evidence of an essential element of

an offense, hearsay declarations are incompetent to prove that element (CM 325401, Gray, 74 BR 215, 218). It thus follows, in the instant case that one essential element of the offense, breaking the restriction was not proved, and the finding of guilty of Specification 3 of Charge II cannot be sustained.

6. With respect to the remaining specifications of which accused was found guilty, the maximum punishment for breach of restriction as alleged under Specification 2 of Charge II is confinement at hard labor for one month and forfeiture of two-thirds pay for a like period. Of the specifications of the Additional Charges, the record discloses that the offense of absence without leave initiated on 19 March 1949 and breach of arrest were committed contemporaneously. Since these two offenses arose out of the same act, accused may only be punished for the most important aspect of the act, the breach of arrest (Par. 80a, MCM 1949; CM 313544 Carson, 63 Br 137, 147, 5 Bull JAG 202 and cases cited therein). The maximum punishment for breach of arrest is confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period.

Since the authorized confinement without substitution is less than six months, and since there is no evidence of five or more previous convictions and the punishment of discharge from the service with a bad conduct discharge is not authorized for any one of the offenses charged against the accused, that part of the sentence imposed by the court adjuding a bad conduct discharge was excessive.

7. For the reason stated above, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Specification 2 of Charge II and Charge II, Additional Charge I and its Specification/and Additional Charge II and its Specification, as modified legally insufficient to support the finding of guilty of Specification 3 of Charge II and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for three months and forfeiture of $35.00 per month for three months.

On Leave, J.A.G.C.

Frank C. Alfred, J.A.G.C.

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

AUG 1 1949

CSJAGI Sp CM 125 1st Ind

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

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

1. In the case of Private William C. Igo (RA 13211866), Detachment Medical Department, 130th Station Hospital, APO 403, United States Army, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Specification 2 of Charge II and Charge II, Additional Charge I and its specification as modified and Additional Charge II and its specification, legally insufficient to support the finding of guilty of Specification 3 of Charge II and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for three months and forfeiture of $35.00 per month for three months. Under Article of War 50e this holding and my concurrence vacate so much of the sentence as is in excess of confinement at hard labor for three months and forfeiture of $35.00 per month for three months.

2. It is requested that you publish a special court-martial order in accordance with said holding and this indorsement, restoring all rights, privileges and property of which accused has been deprived by virtue of that portion of the sentence so vacated. A draft of a special court-martial order designed to carry into effect the foregoing recommendation is attached. Instead of taking the above action you may, if you so desire, disapprove the entire sentence and order a rehearing upon appropriate charges and specifications.

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

(SP CM 125).

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

THOMAS H. GREEN
Major General
The Judge Advocate General

S U B J E C T I N D E X

vol 3 Army JAG Bd Rev & Jud Coun

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TITLE

DATE	BORROWER'S NAME	EXT.