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Volume XII

including

CM 218176 to CM 220398

(1941-1942)

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CONTENTS OF VOLUME XII

CM No.	Accused	Date	Page
218176	Jordan	17 Nov 1941	1
218201	Witkowski	14 Oct 1941	11
218240	Howard	6 Nov 1941	17
218325	Harris	17 Oct 1941	29
218342	Hale	31 Oct 1941	35
218385	Capitell	21 Nov 1941	39
218393	Callan	30 Oct 1941	49
218409	Chadderdon	17 Nov 1941	61
218415	Bethard	28 Oct 1941	67
218520	Coone	14 Nov 1941	77
218521	Nix	8 Nov 1941	85
218579	Lowrance	18 Nov 1941	93
218643	Bright	16 Dec 1941	103
218647	Moody	14 Jan 1942	119
218667	Johns	2 Dec 1941	133
218753	Page	17 Dec 1941	137
218818	Artibee, Barrow	29 Nov 1941	153
218876	Wyrick, Zuver, Gauvey, Harris	30 Jan 1942	157
218883	Long	1 Jan 1942	167
218924	Foster	24 Dec 1941	173
218946	Joly	22 Jan 1942	185
218970	Hendrickson	19 Jan 1942	197
219114	Roy, Backus	8 Jan 1942	211
219134	Crist	12 Jan 1942	215
219135	Stryker	26 Mar 1942	225
219209	Ross	7 Jan 1942	245
219428	Williams	28 Feb 1942	249
219438	Tate	20 Jan 1942	265
219511	O'Neal	5 Mar 1942	269
219574	Salvaggio	11 Feb 1942	277
219575	Mathis	10 Mar 1942	281
219582	Braden	26 Feb 1942	305
219725	Lowry	19 Feb 1942	309

CM No.	Accused	Date	Page
219844	Miloszewski	20 Mar 1942	313
219946	Tracz, Barone, Harrison	18 Mar 1942	317
219972	Robertson	16 Mar 1942	323
220061	Barnes	19 Mar 1942	331
220160	Faulkner	25 Mar 1942	335
220177	Nelson	19 Mar 1942	341
220179	Obear	15 Apr 1942	347
220233	Pratt	21 Mar 1942	365
220237	Neusom	27 Mar 1942	369
220269	Cox	7 Apr 1942	373
220290	Clark	9 Apr 1942	383
220359	Archibald	26 Mar 1942	389
220396	Shepherd	31 Mar 1942	393
220398	Yeager	8 Apr 1942	397

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218176

NOV 17 1941

UNITED STATES v. Private LESTER JORDAN (37053026), Special Weapons Troop, 9th Cavalry.	2ND CAVALRY DIVISION Trial by G. C. M., convened at Fort Riley, Kansas, July 29, 1941. Dishonorable discharge (suspended) and confinement for two (2) years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, Judge Advocates.

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

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

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

Specification: In that Private Lester Jordan, SpW Tr, 9th Cavalry, having received a lawful command from 1st Lieut., J. P. Tomhave, 9th Cavalry, his Superior Officer, to assist Sgt. Dawson in building a wooden sidewalk by helping carry lumber, did at Camp Funston, Kansas, on or about June 16th, 1941, willfully disobey the same.

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

Specification 1: In that Private Lester Jordan, SpW Tr, 9th Cavalry, did at Camp Funston, Kansas, on or about June 16th, 1941, strike First Sgt. T. Taylor, a Non-commissioned officer who was then in the execution of his office, by striking him on the face with his closed fist.

Specification 2: (Finding of not guilty)

Specification 3: In that Private Lester Jordan, SpW Tr, 9th Cavalry, having received a lawful order from Sgt. Clanton Dawson, a Non-commissioned officer who was then in the execution of his office, to assist in building a wooden sidewalk by helping carry lumber, did at Camp Funston, Kansas, on or about June 16th, 1941, willfully disobey the same.

Specification 4: In that Private Lester Jordan, SpW Tr, 9th Cavalry, did at Camp Funston, Kansas, on or about June 16th, 1941, behave in an insubordinate and disrespectful manner toward First Sgt. T. Taylor, a Non-commissioned officer, who was then in the execution of his office by using loud and boisterous language and saying, in a threatening manner, "You don't know what the hell you're talking about", or words to that effect.

He pleaded not guilty to all Charges and the Specifications thereunder. He was found guilty of Charge I and its Specification, and of Charge II and Specifications 1, 3 and 4 thereunder, and not guilty of Specification 2, Charge II. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years. The reviewing authority approved the sentence, ordered it executed, but suspended the execution of the dishonorable discharge until the soldier's release from confinement, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement.

3. The accused is a selectee, 20 years of age, who was inducted into the Army on March 3, 1941, with no previous military service. At the time of the commission of the offenses here alleged he had been in the Army three months and twelve days.

The pertinent evidence of record, including the testimony of accused who took the stand as a witness in his own behalf, may be summarized as follows:

First Lieutenant John P. Tomhave, the accused's company commander, testified that the records kept in the office of the first sergeant of

his organization, Special Weapons Troop, 9th Cavalry (a colored regiment), disclosed that accused had been receiving medical treatment for urethritis at the dispensary in the station hospital at Camp Funston, Kansas, as a GU patient for a period of about ten days prior to June 16, 1941 (the date of the offenses here charged) and had been given (presumably at the dispensary) a "dismounted duty" slip for one week which was "extended from the medical office". It had expired about June 14.

/Apparently it is the local practice, at least in this particular troop, to send an enlisted man in a GU status to the dispensary for treatment without entering his name on the daily sick report of the organization. It would also appear that both the dispensary and this troop adhered to an obsolete administrative practice, formerly officially recognized in the Cavalry, of carrying a sick soldier in a status known as "dismounted duty". Paragraph 1d, AR 345-415, November 23, 1933, provides, in part, as follows:

> "The Daily Sick Report, when signed by the medical officer, will be returned to the organization or detachment without delay in order that the commander thereof may make disposition of those whose names appear thereon in accordance with the medical officer's report, namely, as 'hospital', 'quarters', or 'duty.' There is no such status as 'light duty' or 'part duty.'"/

On Sunday morning, June 15, the accused reported to his first sergeant that he had a kidney ailment and wished to go on the sick book. The sergeant told him that since he was going to the hospital anyhow for GU treatment, and notwithstanding that he now had a different ailment, he did not need the sick book. Accused went to the hospital without the sick book. He was treated by Captain Harold E. Thornell of the Medical Corps, who made out for him a form 52a (copy of which was introduced in evidence as Ex. A), on which appears the entry "Qts". In testifying as to this record Captain Thornell states, "On this form he is marked quarters and his form 258 should be marked the same" (R. 19), and goes on to say that when a soldier reports at the dispensary, as accused did on June 15, 1941, his sick book and his form 258 come with him (R. 19). If the soldier is to be marked "quarters" the medical officer examining him makes out a form 52a, which is a record of, and is kept by, the dispensary. Clerks in the dispensary transfer the data on form 52a to form 258, retained by the soldier, and to one of the columns of the sick book for the information of the soldier's organization. The sick book shows the status of duty and the disposition of the case. The attending doctor signs both the sick book and the form

258 (R. 19-20). It is the responsibility of the troop to enter the man's name on the sick book and not that of the hospital. It will be remembered that the accused on this occasion was not able to have an entry made because he was refused the sick book by the first sergeant. The next day, Monday, June 16, about 3:30 in the afternoon, the first sergeant sent for accused and asked him why he was not working, whereupon accused explained that he had been marked quarters by Captain Thornell at the hospital. The first sergeant

> "then produced my 52a form and look at it and he said the disposition on the form wasn't 'quarters', the abbreviation was Qts. and he said it wasn't 'quarters'. He said during experience looking at forms, he knew 'quarters' when he saw it. I told him the captain told me it was 'quarters', and he had ok'd it and I said I took his word for granted. He then told me to go back to the hospital with the sick-book and he said, 'your name is not in the sick-book', and I said, 'Sergeant, I came to you yesterday to get on the sick-book, and you refused to put me on.' He said, 'you don't have to go on the sick-book', and he said, 'you take the sick-book and the form back to the dispensary and if they don't mark it quarters you will have to go back to work'. I did that and showed it to the Captain, —Captain Thornell, and he said it was alright and was marked quarters, and he said if First Sergeant Taylor wasn't satisfied he'd have it changed, and he had one of the clerks change the form to quarters and then he asked him about the sick-book, and he said it was up to the First Sergeant to put it in the sick-book. I then took the book and the form back to Sergeant Taylor, and handed it back to him. He looked up the form and he didn't say anything about the form. He then looked in the sick-book and I told him that the Captain said he was supposed to list my name in the sick-book. He then said he still wouldn't accept me being marked Quarters and to get out. I said, 'Sergeant, I am not able to do my work'. He said, 'I don't give a damn, get out of my office, and get to work'. I said, 'Sergeant, will you give me a chance to sign the sick-book'? and he said, 'get out of here', and I was standing in front of the desk, and he got up and pushed me against the side of the door, and then he swung at me, and I didn't make any offer to retaliate, I merely threw up my hand to ward off the blow, and by that time the troop commander, who was in his office with the door shut, came out of his office and pushed me back and got between us and said, 'arrest that man for assaulting the

> First Sergeant', and he said, 'get out of here and go to work', and he put Private Wilson in charge of me and I went over with Sergeant Dawson, who had a detail building a walk around the barracks, and I reported to him and the Sergeant told me to go back and get some lumber and I said I wanted to speak to the troop commander, because I was sick, and the troop commander saw me talking and he came out and said, 'I told you to go to work', and I said I'd like a chance to explain about the situation and he said, 'you can explain nothing. You either go to work or go to the guardhouse'. I then said, 'Well, sir, I have no "alternity" in the matter, because you won't let me explain'. He then went to Regimental Headquarters, and Sergeant Taylor came out of the back, and he said, 'I am tired of you getting on the sick-book and going to the hospital every day', and he said, 'I'll fix you', and I said, 'If you'll only give me a chance to explain how it was', and he walked in the barracks, and got the troop commander and the troop commander placed me under arrest. He had my charge made out against me, got my clothes, and they took me to the guard house." (R. 21-22)

The first sergeant's version of this argument is substantially to the effect that when accused came back from the hospital and quarreled about his status he said to Sergeant Taylor, who was then in the execution of his office as first sergeant, "You don't know what the hell you're doing", and the sergeant said,

> "Get out of my office. I got from around my desk and pointed at the door and he swung at me and hit me on the right side of my chin, and then I caught him and held him and the troop commander came out and stopped us." (R. 9)

That same morning the first sergeant had detailed accused to work in the stables, which was dismounted duty. The sergeant explained this by saying that although he knew accused's dismounted duty slip had expired he put him on dismounted duty because he needed men at the stables and because accused had to report to the hospital every two hours (R. 11, 12).

Immediately after the controversy with the first sergeant the troop commander ordered accused into arrest and directed Corporal Wilson to deliver him to Sergeant Dawson who was just outside operating a detail which was, at the time, carrying lumber from the back of the supply room to the barracks where they were building a wooden sidewalk. Sergeant

Dawson told him to go get some lumber but accused said he "wasn't going to work because he wasn't able to work" (R. 12) and wanted to speak to the troop commander because he was sick. Overhearing this argument the troop commander came out and, upon discovery that accused was refusing to obey the work order of Sergeant Dawson, gave accused a direct order (Charge I and its Specification) to assist Sergeant Dawson in building the wooden sidewalk by helping to carry lumber. When accused tried to explain the situation to him, the troop commander said, "You can explain nothing. You either go to work or go to the guardhouse", whereupon the troop commander had him put under guard and confined at the guardhouse at Fort Riley.

During the course of the argument with the first sergeant the accused showed him form 258 on which, he testified, he is marked quarters, but this form was never introduced in evidence because it was apparently lost by the troop commander who, after the argument was over, took accused's form 258 and the sick book to the hospital to check up on the accuracy of accused's statements. This form has not been seen since (R. 10).

There is a conflict of testimony as to who struck the first blow. The troop commander, Lieutenant Tomhave, who had a partial view of the encounter through a partly opened door, makes a definite statement that he saw the accused strike the first sergeant (R. 6), and that his manner at the time was insolent and disrespectful, but witness would not swear that this blow was the first one struck. He testified it was "the first I saw" (R. 8). There was only one witness in the room with accused and the first sergeant during the argument, Corporal Macon J. Wilson, who testified, "I saw one lick swung, but it was missed" (R. 17). Unfortunately neither the court, the prosecution nor defense counsel asked this witness who struck this blow, although the inference is that it was accused because Corporal Wilson also testified that Sergeant Taylor made no physical motion whatever when he told accused to get out of his office (R. 18).

4. As to the offenses alleged in Specifications 1 and 4 of Charge II (the assault on, and the insubordinate and disrespectful behavior toward, First Sergeant Taylor), the Board of Review is of the opinion that there is sufficient substantial evidence in the record to sustain the findings of guilty. For the purposes of punishment, however, it is believed that what is substantially one transaction has been made the basis for an unreasonable multiplication of charges against the accused in that the loud and boisterous language and threatening manner alleged

in Specification 4 of Charge II is part of, and simultaneous with, the quarrel ending in blows and bodily contact set forth in Specification 1 of Charge II.

Paragraph 134b, page 148, Manual for Courts-Martial, 1928, in clarifying the offense of willful disobedience of the order of a superior officer, states:

> "The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused." (Underscoring supplied)

The testimony of the medical officer, Captain Thornell, definitely establishes the fact that accused had been marked quarters by him on the day previous to the commission of the offenses here charged. No evidence was introduced that this status of accused on the next day, June 16 (the date of the offenses), had been changed by proper medical authority. Moreover, Captain Thornell testified that in his opinion, based upon his diagnosis of the case made on June 15, the accused was not able to carry lumber, the duty he was ordered to perform, on June 16 (R. 18). Although Captain Thornell had marked accused "quarters" on June 15, either through error or carelessness on the part of the clerks in the dispensary and of his troop commander, this fact did not appear on his form 258 or in the sick book on the following day.

The Technical Manual, entitled "Administration" (TM 12-250), an official War Department publication based on Army Regulations, defines the term "quarters" when used in a medical officer's report as follows:

> "The entry 'Quarters' means that the enlisted man is undergoing medical treatment, and that he is excused from ordinary duties and is to remain in quarters whether it be a barrack or a tent. The enlisted man reports to the medical officer at sick call daily until his status is changed." (par. 68c (2))

It is the opinion of the Board of Review that the orders given by the troop commander (Charge I and its Specification) and the order given by Sergeant Dawson (Specification 3, Charge II) were illegal under the circumstances, for the reason that accused was then and there a soldier undergoing medical treatment and was in a "quarters" and not a "duty" status. A soldier marked "quarters" by proper medical authority continues in that status until relieved therefrom by the same authority

and during that period he stands relieved of all the routine duties of a soldier and particularly so of all manual labor which would require him to leave his quarters. The troop commander visited the hospital during the afternoon of Monday, June 16, for the purpose of ascertaining the precise status of accused but he did not see fit to consult with Captain Thornell, the medical officer who had treated accused and marked him quarters, nor apparently with any other officer on duty or in authority at the hospital. He confined his inquiries to certain unnamed enlisted men whose official status is not described who told him that if accused was in quarters it was not on the record (R. 7). In this connection it is not clear whether these enlisted men, probably clerks, had reference to the official medical records made on that date or on the previous day, June 15. In any event, it is apparent that the substantial rights of the accused are invaded and prejudiced by his inability to produce in his defense form 258 and the approved sick book, brought about by the fact that the troop commander had lost both of them at the time of this investigation at the hospital. It was the plain duty of the troop commander to exercise such supervision over the records of his organization as to provide and have available the exact status of the enlisted men therein who were undergoing medical treatment, and to comply with all of the provisions of AR 35-415 in the preparation of such records. The fact that such records were carelessly kept, and the further fact that some of them were lost by the troop commander himself, cannot per se change the status of the accused from quarters to duty in this case.

Accused is charged with disobedience of the order of Sergeant Dawson to go to work (Specification 3 of Charge II) and with disobedience of Lieutenant Tomhave's order to obey the order issued by Sergeant Dawson. Both orders were given while accused was remonstrating, and with reasonable justification explaining, that he was unable to work because of his physical condition and that an Army doctor had made his condition a matter of official diagnosis and of record. The troop commander's conduct under the circumstances violates the spirit of the last sentence of paragraph 134b, page 148, Manual for Courts-Martial, which provides:

> "Disobedience of an order *** which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article."

5. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specifications 1 and 4 of Charge II, but, for the reasons above indicated, not legally

sufficient to support the findings of guilty of Charge I and its Specification and Specification 3 of Charge II. The Board of Review is further of the opinion that since the findings as to Specifications 1 and 4 of Charge II relate to what is substantially one transaction, they are legally sufficient to support only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement at hard labor for one year.

Since the conviction in this case is not of offenses involving moral turpitude or affecting the civil status of the accused, remedial action may be taken in the War Department in compliance with the policy directed by the Secretary of War in his approval of the opinion of The Judge Advocate General of April 13, 1923 (250.404 Review 4-13-23), relative to action under Article of War 50½.

J. M. Smith, Judge Advocate.

William A. Pounds, Judge Advocate.

On Leave, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

Board of Review
CM 218201

OCT 14 1941

UNITED STATES	)	FIRST ARMY
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Ontario, New York, Septem-
Private FRANK J. WITKOWSKI	)	ber 12, 1941. Dishonorable
(20256272), Battery B, 198th	)	discharge and confinement for
Coast Artillery (AA).	)	one (1) year. Disciplinary
		Barracks.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

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

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

Specification: In that Private Frank J. Witkowski, Battery "B", 198th C.A. (AA) did at Camp Edwards, Massachusetts, on or about April 7, 1941, at 11:00 P.M. desert the service of the United States and did remain in desertion until he was apprehended at Wilmington, Delaware on or about July 6, 1941, at 6:00 P.M.

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

Specification: In that Private Frank J. Witkowski, Battery "B", 198th C.A. (AA) having been duly placed in confinement in Regimental Guard house on or about July 8, 1941, did at Camp Edwards, Massachusetts on or about August 8, 1941, escape from said confinement before he was set at liberty by proper authority.

Accused pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification. He was found guilty of all Charges and Specifications, and was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years. Evidence of four previous convictions was introduced. The reviewing authority approved only so much of the findings of guilty of the Specification, Charge I, and of Charge I, as involved a finding of guilty of desertion at the time and for the period alleged, terminated by surrender, approved the findings of guilty of the Specification, Charge II, and of Charge II, approved the sentence, but remitted one year of the confinement imposed, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The only question requiring consideration is the legal sufficiency of the record to support the findings of guilty of Charge I and its Specification.

The only witness who testified with respect to the beginning of the unauthorized absence on April 7, 1941, was Second Lieutenant Richard J. Peterson, 198th Coast Artillery (AA), who stated that he was the personnel adjutant of that regiment, that he was the custodian of the organization morning reports of Battery B of that regiment, and who identified his signature on extract copy of morning report of Battery B, 198th Coast Artillery (AA), for April 7, 1941, which was offered and received in evidence as Exhibit 1, and further testified that the statement (Ex. 1) was true to the best of his knowledge and belief.

4. Exhibit 1 reads in pertinent part as follows:

"Btry 'B', 198th Coast Artillery

"Apr 7/41: Pvt Witkowski from duty to AWOL 11:00 P.M. RJP (Initials written in ink.)

* * * *

"Btry 'B', 198th CA (AA) Fort Ontario 9/18/41.
"I, Richard J. Peterson 2d Lt CAC, certify that I am the Regtl. Personnel Adj. of 198th CA (AA) and official custodian of the morning reports of said

command, and that the foregoing is a true and complete copy (including any signature or initials appearing thereon) of that part of the morning report of said command submitted at Fort Ontario, N. Y. for the dates indicated in said copy which relates to Frank J. Witkowski 20256272 Pvt Btry 'B' 198th CA (AA).

(SGD.) Richard J. Peterson
(Typed) Richard J. Peterson
2nd Lt., 198th C.A. (AA)
Personnel Adjutant."

5. The original copy of a morning report is competent evidence of the facts recited in it, except as to entries obviously not based on personal knowledge (par. 117 a, M.C.M., 1928). A copy of any document in any unit of the Army, authenticated by a signed certificate or statement indicating that the paper is a true copy of the original and that the signer is the custodian of the original, is sufficient, prima facie, to authenticate a paper as a copy of an original company record (par. 116 a, M.C.M., 1928).

In the instant case the extract copy of the morning report (Ex. 1) is certified as a true copy of the morning report of Battery B, 198th Coast Artillery (AA), submitted at "Fort Ontario, N. Y." with respect to the entry of accused from duty to A.W.O.L. on September 7, 1941, upon which date the Specification alleges his desertion at Camp Edwards, Massachusetts. It is manifest that the entry in the morning report stated to have been submitted at Fort Ontario, New York, could not have been within the personal knowledge of the officer at Fort Ontario, New York, making the report, and was not competent evidence of desertion or of absence without leave of accused committed at Camp Edwards, Massachusetts (Dig. Ops. JAG 1912-30, Sec. 1507 (1)).

The extract copy dated September 18, 1941, of the morning report (Ex. 1) is also defective in that it is certified and signed by the Regimental Personnel Adjutant, Lieutenant Peterson, who states therein that he is the "Official custodian of the morning reports of Battery 'B', 198th CA (AA)" and that it is a "true and complete copy (including any signature or initials appearing thereon)" and whose initials appear signed in ink following the entry of April 7, 1941, on the extract copy.

The only authorized authentication of the entries in a morning report in the case of a company is that of the company commander by writing his initials on the line with and immediately following the last entry of the date under "remarks" (par. 9 a (1), AR 345-400, Aug. 25, 1938).

The unit personnel officer of a regiment is not the official custodian of the company morning reports. Those reports are retained by the company commander as basic records (par. 13 a (1), AR 345-5, Aug. 15, 1941).

The certification of the extract copy (Ex. 1) as a true and complete copy of the morning report by Lieutenant Peterson as regimental personnel adjutant is not such an authentication as makes the extract copy admissible in evidence, notwithstanding his statement therein that he is the official custodian of the morning reports of Battery B, 198th Coast Artillery (AA), nor is the entry of April 7, 1941, complete and authentic because the entry fails to include the initials of the battery commander on that date, as required by paragraph 9 a (1), AR 345-400, August 25, 1938.

That Lieutenant Peterson was not the company commander who authenticated the entry of April 7, 1941, on the original morning report, is confirmed by the statement of expected testimony of Captain Walter L. Tindall, Jr., Commanding Officer of Battery B, 198th Coast Artillery, found in the report of the investigation among the papers accompanying the record, and by an extract copy dated May 15, 1941, of a morning report of that Company in the 201 file of accused in the Office of The Adjutant General in which the entry of April 7, 1941, as to absence of accused appears, and in which the certificate is signed by Captain Tindall showing that the morning report was submitted at Camp Edwards and showing the initials W.L.T., Jr. signed in ink authenticating the entry of April 7, 1941, as to accused.

It follows that the purported extract copy of the morning report of Battery B, 198th Coast Artillery (AA) of April 7, 1941, with respect to the accused is not competent evidence of the beginning of absence without leave by the accused. The record discloses no other evidence of accused's absence without leave on or about April 7, 1941.

The Board of Review is, accordingly, of the opinion that

the record contains no competent evidence of absence without leave or desertion on the part of the accused for the period alleged in the Specification, Charge I.

6. The action of a reviewing authority in approving a sentence of a general court-martial and simultaneously remitting a portion thereof is legally equivalent to approving only the sentence as reduced (Dig. Ops. JAG 1912-30, Sec. 1395 (1)).

7. For the reasons above indicated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and its Specification.

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

Carlton F. Duffy, Jr., Judge Advocate.

Chas. L. Sesson, Judge Advocate.

Thomas N. Taffy, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218240

NOV 6 1941

UNITED STATES	1st AIR FORCE
v.	Trial by G.C.M., convened at Langley Field, Virginia, August 13, 14 and 20, 1941. Dismissal and confinement for two (2) years. Federal Correctional Institution, Danbury, Connecticut.
Second Lieutenant WILLIAM H. HOWARD (0-393136), 43rd Bombardment Group, Air Corps.	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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.

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

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

Specification: In that Second Lieutenant William H. Howard, Air Corps, while operating and flying a United States Government Airplane, Type PT-17, did, at or near the mouth of Back Creek, Chesapeake Bay, York County, Virginia, on May 22, 1941, by his culpable negligence in operating said airplane in a reckless and unauthorized manner, unlawfully and feloniously kill one Robert Lynwood Saunders, by running into and striking him with said airplane.

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

Specification: In that Second Lieutenant William H. Howard, Air Corps, having full knowledge of Army Regulations 95-15 and Civil Air Regulations, Department of Commerce, did, at or near the mouth of Back Creek, Chesapeake Bay, York County, Virginia, on or about May 22, 1941, by the

> operation of an airplane in a reckless and unauthorized manner, willfully and knowingly violate such regulations; this to the prejudice of good order and military discipline.

The accused entered a special plea in the nature of a motion to strike out Charge II and its Specification as a lesser included offense of and a duplication of the Specification, Charge I. The motion was denied. The accused then pleaded not guilty to, and was found guilty of all Charges and Specifications. No evidence of previous conviction was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The findings and sentence were not announced. The reviewing authority approved the sentence, designated the Federal Correctional Institution, Danbury, Connecticut, as the place of confinement, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution is substantially as follows:

a. Second Lieutenant Paul M. Lindsey, Air Corps Reserve, who was in the plane piloted by accused at the time of the collision with the boat of the deceased, was by Operations Order dated May 22, 1941, Langley Field, Virginia, ordered on a "U-5" Mission to be checked off on a PT-17 by accused as check pilot in command of the ship (R. 26; Ex. 3). The plane took off about 1530 (3:30 p.m.) with Lieutenant Lindsey in the front cockpit operating the plane and accused in the rear cockpit. After Lieutenant Lindsey had operated the plane for about ten minutes, accused took over the operation of the plane (R. 27-28). Thereafter Lieutenant Lindsey at no time touched the controls (R. 31).

The accused flew at low altitudes for about fifteen minutes over land and then sighted three boats about a mile out in the bay. After making three "buzzes" - diving down and pulling up again - on one boat, the plane crashed a boat. On all three buzzes the plane came within ten feet of a boat. On the last, the plane started to make a stiff right bank and while in that bank they crashed "like a flash" into a boat. After the crash they came up in the water about three hundred yards from the boat they had buzzed and by which they were rescued from the water. Lieutenant Lindsey saw someone each time in the boat they buzzed, but did not notice anyone in the boat they crashed into, nor the boat itself. The controls and motor functioned properly while he had them and he noticed no defect in them up to the time of the crash (R. 28-35).

b. Six fishermen testified for the prosecution substantially as follows:

Five of them were in three boats tied to a duck blind about five hundred yards off shore in Poquoson River, mending nets (R. 39-40, 49, 60, 68, 73). The sixth was clamming alone in a boat on the river (R. 70) about one thousand yards in shore from the duck blind (R. 73). The deceased, variously designated as Robert Lynwood Saunders, Robert Saunders and Linwood Saunders, was tonging clams in his boat about four hundred yards off shore from the duck blind (R. 40, 70).

All six of the fishermen had seen Mr. Saunders, who was well known to them all, in his boat for a considerable time prior to the crash (R. 41, 50, 61, 68, 73). Two of them saw him standing on the washboard working his tongs about two minutes, another less than a minute, and another about four or five seconds before the plane hit Saunders' boat (R. 43, 52, 63, 76).

Between 2:30 and 3 p.m., the plane, which later crashed, came from the south right down level with the water, flying practically for them and then was about four feet over the stern of one boat at the duck blind and had to lift a wing in order to clear the mast (R. 41, 50, 61, 68, 74). The plane then rose to the north and then came back on the second trip with water spinning from the wheels, the tail not missing a mast by but a few inches (R. 42, 50, 61). The plane came back the third time with the body of the plane about twenty feet from them toward Saunders' boat, but with the end of the wing over them. It then turned, "kind of backed" thirty feet from Saunders' boat, the right wheel hit the water, pulled the right wing in the water and threw the plane into Saunders' boat (R. 43, 51-52, 62, 68, 74). The plane and the boat went down suddenly. The fishermen rescued the two pilots from the water. They were unable to find Mr. Saunders' body but did pick up a shoe with one of his legs in it (R. 44, 53, 63, 69).

One fisherman believed that the plane kept going straight on and did not turn at all before hitting the boat (R. 77); another saw it change direction, "imagines" that the plane turned a full right angle, and believed that if the plane had not hit the water it would have cleared Saunders' boat (R. 65-66); another that the plane turned north immediately before the crash (R. 51); and another that the pilot brought the plane down on the water about thirty feet off the stern of Saunders' boat, the right wheel hit the water, pulled

the right wing in the water, and the plane made a sudden right angle turn into the boat (R. 45-47). All of the occupants of the three boats at the duck blind were scared by the three buzzes and stretched out or squatted down in the bottom of the boat (R. 40, 51, 62, 69, 74, 76). The water was smooth and calm (R. 46, 54). On the next day Saunders' body was taken from the water where the boat went down, and was positively identified as his body by three of the fishermen (R. 45, 63, 69-70).

c. Parts of an airplane, the fuselage less the engine, PT-17 Ship No. 41-8016, was recovered by salvage operations in Poquoson River off Crab Neck, on May 23, 1941. The plane was unrepairable and a complete loss (R. 86-87).

d. Dr. L. O. Powell, Coroner of York County, Virginia, viewed a body on a branch of Bennett's Creek on the evening of May 23, 1941, which was identified by others to him as the body of Linwood Saunders. The body was dead. Each leg was severed at the knee and there were several transverse lacerations of the head. Medically he would state the cause of death as shock and hemorrhage, if he had not known that the body had been under water. The death certificate (Ex. 5) showed his opinion, "Accidental death from an airplane driven carelessly and by a dangerous pilot. Shock and Hemmorrhage" (R. 89-90).

e. When accused was examined at about 4:15 p.m., May 22, 1941, by the Medical Officer of the Day, Station Hospital, Langley Field, Virginia, there was no odor of alcohol on his breath (R. 94).

f. The flight in this plane was pursuant to Operations Order No. 125, 96th Bombardment Squadron, 2nd Bombardment Group, Langley Field, Virginia, May 22, 1941 (Ex. 1), directing a fifteen minute PT-17 check for Lieutenant Lindsey, mission symbol U-5, with accused as check pilot. Prior to issuance of that order, the accused had initialed the records of the Group to the effect that he had read Army Regulations 95-15, Civil Air Regulations and all Air Base Flying Regulations. Before any pilot in that Group flies any airplane, it is required that he read and initial those regulations to indicate that he has read them (Ex. 2).

g. Major D. H. Alkire, Air Corps, Commanding Officer, 96th Bombardment Squadron, of which accused was a member, after qualifying as an expert in aviation matters, stated that the seventy-

five feet minimum altitude was placed in the regulations to safeguard civil or other ground establishments, Government property, and personnel. It is permissible to fly under seventy-five feet only on take-off and landing. The mission symbol "U-5" does not warrant dropping below the minimum. Neither nose dives, nor flying at low altitudes making simulated attacks on boats are considered acrobatic flying, and a check flight mission does not require practice of such a maneuver. Major Alkire stated that on this training check it would be proper for the instructor pilot to carry the student through a simulated attack at low altitude, but would consider it poor judgment and a dangerous procedure for a check pilot to do so over open fishing boats in unrestricted water (R. 17-24).

h. Lieutenant Colonel Malcolm N. Stewart, Air Corps, Assistant Base Executive, Langley Field, Virginia, testified that an officer, who identified himself as Lieutenant Howard, stated to him over the telephone on May 22, 1941, that he had had an accident, dived into the river hitting a fishing boat, and that a man had been killed. Colonel Stewart, who had been flying with the Army since 1917, expressed the opinion that the minimum altitude of seventy-five feet in Army Regulations 95-15 was placed there for various safety reasons; that flying under seventy-five feet is permissible when on practice mission, when ordered by higher authority, or in event of an emergency when gravity itself would determine the altitude; that flying over water making simulated attacks at a boat would not be a normal maneuver in any organization which he commanded (R. 81-84).

4. Defense.

a. Major D. H. Alkire, Air Corps, recalled by the defense, testified he had known accused for slightly over a year; considered him while serving in the organization as a man considerably above the average both from personal and moral standards; did not think that he would lie to get out of trouble; and considered him definitely above the normal standard morally, compared with persons in the service (R. 106-107).

b. Second Lieutenant Paul J. Yurkenis, Air Corps, who had lived with the accused during last November and December, and had known him almost daily since, believed his character excellent and far above the average, his morals superior and far above the average, and that he would not lie to get himself out of serious trouble (R. 107-108).

c. The accused elected to testify upon Charge I and its Specification only.

The last thing accused remembered before the accident on May 22, 1941, was starting into a right-hand turn, intending to bank around the boat, when he heard a loud bang and came to under water. At the time of the bang his position was about right angles to the boat, and thirty to forty feet away from it. He had practically cleared the boat at the time of the crash (R. 110). He intended to bank around the boat and then to head back to Langley Field. He was flying as he did at the time of the accident to perfect his flying technique. He was trying to see if he could make the ship do what he wanted to do, using the surface of the bay as a reference and a margin. He thought that he was about ten feet above the water, but events proved that he was wrong. He did not know sufficiently well that he could not judge distance very accurately on smooth water (R. 111). He did not see anyone in the boat before the crash, but was told afterward that someone was in it. They spent at least ten minutes looking for Saunders and the fishermen were reconciled before they left the scene of the crash that they were not going to find Saunders' body (R. 112).

Upon cross-examination and examination by the court the accused testified that his direction of flight was ninety degrees to the boat when the bank occurred. The boat he had practically cleared at the time of the crash was Saunders' boat. When he first saw it one minute before the crash, Saunders' boat was about three hundred yards ahead and a little bit to his right. At that time the plane was at level flight more than twenty feet "close to the water", about southwest from Saunders' boat (R. 113). He was still banking just before the crash. The stick was still going over, and that is all he could remember. The boat looked to him about forty feet away when he put the plane into the bank. He took two glances at Saunders' boat, one from about three hundred yards away and the second from about one hundred or eighty yards away. He could see the whole bottom of the inside of the boat, but not back of its engine (R. 114). He was at the level of about twenty feet above the water because he had flown down there (R. 118). His speed at the time of the crash was about ninety-five to one hundred miles per hour. If he had continued straight flying and not attempted to bank, he would have missed the boat on his right by at least thirty feet (R. 121). From the commencement of the turn by physical action to the crash was not at the most over two or three seconds. His controls were functioning all right so far as he knew (R. 122).

5. After the arguments by the prosecution and defense, Major Alkire was recalled for further examination by the court.

As an expert witness, he would not consider flying a plane within twenty feet of the water in the direction of or at right angles to a boat and coming within twenty feet of it, as careless and reckless flying if the ship was under control and properly handled. It is done repeatedly in tactical maneuvers and on shows. It is not good practice on simulated diving attacks to pick out an object with people in it, but he would not consider it careless. The pilot sitting in the rear cockpit of a PT-17 has as complete control and as good vision as from the front cockpit, but has a different flying angle (R. 126-127).

6. The accused on May 22, 1941, was in command of a plane as a check pilot under orders to give a PT-17 check for Lieutenant P. M. Lindsey, Air Corps. The plane took off at about 3:30 p.m. After Lieutenant Lindsey had operated the plane for about ten minutes the accused took over operation of the plane and thereafter Lieutenant Lindsey at no time touched the controls. After flying at low altitudes over land for about fifteen minutes the accused sighted three boats tied together to a duck blind about five hundred yards off shore in the Poquoson River in which boats five fishermen were mending nets. The accused made three "buzzes" - diving down and pulling up again - on these boats, and each time came within about ten feet of those boats. After passing them the third time, accused started to make a stiff right bank, a wheel hit the water, the right wing was pulled into the water, and the plane crashed into a boat in which Linwood Saunders was operating tongs in clamming about three or four hundred yards from the duck blind, cut off both Mr. Saunders' legs, and sunk both the boat and the plane. The accused was flying to perfect his technique, to see if he could make the ship do what he wanted using the surface of the bay as a reference and margin. He testified that he thought he was about ten feet above the water but that events proved that he was wrong, that he did not know sufficiently well that he could not judge distance very accurately on smooth water, and that if he had continued straight flying and not attempted to bank he would have missed the boat by at least thirty feet. He did not see anyone in the boat into which he crashed.

The corpus delicti was clearly established under Charge I. Mr. Saunders was identified by the fishermen - who had all known him for many years - as being alive on his boat operating his tongs up to a few seconds before the crash, and his dead body positively

identified by them when on the next day it was taken from the water at the scene of the crash. The coroner found the cause of his death "Shock and Hemmorrhage".

7. Manslaughter is defined in Federal law as follows:

"Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

"Voluntary - Upon a sudden quarrel or heat of passion.

"Involuntary - In the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection" (Criminal Code, sec. 274, 18 U.S.C. 453).

"Involuntary manslaughter is homicide unintentionally caused * * * or by culpable negligence in performing a lawful act, * * *.

* * *

"Instances of culpable negligence in performing a lawful act are: Negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in fun at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be discharged; * * *" (par. 149 a, M.C.M., 1928).

"Where, however, the injury is inflicted negligently, without such recklessness as implies malice, as in negligently letting a piece of timber fall from a roof, or in negligently driving in the public streets, or in negligently driving a locomotive engine; then the offense is but manslaughter" (Wharton's Criminal Law, vol. 1, 12th ed., 1932, sec. 445).

In the case of Roberts v. United States (126 Fed. 897 (Texas)), the following charge to the jury on manslaughter was held proper upon appeal:

"'Manslaughter, at common law, is the unlawful killing of a human being, without malice, express or implied. A

homicide is manslaughter when committed with the design to kill, under the influence of sudden and violent passion, caused by great provocation, which the law, in its tenderness to the infirmity of human nature, considers such a palliative as to rebut the presumption which would otherwise arise of malice. In the definition of manslaughter contained in the statute, the killing must be done unlawfully and willfully. The term "unlawfully", as here used, means without legal excuse. The term "willfully" here means done wrongfully, with evil intent. It means any act which a person of reasonable knowledge and ability must know to be contrary to duty, and, while the act must be done with evil design, and knowingly, as herein stated, still a killing which takes place under circumstances showing a reckless disregard for the life of another, and the reckless and negligent use of means reasonably calculated to take the life of another, such killing would be willfully done, as the term is herein defined.'"

8. a. Charge I: The proof shows that the operation of the plane by accused was beyond the scope of the mission stated in the flight order; that accused three times deliberately buzzed the three boats tied to the duck blind, each time coming within ten feet of a boat, performing a lawful act but in a grossly and culpable negligent manner in total disregard of the safety of the five occupants of those three boats; that following the third buzz accused proceeded in level flight "he thought he was about ten feet above the water, but events proved he was wrong", when he first saw Mr. Saunders' boat about three hundred yards away, and in attempting to bank around that boat, crashed into it, sinking the boat and causing the death of Robert Linwood Saunders. Accused stated his belief that if he had continued straight flying and not attempted to bank, he would have missed the Saunders' boat by at least thirty feet.

In the opinion of the Board of Review the evidence clearly shows the accused culpably negligent in operating the plane in a lawful but unauthorized and reckless manner, and without due caution and circumspection, resulting in the death of Robert Linwood Saunders, as alleged in the Specification, Charge I.

b. Charge II: Army Regulations provide that under no circumstances within the control of the pilot, except in landing and in

taking off, and in conducting certain test flights (not here pertinent) will aircraft be flown over troops, other persons or obstacles at an altitude lower than seventy-five feet (par. 28, AR 95-15).

Civil Air Regulations - accused certified that he had read and understood them - provide that exclusive of take-off or landing, aircraft making a contact flight (one conducted by direct observation of the ground) shall not be flown below a minimum altitude of five hundred feet above ground or water (Civil Aeronautics Manual 60, part 1, Summary of Flight Rules, revised Dec. 1, 1940).

In the opinion of the Board of Review the evidence clearly shows the accused guilty of a violation of the above regulations as alleged in the Specification, Charge II.

9. The findings of guilty under Charge I and under Charge II are each findings as to different aspects of the same act. In fixing punishment thereunder a single sentence with respect to the act in its more serious aspect only should be adjudged.

10. The defense challenges for cause were properly not sustained (R. 11-14). The defense motions to strike Charge II and its Specification (breach of regulations) as a lesser included offense of Charge I and its Specification (manslaughter) (R. 15-16), for a finding of not guilty of Charge I and its Specification (R. 94-98), for a reconsideration of the action on the next preceding motion (R. 100-105), and for a dismissal of Charge II and its Specification (R. 123-124) were properly denied.

11. Four separate recommendations of clemency, each signed by one member of the court, are attached to the record:

a. One recommended that so much of the sentence as involved dishonorable discharge and confinement at hard labor for two years be suspended, and in lieu thereof accused be dropped in files to the bottom of the list and "not be advanced in grade two years after he is due for such a promotion".

b. One recommended that the period of confinement be reduced to one year.

c. One recommended that the sentence be reduced to "dishonorable discharge" and confinement at hard labor for six months.

d. One recommended that the sentence be reduced to dismissal and six months confinement.

12. At the time of the trial accused was twenty-three years of age. The records of the Office of The Adjutant General show his service as follows:

> Enlisted as Flying Cadet, 12 August 1939. Appointed Second Lieutenant Air Reserve, May 11, 1940. Extended active duty May 12, 1940. April 10, 1941, continued on active duty until 11 May 1942.

13. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and of the sentence, and to warrant confirmation of the sentence. Dismissal is authorized for violation of the 93rd Article of War, or of the 96th Article of War. Confinement in a penitentiary is authorized by Article of War 42 for the offense of manslaughter involved in the Specification, Charge I, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by sections 274 and 275, Criminal Code, 18 U.S.C. 453, 454.

Nestor S. Hall, Judge Advocate.

Chas. B. Besson, Judge Advocate.

Morris N. Jaffe, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218325

OCT 17 1941

UNITED STATES v. Second Lieutenant WILLIAM GRABER R. HARRIS (0-403933), Air Corps.	4TH AIR FORCE Trial by G. C. M., convened at Hamilton Field, California, September 12, 1941. Dismissal.

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, Judge Advocates.

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.

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant William Graber R. Harris, Air Reserve, 79th Pursuit Squadron, 20th Pursuit Group (I), GHQ AF, Hamilton Field, California, with intent to defraud the Post Exchange, Hamilton Field, California, did at Hamilton Field, California, on or about March 14, 1941, unlawfully pretend to Willard Ward, an authorized employee of said Post Exchange, that he was Arthur P. Larsen, well knowing that said pretense was false, and by means thereof did fraudulently obtain from the said Post Exchange merchandise of the value of about $2.16.

Specification 2: In that Second Lieutenant William Graber R. Harris, Air Reserve, 79th Pursuit Squadron, 20th Pursuit Group (I), GHQ AF, Hamilton Field, California, with intent to defraud the Post

Exchange, Hamilton Field, California, did at Hamilton Field, California, on or about March 14, 1941, unlawfully pretend to Eleanor Robbins, an authorized employee of said Post Exchange, that he was John L. Pierson, well knowing that said pretense was false, and by means thereof did fraudulently obtain from the said Post Exchange merchandise of the value of about $6.90.

Specification 3: In that Second Lieutenant William Graber R. Harris, Air Reserve, 79th Pursuit Squadron, 20th Pursuit Group (I) GHQ AF, Hamilton Field, California, with intent to defraud the Post Exchange, Hamilton Field, California, did at Hamilton Field, California, on or about March 14, 1941, unlawfully pretend to Jean Anderson, an authorized employee of said Post Exchange, that he was Gerald E. Wilson, well knowing that said pretense was false, and by means thereof did fraudulently obtain from the said Post Exchange merchandise of the value of about $2.55.

Specification 4: In that Second Lieutenant William Graber R. Harris, Air Reserve, 79th Pursuit Squadron, 20th Pursuit Group (I) GHQ AF, Hamilton Field, California, with intent to defraud the Post Exchange, Hamilton Field, California, did at Hamilton Field, California, on or about March 17, 1941, unlawfully pretend to Eleanor Robbins, an authorized employee of said Post Exchange, that he was John A. Simon, well knowing that said pretense was false, and by means thereof did fraudulently obtain from the said Post Exchange merchandise of the value of about $7.60.

Specification 5: In that Second Lieutenant William Graber R. Harris, Air Reserve, 79th Pursuit Squadron, 20th Pursuit Group (I), GHQ AF, Hamilton Field, California, with intent to defraud the Post Exchange, Hamilton Field, California, did at Hamilton Field, California, on or about April 7, 1941, unlawfully pretend to Eula Phillips, an authorized employee of said Post Exchange, that he

was Allen P. Larsen, well knowing that said pretense was false, and by means thereof did fraudulently obtain from the said Post Exchange merchandise of the value of about $1.80.

Specification 6: In that Second Lieutenant William Graber R. Harris, Air Reserve, 79th Pursuit Squadron, 20th Pursuit Group (I), GHQ AF, Hamilton Field, California, with intent to defraud the Post Exchange, Hamilton Field, California, did at Hamilton Field, California, on or about April 8, 1941, unlawfully pretend to R. Peaslee, an authorized employee of said Post Exchange, that he was Lt. J. J. Stone, well knowing that said pretense was false, and by means thereof did fraudulently obtain from the said Post Exchange merchandise of the value of about $1.79.

Specification 7: In that Second Lieutenant William Graber R. Harris, Air Reserve, 79th Pursuit Squadron, 20th Pursuit Group (I), GHQ AF, Hamilton Field, California, with intent to defraud the Post Exchange, Hamilton Field, California, did at Hamilton Field, California, on or about April 12, 1941, unlawfully pretend to Dorothy Roberson, an authorized employee of said Post Exchange, that he was John J. Stone, well knowing that said pretense was false, and by means thereof did fraudulently obtain from the said Post Exchange merchandise of the value of about $25.20.

Specification 8: In that Second Lieutenant William Graber R. Harris, Air Reserve, 79th Pursuit Squadron, 20th Pursuit Group (I), GHQ AF, Hamilton Field, California, with intent to defraud the Post Exchange, Hamilton Field, California, did at Hamilton Field, California, on or about May 27, 1941, unlawfully pretend to Margaret Thayer, an authorized employee of said Post Exchange, that he was Lt. William Morris, well knowing that said pretense was false, and by means thereof did fraudulently obtain from the said Post Exchange merchandise of the value of about $3.10.

He pleaded guilty to, and was found guilty of, the Charge and all Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The findings and sentence were announced in open court. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution as to each Specification may be summarized as follows:

Mr. Willard Ward, an employee of the post exchange service station, testified as to Specification 1 that a certain paper marked Exhibit 1 is a duplicate copy of a sales tag which he made out, and that he delivered the merchandise referred to on that slip to the person who signed his name thereon. (R. 9-10) The articles referred to on this paper are the same referred to in the confession of the accused in his statement as to this transaction.

Miss Eleanor Robbins, a clerk in the post exchange, testified that the two papers, marked Exhibits 2 and 4, are "chits" of charges at the post exchange; that she made out these slips; that Exhibit 2 refers to a charge for a fountain pen, stationery and ink, and is signed by John L. Pierson; that Exhibit 4 is a charge slip covering the purchase of three shirts, and is signed by John A. Simon; that she delivered the merchandise to the persons who signed the slips. (R. 10-11)

It was stipulated with reference to Specification 3 that Jean Anderson if present would testify that she delivered goods of the value of about $2.55 to a man who signed his name as Gerald E. Wilson. (R. 11) The price charged for the goods and the name used as that of the customer who bought the shirts agreed with the confession of the accused as to this transaction.

It was stipulated with reference to Specification 5 that Eula Phillips if present would testify that she was an authorized employee of the post exchange, and that she delivered goods of the value of $1.80 to a man who signed his name as Allen P. Larsen. (R. 11) The charge slip was introduced in evidence and marked Exhibit 5. The amount and name on this slip agree with the confession of accused as to this particular transaction.

With reference to Specification 6 it was stipulated that R.

Peaslee if present would testify that he gave goods of the value of $1.79 to the man who signed his name as Lieutenant J. J. Stone. (R. 12) The charge slip covering this transaction was received in evidence and marked Exhibit 6. The amount and the name which appear on this slip correspond to the confession made by the accused as to this transaction.

With reference to Specification 7 it was stipulated that Dorothy Roberson if present would testify that she delivered goods of the value of $25.20 to a man who signed his name as John J. Stone. (R. 12) The charge slip covering this transaction was introduced in evidence and marked Exhibit 7. The amount and the name on this slip correspond to the statement made by the accused in his confession as to this transaction.

As to Specification 8 a stipulation was introduced to the effect that if present Margaret Thayer would testify that she was an authorized employee of the post exchange, and delivered goods of the value of about $3.10 to a man who signed his name as Lieutenant William Morris. (R. 12) The charge slip covering this transaction was introduced in evidence and is marked Exhibit 8.

Captain Raymond A. Nelson, Air Corps, testified that he is post exchange officer at Hamilton Field. He examined Exhibits 1 to 8, inclusive, and stated that they are post exchange slips used in the normal routine of post exchange business for setting up charge purchases made by customers. His attention was brought to these slips when the statements covering same were returned at the end of the month as unclaimed. An effort was made to locate the persons whose names appeared on the slips but there was no record of any persons bearing those names. Captain Nelson further testified that the bills were paid in full by accused on or about August 15, 1941. (R. 12,13) The date of this payment by accused is one month after the charges were drawn.

All of these post exchange slips are attached to the record as prosecution's exhibits and are marked Nos. 1 to 8, inclusive.

First Lieutenant Patrick W. Hayes, Air Corps, testified that accused, after having been duly warned by him, made a full and complete confession as to the matters covered by the several Specifications, which confession was transcribed, introduced in evidence and is attached to the record marked Exhibit 9.

Accused, having been advised of his rights as a witness, elected to remain silent and no evidence was introduced by the defense.

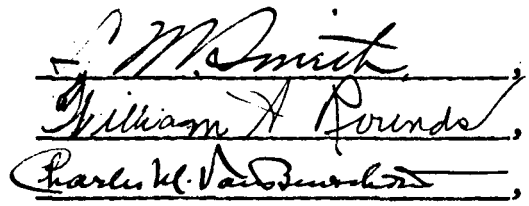
4. While the evidence adduced before the court as to all of the Specifications is fragmentary, it is sufficient to establish the corpus delicti, and when considered in connection with the pleas and the confession of accused is conclusive.

5. The charge sheet shows that accused was about 22 years of age at the time of the commission of the offenses, with prior enlisted service as follows:

> "10-13-38 to 1-26-40, Battery 'D', 65th C.A. (AA); 1-27-40 to June, 1940, C. A. School, Fort Winfield Scott, Calif.; June, 1940, to 2-7-41, Flying Cadet, Maxwell Field, Ala."

War Department records disclose that he was commissioned a second lieutenant, Air Corps Reserve, on February 7, 1941, and assigned to active duty at Hamilton Field, California, on or about February 18, 1941.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of 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 of dismissal is mandatory upon conviction of violation of the 95th Article of War.


, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218342

OCT 31 1941

UNITED STATES	2nd ARMORED DIVISION
v.	Trial by G.C.M., convened at Fort Benning, Georgia, August 7 and 8, 1941. Dishonorable discharge and confinement for ten (10) months. Disciplinary Barracks.
Private BALLARD HALE (6936912), Reconnaissance Company, 66th Armored Regiment.	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

2. The accused was found guilty of a, desertion at Sparta, Tennessee, on or about June 16, 1941, terminated by apprehension at Sparta, Tennessee, on or about June 17, 1941, in violation of Article of War 58 (Specification, Charge I); b, wrongfully disposing on June 17, 1941, of certain property of a total value of $11.63, issued for use in the military service of the United States, in violation of Article of War 84 (Specification 1, Charge II); and c, conduct to the discredit of the military service by firing a service revolver loaded with live ball ammunition upon private property, in violation of Article of War 96 (Specification, Charge III).

Evidence of one previous conviction for absence without leave for fifteen days was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, remitted two months of the confinement imposed because of the length of time accused had been in confinement, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

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3. The only question requiring consideration is the legal sufficiency of the record to support the findings of guilty of desertion alleged in Charge I and its Specification.

The record contains no proof that accused was absent without leave on or about June 16 or 17, 1941. The only testimony having any reference to absence without leave is that of Lieutenant Light, his company commander, that accused from the beginning of the maneuvers to include June 17, 1941, was assigned on special duty at the "Post Office", and his incompetent statement that he received a letter from the military police in Tennessee that accused was A.W.O.L. (R. 9). Lieutenant Light read from an extract copy of the morning report of his organization the only entries therein as to accused on June 16 and 17, 1941, an entry on June 17th that accused was that date placed under arrest and on June 20th that he was "arrested in confinement" at Manchester, Tennessee. He further testified that there was no entry in his morning report indicating that accused was absent from duty at any time between June 16 and 17, 1941 (R. 9-10). No competent proof was offered of the apprehension of accused.

In the absence of any competent proof that accused was either absent without leave on or about the dates alleged or was apprehended, the record entirely fails to support the findings of guilty of desertion.

4. The maximum authorized punishment for wrongful disposition of property issued for use of the military service of the United States of a value of $20 or less is dishonorable discharge, total forfeitures, and confinement at hard labor for six months. The maximum authorized punishment for disorderly conduct under such circumstances as to bring discredit upon the military service is confinement for four additional months, a total authorized confinement of ten months.

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of the Specification, Charge I, and of Charge I.

The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specification 1, Charge II, and of Charge II, of the Specification, Charge III, and of Charge III, and the sentence.

Judge Advocate.

Chas. B. Bresson Judge Advocate.

Thomas H. Tapp Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218385

NOV 21 1941

UNITED STATES	)	4th ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Pine Camp, New York, September 29, 1941. Dismissal.
Second Lieutenant ROBERT W. CAPITELL (0-396588), Cavalry, 35th Armored Regiment (L).	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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.

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

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

Specification: In that 2nd Lieutenant Robert W. Capitell, Cavalry, 35th Armored Regiment (L), did, without proper leave, absent himself from his command at Fort Wayne, Michigan from about 6:30 A.M. September 3, 1941 to about 10:00 A.M. September 3, 1941, when he rejoined at Toledo, Ohio.

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

Specification 1: In that 2nd Lieutenant Robert W. Capitell, Cavalry, 35th Armored Regiment (L), having been restricted to the limits of camp, did, at camp, in National Guard Armory, Buffalo, New York, on or about September 4th, 1941, break said restriction by going to other parts of the city of Buffalo, New York.

Specification 2: In that 2nd Lieutenant Robert W. Capitell, Cavalry, 35th Armored Regiment (L), was at National Guard Armory, Buffalo, New York, on or about September 5th, 1941 drunk in camp.

Specification 3: In that 2nd Lieutenant Robert W. Capitell, Cavalry, 35th Armored Regiment (L), did at Buffalo, New York, on or about September 5, 1941, render himself unfit for duty by the excessive use of intoxicants this to the prejudice of good order and military discipline.

The plea of accused in bar of trial that he had been restricted under the 104th Article of War, was properly overruled. He then pleaded not guilty to, and was found guilty of, all Specifications and Charges. Evidence of one previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the provisions of Article of War 48.

3. Lieutenant Colonel Frederick W. Fenn was in command of a convoy which had arrived at Fort Wayne, Michigan, for the purpose of receiving and transporting to Pine Camp about sixty new two and one-half ton trucks. Captain Gerald G. Daubek was maintenance and gasoline supply officer. Captain Howard M. Thacker was in command of the second serial of this convoy. Second Lieutenant Thomas G. Churchill was the advance agent of the convoy. The accused was scheduled to move with the first serial as motorcycle officer to control traffic en route.

a. As to Charge I and the Specification thereunder, the absence without leave of accused is conclusively established by the testimony of Captain Daubek (R. 7), of Captain Thacker (R. 16), of First Lieutenant Mulliniks (R. 22-23), the deposition of Lieutenant Colonel Fenn (R. 15; Ex. A), and the unsworn statement of accused (R. 33-35).

The substance of their testimony is that the accused was a member of the convoy which left Fort Wayne, Michigan, under command of Colonel Fenn at seven o'clock on the morning of September 3, 1941, but that accused did not report for duty, and was absent without leave until he rejoined the convoy at Toledo, at ten o'clock on the morning of that day. On the previous evening accused and

Lieutenant Mulliniks accompanied Colonel Fenn in a taxi to Detroit. The accused became separated from these officers and because he was without funds for transportation, proceeded in some undisclosed manner to Fort Wayne, and arrived there early in the morning of September 3rd, after the convoy had departed.

b. As to Specification 1, Charge II, the allegation that accused breached a restriction to the limits of camp at Buffalo, New York, September 4, 1941, is established by the testimony of Captain Daubek (R. 7), of Captain Thacker (R. 16-17), of Lieutenant Churchill (R. 20), of Lieutenant Mulliniks (R. 23), by the deposition of Colonel Fenn (R. 15; Ex. A), and the unsworn statement of accused (R. 34).

The substance of their testimony is that at Cleveland on September 3, 1941, Colonel Fenn said to accused "You are restricted to camp" (R. 7; Ex. A). This restriction was intended to last until the convoy returned to Pine Camp to insure accused's future presence for duty and not as a punishment for absence from duty that morning (Ex. A). The next camp site on September 4th was the National Guard Armory at Buffalo. On that evening accused in company with Captain Thacker and Lieutenant Mulliniks left the armory about 8 p.m., and visited in the city of Buffalo. Before leaving the armory Captain Thacker told accused as a friendly tip, that it would be best for him to get the Colonel's permission as he, Captain Thacker, did not know whether the restriction was only for the night in Cleveland or for the duration of the convoy. Accused could not find Colonel Fenn at the time and proceeded to Buffalo in spite of this warning. He left the armory in plain view of all including the Officer of the Day (R. 18, 34). At about ten o'clock in the evening, Captain Daubek, who was Officer of the Day, made a search of the camp area for accused but did not see him until the next morning (R. 7). Captain Daubek was "closest" to Colonel Fenn when he restricted the accused and knew that the restriction was meant for the trip, though it might have been misunderstood by the others, including accused, as Colonel Fenn had turned his back when he restricted accused to camp. In the opinion of Captain Daubek the instructions as to restriction were not indefinite (R. 10). There was doubt in the mind of Captain Thacker about the restriction (R. 18) as well as in the mind of Lieutenant Churchill, who asked Colonel Fenn about it because he thought it would be misunderstood (R. 20). Second Lieutenant Samuel J. Seiglar thought that the restriction applied

to the place where they stopped for the first night (R. 32). Accused believed that the restriction pertained to the encampment at Cleveland only, but realized later that he was mistaken in this belief.

c. The offenses alleged in Specifications 2 and 3, Charge II, are closely related and will be considered together. The testimony for the prosecution with respect to these two Specifications is as follows:

(1) On the morning of September 5th, at Buffalo, everybody overslept and had no breakfast. Colonel Fenn did not have his coffee and was quite angry. He called accused's name out in a loud voice, shouting and hollering in an angry voice several times, then strode over to accused's bed, picked it up, dumped it over violently and threw accused out on the cement floor. The bed rolled about three feet and accused about five feet beyond the bed (R. 8). As a result, the accused received an injury to his left great toe, one of his elbows was injured, and he was greatly shocked.

(2) Captain Daubek testified that accused was drunk on the morning of September 5th. His opinion was based on the fact that accused was unsteady, his eyes were not steady and did not focus, and his speech was incoherent and thick (R. 8). He was too far from accused to smell his breath and did not examine him as completely as he would have liked. His examination would have been much more complete had he known he would have been later required to give testimony before a court. He did not give accused any sobriety tests, nor report him unfit for duty, and stated that unfitness for duty of accused could have been caused by other things than liquor (R. 12, 15).

Colonel Fenn in his deposition stated that accused appeared to have a very severe hangover from the use of intoxicating liquor, to the extent that his eyes were vacant, unsteady, and was not steady on his feet even while standing still after he had been in the bathroom several minutes and had full opportunity to be thoroughly awakened (Ex. A).

Captain Thacker (R. 18) had no opportunity to make a study of accused's condition that morning. He did not think accused was suffering from the effects of drinking. He was neither intoxicated nor drunk when they returned to camp the night of September 4th. Accused did no more drinking than Thacker nor Lieu-

tenant Mulliniks the night of September 4th (R. 17-18).

(3) Three witnesses for defense, Lieutenant Churchill (R. 20), Lieutenant Mulliniks, M.C. (R. 23-24), and Lieutenant Seiglar (R. 32), all testified that the accused was not drunk but was sober on September 4th and 5th.

Accused made an unsworn written statement, in which he said, among other things, that he was not drunk the night of September 4th, and was dead sober the next morning (R. 35).

4. Drunkenness, within the meaning of the 85th Article of War, is defined in the Manual for Courts-Martial, 1928, page 160, as "* * * any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties * * *."

The testimony of prosecution witnesses, Captain Daubek and Colonel Fenn, tends to support drunkenness within that definition. The opinion of both of these witnesses as to the sobriety of accused was based upon his conduct and demeanor; the fact that he was unsteady on his feet, his eyes were unsteady and did not focus, his speech was incoherent and thick, and that he gave evidence of having a severe "hangover" from the use of intoxicating liquor.

5. On the other hand, three defense witnesses, Lieutenant Churchill (R. 18), Lieutenant Mulliniks, M.C. (R. 23-24), and Lieutenant Seiglar (R. 32), two of whom had been in company with the accused on the night of September 4th, testified that the accused was not drunk but sober on September 4th and 5th.

6. As will be seen, there is considerable conflict in the testimony of the witnesses concerning the physical and mental condition of the accused on the morning in question. In fact only one witness, Captain Daubek, testified positively that accused was drunk, and on redirect examination and recross by defense counsel, he admitted that the use of intoxicants might have contributed to accused's unfitness for duty, and that other things than liquor could have caused his unfitness for duty. He also admitted that he could have made a more thorough investigation of accused and would have made a more thorough examination had he known he would have been called upon to testify before a court. Colonel Fenn did not testify that accused was drunk but that his conduct and demeanor gave evidence of the fact that he was suffering from a severe "hangover" from the use of intoxicating liquor.

As opposed to this testimony three witnesses for the defense, one of whom, Mulliniks, was a medical officer, testified positively that accused was not drunk but sober on September 4th and 5th, but gave no facts on which to base their statements.

> "* * * It is well settled that a witness may state whether or not another was intoxicated at a particular time, without narrating the facts on which he bases his opinion; and it is also permissible for a nonexpert witness to state how far another was affected by intoxication. * * * The acts, conduct, and demeanor of a person under the influence of intoxicants cannot be accurately reproduced, and for this reason the question of intoxication is better determined from the direct answers of those who saw him, than from any description of his conduct. * * *." (State v. Cather, 121 Iowa, 106, 96 N.W. 722.)

> "* * * Whether a person is drunk is a question which a person not an expert is competent to answer, as this is something which may fairly be considered to be a matter of common knowledge and observation. People v. Eastwood, 14 N. Y. 562; State v. Huxford, 47 Iowa, 16. * * *." (Burt v. Burt, 168 Mass. 204, 46 N.E. 622.)

> "Upon a trial where the offense is drunkenness or drunken conduct charged under article 62, or drunkenness on duty charged under article 38, it is not essential to confine the testimony to a description of the conduct and demeanor of the accused, but it is admissible to ask a witness directly if the accused 'was drunk,' or for a witness to state that the accused 'was drunk,' on the occasion or under the circumstances charged. Such a statement is not viewed by the authorities as of the class of expressions of opinion which are properly ruled out on objection unless given by experts, but as a mere statement of a matter of observation, palpable to persons in general, and so, proper to be given by any witness as a fact in his knowledge." (Dig. Ops. JAG 1912, XI A 8, p. 530.)

7. To warrant confirmation of the sentence the evidence must show, beyond a reasonable doubt, that accused is guilty of the offenses with which he is charged, and of which the court has found him guilty.

> "* * * The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt. * * *." (M.C.M., 1928, par. 78 a.)

The evidence in this case does not exclude the fair and reasonable hypothesis that the physical and mental condition of the accused on the morning of September 5, 1941, was the result of factors other than intoxicants or that things other than intoxicants rendered him unfit for duty on that date.

The Board of Review is, therefore, of the opinion that the evidence is not legally sufficient to establish the guilt of the accused as to Specifications 2 and 3 of Charge II beyond a reasonable doubt.

8. Since the more serious offenses of drunk in camp on September 5, 1941, and rendering himself unfit for duty by the excessive use of intoxicants on the same date as alleged in Specifications 2 and 3, respectively, of Charge II are not supported by the evidence beyond a reasonable doubt, the question arises as to whether Charge I and the Specification thereunder, absence without leave for about three hours, and Specification 1, Charge II, breach of restriction under the circumstances and in the manner alleged, are sufficiently serious offenses standing alone to warrant the sentence of dismissal.

The present conviction does not, however, stand alone. There was introduced in evidence a true extract copy of a previous conviction of accused of unlawfully entering the maid's quarters of the residence of First Lieutenant Mitchell W. Phillips at Fort Knox, Kentucky, on two separate occasions, January 14 and 15, 1941, in violation of the 96th Article of War, and within eight months of the time of the commission of the offenses involved in the present trial. For this previous conviction the accused was reprimanded.

9. At the time of the trial accused was twenty-six years of age. The statement of his service is as follows:

> Appointed Second Lieutenant, Cavalry, Officers' Reserve Corps, July 22, 1940. Ordered to extended active duty for one year, effective August 12, 1940. Extended to August 11, 1942.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial.

In the opinion of the Board of Review the record is not legally sufficient to support the findings of guilty of Specifications 2 and 3, Charge II, but is legally sufficient to support the findings of guilty of Charge I and the Specification thereunder, of Specification 1, Charge II, and of Charge II, and to support the sentence, and warrants confirmation of the sentence. Dismissal is authorized for violation of the 61st or of the 96th Article of War.

Walter S. Kidd Jr., Judge Advocate.

Charles L. Grosson, Judge Advocate.

Thomas H. Taffy, Judge Advocate.

1st Ind.

War Department, J.A.G.O., DEC 4 1941 To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert W. Capitell (0-396588), Cavalry, 35th Armored Regiment (L).

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of Specifications 2 and 3, Charge II, but legally sufficient to support the findings of guilty of Charge I and the Specification thereunder, of Specification 1, Charge II, and of Charge II, and to support the sentence and to warrant confirmation of the sentence.

3. I recommend that the sentence be confirmed, but the fact that the record is not legally sufficient to support the finding of guilty of the two more serious offenses, and the fact that the offenses of which accused stands convicted are not sufficiently serious to warrant dismissal, even when considered in the light of his previous conviction, I recommend that the sentence of dismissal be commuted to the forfeiture of $25 per month for six months and to a reprimand.

4. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to confirm the sentence but to commute the sentence of dismissal to forfeiture of $25 per month for six months and to a reprimand to be administered by the Commanding General, 4th Armored Division, should such action meet with approval.

Myron C. Cramer.

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls -
Incl 1 - Record of trial.
Incl 2 - Drft. of let. for sig. Sec. of War.
Incl 3 - Form of Executive action.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218393

OCT 30 1941

UNITED STATES	)	FOURTH CORPS AREA
v.	)	Trial by G. C. M., convened at Fort Benning, Georgia, September 16, 1941. Dismissal.
First Lieutenant GEORGE A. CALLAN (0-407649), 181st Infantry.	)	

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, Judge Advocates.

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.

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

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

Specification: In that First Lieutenant George A. Callan, 181st Infantry, while on duty as a student, The Infantry School, was at Columbus, Georgia, on or about August 8-9, 1941, in a public place, to wit, Buddy's Place, 1326 Glade Road, drunk and disorderly while in uniform.

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

Specification: In that First Lieutenant George A. Callan, 181st Infantry, did, at Columbus, Georgia, on or about August 8-9, 1941, violate published post orders by entering a business establishment declared "off limits" to officers, to wit, Buddy's Place, 1326 Glade Road.

He pleaded not guilty to, and was found guilty of, both Charges and the Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The findings

and sentence were announced in open court. The reviewing authority approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence of record may be summarized as follows:

On the same day Lieutenant Callan reported for duty as a student officer to the Infantry School at Fort Benning, Georgia, and was assigned to Company E, his faculty company commander gave the newly formed company an orientation talk during which he read to them a post order (General Order No. 18, Headquarters Fort Benning) which directs attention to the fact that certain establishments in Columbus, Georgia, and vicinity are declared "off limits" for officers and defines certain restricted areas. He also directed each of them to read a list of such places then posted on the company bulletin board. This list, designating by name and location the places declared "off limits", is incorporated in an official letter dated May 9, 1941, from the Commanding General, Fort Benning, to the commanding officers of all separate organizations. The pertinent part of this letter reads as follows:

> "In connection with letter, this headquarters, file 250.1, subject, 'off limits for officers', May 5, 1941, the following business establishments are declared 'off limits' to officers of this command:
> * * * * * *
> Buddie's Place Near Provision Co. on Benning Blvd."
> (Pros. Ex. A)

Lieutenant Callan was present and received these instructions. At the time the talk was given this list was actually posted on the bulletin board of Company E (R. 9-13 and Ex. A).

Lieutenant Colonel William S. Wilkinson, the post adjutant of Fort Benning, the custodian of the official records of post headquarters, verified the authenticity, publication and distribution of the order of May 9, 1941, and testified that it was still in effect on August 8 and 9, 1941 (R. 8).

The address of Buddie's Place is averred in the Specification of Charge II as "1326 Glade Road". In the published order of May 9, the

address 1326 Glade Road does not appear. The proprietor, Mr. Robert Darlan Roberson, testified that the address is "1326 Fort Benning, or Glade, Road" and explained that Glade Road is commonly known under three different names, Fort Benning Road, Glade Road, or Cusseta Road (R. 14).

Private First Class Alton J. Gordon, a member of the local military police detachment, described the location of the place as on Glade Road near the Provision Company, and explained that Glade Road starts on 10th Avenue, runs to Benning Park where it joins Cusseta Road and that Benning Boulevard also runs into Cusseta Road (R. 52). It is all one road called by three different names (R. 53).

First Lieutenant Ralph A. Tolve, Assistant Provost Marshal, Fort Benning, testified that Buddie's Place is on Glade Road right across from, and approximately 50 yards below, the Provision Company. Coming out from the city of Columbus this road is known as Glade Road as far as the city limits, then becomes Fort Benning Boulevard and, a short distance farther, branches off into the Fort Benning Road which is also known as the Cusseta Highway (R. 41). There is a large sign on the front of the building which reads "Buddie's Place - Soldiers Welcome". It is a cafe and dance hall located within the city limits of Columbus, Georgia (R. 15), which the proprietor advertises as a place for enlisted men only. It is actually a public place which anyone may enter, although the proprietor tries to restrict his patronage to soldiers rather than civilians (R. 15). It is located in a negro section (R. 53), across the street from a big packing plant, the Provision Company (R. 15).

On two occasions prior to the night of August 8, 1941, Lieutenant Callan had visited Buddie's Place (R. 16). The first time, which was about two or three days prior to August 8, he came there about three o'clock in the morning dressed in civilian clothes. The proprietor, Mr. Roberson, warned him that the place was "off limits" for officers. The second time he came in was about 5:30 on the afternoon of August 8. On this visit he was in uniform and again Mr. Roberson warned him that the place was "off limits" for officers (R. 30,31). Finally, on the third occasion, the night of August 8, Mr. Roberson addressed a similar warning to the group at the table where Lieutenant Callan was sitting with his wife and others (R. 17,26,30,32).

On the night of August 8, 1941, "around 9:30 or 10:30", Lieutenant Callan and his wife, a Lieutenant White, a Government employee, Mr.

John C. Williams, and a young lady named Beulah Cunningham who had been in there a good many times, came into Buddie's Place (R. 17). At the moment the place was crowded and they sat down at a table out on the dance floor. Lieutenant Callan showed visible effects of having had something to drink. All of the party had been drinking, especially Mrs. Callan, who showed the effects of it more than the others. At their request, and in order "to get them separated from the rest of the crowd out there and from the soldiers out on the dance floor and milling around", the proprietor, Mr. Roberson, moved them into a booth (R. 18). He thought that they had had something to drink before they came into his place because "that afternoon when they were in the place" he had sold them six 7-Ups which they took with them, "and as a general rule when anybody buys 7-Ups they are going to have something to drink". Later in the evening when they came back they acted as if they had had something to drink and he "could tell they had been drinking" (R. 32,33), but in his opinion their actions were not disorderly at that time. Each member of Lieutenant Callan's party was served three cans of beer during the course of the evening (R. 18,24), one round at the table before they moved over to the booth and two more after they were in the booth (R. 24). The party remained in the place about an hour and a half. Miss Hazel Patterson, who patronizes the place a good deal, works there as an extra sometimes, and who "doesn't have such a good reputation", was out on the floor dancing. She overheard Mrs. Callan call her "a bitch". An argument followed between the two women and they were separated. Mrs. Callan went outside to their car which was parked just outside of the window looking into the booth occupied by her husband and the rest of their party. Hazel Patterson then returned to the booth where Lieutenant Callan was sitting and was apologizing when Mrs. Callan came back and resumed the argument (R. 19). The proprietor forcibly ejected Miss Patterson from the dance floor and Lieutenant Callan asked his wife to leave but she refused (R. 21). Referring to Mrs. Callan's course of action at the moment, Mr. Roberson testified

> "She went over to the booth and leaned over the table and she hit him (Lieutenant Callan) I am sure twice, but any way she hit him at least once and scratched his face, and then he got up from the table to take her out and she wouldn't go, and she continued to hit at him and kept trying to scratch him as he tried to get her to go on out, and so he popped her once at least, ***." (R. 21)

About that time the military police removed both Lieutenant Callan and his wife from the premises and took them out to the place where their car was parked in front (R. 20,21). Mr. Roberson saw Lieutenant Callan slap his wife in the face a couple times and hit her in the face with his fist. He struck her three times in all (R. 22).

> "When he slapped her she fell back against the booth and struck her head and then she came up scratching at his face again and he slapped her a couple of more times, and then is when I started over to see if I could get that stopped and the military police came in" (R. 22,23).

In the opinion of this witness Lieutenant Callan, although drinking, was not drunk. He had not had enough intoxicating liquor so that his faculties were impaired to a point where he did not know what he was doing (R. 23). There was a pretty big crowd there at the time, mostly enlisted men, some in uniform and some in civilian clothes. Some of the men in civilian clothes were civilians. In addition to the civilians who came into the place with Lieutenant Callan and his party there were also present the civilian employees connected with the place and four girls (R. 25).

First Lieutenant Ralph A. Tolve, Field Artillery, testified that in addition to his regular duty as assistant provost marshal, Fort Benning, Georgia, he was, on the night of August 8, 1941, also the officer of the day. In response to a telephone call he drove the official military police car to Buddie's Place, accompanied by Private Gordon of the military police (R. 35), arriving there about 12:30 in the morning of August 9 (R. 40). While parking his car he looked through a window of Buddie's Place and saw Lieutenant Callan "at one of the booths inside that establishment, and he was leaning over and from his motions it looked like he was having a struggle with some person in that booth". They immediately got out of the sedan and went inside and saw that there was no one else in the booth besides Lieutenant Callan and his wife (R. 43). This lieutenant was

> "leaning over a woman who was down in the corner under the table of this booth, and she was crying and her clothing was disarranged and her hair was disheveled, and she looked like she had been in a tussle of some sort, and he was leaning over her and talking in a loud voice." (R.36,40,42,43,45,46)

He called her a "son-of-a-bitch" (R. 47). His nose was bleeding from

scratches on it about an inch from his eye (R. 49). Lieutenant Tolve immediately noticed that Lieutenant Callan was drunk.

> "His eyes were blood-shot and by his actions and the odor of alcohol about him there was no doubt about him being drunk, so I immediately told him who I was, because I was in civilian clothes" (R. 36-37).

He placed Lieutenant Callan under arrest and told him to go outside and wait in the official car. The woman in the booth with him, Mrs. Callan, got up off the bench and they left the place together and went out to the official car with Private Gordon. All the people in the place had cleared the floor and were watching the scene. There were approximately ten people in the room (R. 41). Lieutenant Callan was in uniform, he was in a public place, he was drunk and he was disorderly (R. 40).

Private First Class Alton J. Gordon, the military policeman who drove Lieutenant Tolve to Buddie's Place, corroborates the testimony of Lieutenant Tolve with respect to the drunkenness of accused and the appearance of a struggle going on between him and some person (then unknown to witness) before he and Lieutenant Tolve entered the cafe. When they all got on the outside Lieutenant Tolve directed Private Gordon to get in Callan's car and drive them home. He said that he would follow in the military police car. Lieutenant Tolve then went off to investigate another matter and while he was gone Mrs. Callan got in the car, said it was her car and that she was not going to let anybody else drive it. Lieutenant Callan told her to get out and when she refused he reached over and struck her in the face with his hand. Gordon testified that Lieutenant Callan was then in uniform and was drunk (R. 52).

The accused's rights as a witness were explained to him both by his counsel (R. 88) and by the law member of the court (R. 89). He elected to remain silent. The evidence of record adduced by the defense may be summarized as follows:

Miss Ellington Mornlight Pattillo, also known as Hazel Pattillo, resides at Columbus, Georgia, and was in Buddie's Place on the night of August 8 between the hours of 11 and 12:30. She was not employed there but she was there because she liked to go. She does not remember whether she was alone or with someone (R. 57). She danced and had a few beers, how many she does not recall but she did not get drunk or feeling high (R. 58). She has no personal acquaintance with Lieutenant Callan but

she happened to notice him at a table in a booth across from where she was sitting and she saw nothing unusual during the time he was in there. She observed no disorder in his conduct or anything unusual in his appearance or actions. She did not see him strike anyone during the evening and she would say that the character of his behavior on that evening was "pretty decent" (R. 56). In her opinion "he didn't look drunk" (R. 59). She was present all during the time Lieutenant Callan was in Buddie's Place except about ten minutes when she was outside the room (R. 60). She didn't pay much attention to Lieutenant Callan and although she was inside the place when the military police arrived she did not particularly notice what they did. "I just noticed them come in the door and that was about all the attention I paid to them" (R. 59).

Miss Sue Petrick, who is a maid by occupation and lives in Columbus, Georgia, was in Buddie's Place between the hours of 11:00 p.m., and 12:30 a.m., on August 8-9. It was her birthday and she went there to celebrate and have a few drinks (R. 62). She saw no disturbance in there that night to speak of. "There was a minor disturbance of some kind, but I couldn't hear any of it and didn't see much to it, and I was sitting directly across the room from it." She does not know the persons who were involved in it. She had had around three drinks of beer and was entirely sober (R. 63). She ate a sandwich, visited with a girl friend and did not dance. Upon being shown a signed sworn statement previously made by her during the investigation of this case, and her memory having been refreshed, she testified that although she was not watching Lieutenant Callan on that night she overheard some of his conversation with his wife in which he was trying to get his wife to go home. She heard no foul language nor saw anything out of the way (R. 68,69).

Mr. John C. Williams, a draftsman employed by the quartermaster at Fort Benning, and living at Columbus, Georgia, was a member of Lieutenant Callan's party at Buddie's Place on the night of August 8. He and his wife occupy a furnished room in the same apartment house building in which the Callans live. He saw no evidence of disorder in Lieutenant Callan's conduct at any time during that night "unless you could call what he said to his wife trying to quiet her a disorder, and he just said that trying to quiet his wife" (R. 72). Lieutenant Callan was not drunk and he did not strike Mrs. Callan to keep her quiet. Witness was present in the same booth with them all the time that they were in the place. He is sure that he himself did not have more

than three cans of beer to drink. When the military police arrived, Lieutenant Callan and his wife were both sitting properly at the table in the booth acting in an orderly manner (R. 79,80). He believes that Mrs. Callan tried to scratch Lieutenant Callan when she tried to get up to go out on the floor to fight with this other young lady and Lieutenant Callan tried to get her to sit quiet. As a result Lieutenant Callan had a scratch on his face. Witness saw it a couple of days later but on the night in question he did not see him get scratched or notice a scratch on his face (R. 80).

Major Fred K. Estes, 181st Infantry, a student in the advance company, the Infantry School, Fort Benning, has known Lieutenant Callan personally for the past eight months, that is, since the day of his induction on January 16, this year, and has been closely associated with him during that time. Lieutenant Callan's habits are very good and he has never seen him take a drink or act in a disorderly way at any time. To his knowledge he has never been drunk (R. 83).

First Lieutenant David I. Davores, Infantry, a fellow student officer in Company E, testified that he has known Lieutenant Callan for about two years and during the time that he was a guard at the State Prison in Norfolk, which is the State Penitentiary in Massachusetts. The requirement as to sobriety for persons engaged in that type of work is high, and from his observation of Lieutenant Callan during the period he has known him, his habits are moderate and he is not addicted to excesses (R. 84-85).

Major Frederick R. Undritz, Infantry School Service Command, who made the preliminary investigation of the charges in this case, testified that on August 10, 1941, he interviewed Mrs. Callan, who desired to be called as a witness at the investigation, and although she sat within six or eight feet from him during the interview he noted no bruises or anything of that nature on her face and nothing unusual about her appearance (R. 85-87).

4. The evidence as to the offense alleged in the Specification of Charge II (96th Article of War) discloses that the post order of May 9, 1941, relative to various business establishments declared by the Commanding Officer, Fort Benning, to be off limits for all officers serving at the Infantry School, was one of general scope issued to the command of which accused was a member. The terms of this order were clear, unmistakable and unambiguous. The order specifically designated by name and location the particular place of business which

the accused chose to patronize on August 8, 1941. Furthermore, since accused's company commander, during his orientation talk to the company, personally directed each officer listening to him, which included the accused, to read this order which was then posted on the company bulletin board, it became, as to accused, express and personal. The testimony of the proprietor of the place, which was affirmative in character and neither explained away nor denied by other testimony, conclusively establishes that not only on the night of August 8, 1941, did accused voluntarily enter this dance hall, but that on two previous occasions he had visited there and had been warned by him that it was off limits to officers. These circumstances compel the conclusion that the violation of this order by accused on the date alleged could not have occurred through ignorance, accident or mistake but, on the contrary, was voluntary, willful and deliberate.

The report of the officer who investigated the case, attached to the record of trial, states that Buddie's Place is located in the heart of the colored district in Columbus. Such an environment alone is sufficient to suggest that it is not a proper place for an Army officer to visit himself, much less a place to which he could with propriety take his wife. On the night of August 8, 1941, Lieutenant Callan was there in the full uniform of an officer of the Army, accompanied by his wife. The order of May 9, 1941 (Pros. Ex. A) refers to a previous letter of May 5, 1941, also relating to the subject of "off limits" to officers, a copy of which appears with the investigation papers in this case. This letter of May 5 is cited here for the sole purpose of revealing the questionable character of establishments such as Buddie's Place, together with the reasons underlying the order restricting officers from patronizing them -

> "It has come to the attention of this headquarters that many Officers are frequenting the so called 'honky tonks' commonly patronized by soldiers. Some have been seen dancing and otherwise associating with girls of questionable character and fraternizing with enlisted men. As this is not only disgraceful but is injurious to discipline, all of these establishments are hereby placed off limits for Officers, and any Officer found therein by a Military Police Officer will be returned to the Post in arrest."

The evidence with respect to the offense alleged under Charge I (95th Article of War) is clear and conclusive and undisputed as to the

allegations that Lieutenant Callan was in uniform in a public place at the time and place averred. The impersonal and disinterested testimony of the provost marshal and the military policeman accompanying him discloses that they were eye and ear witnesses to a heated argument between Lieutenant Callan and his wife about 12:40 a.m., August 9, 1941, in Buddie's Place, during which blows were exchanged between them, and that Lieutenant Callan was drunk. It does not appear that this officer was engaged in the original argument between his wife and Hazel Patterson. He endeavored to keep his wife quiet and to induce her to leave the place. Mrs. Callan resented her husband's interference. She slapped him on the face several times and scratched him about the nose, causing it to bleed. In turn Lieutenant Callan slapped his wife several times and, at least once, struck her with his fist. Husband and wife struck each other, blood was spilled and each resorted to cursing and swearing. This disgraceful domestic brawl occurred in the presence of a number of enlisted men in uniform, some who were not in uniform, and a number of civilians. The indecency and indecorum of Lieutenant Callan's conduct exceeded the limit of tolerance which the individual standards in these respects demands of an officer and below which he cannot fall without being morally unfit to be an officer or to be considered a gentleman. This gross and conspicuous disorder in a public place in uniform is sufficient in itself to constitute a clear violation of the 95th Article of War. On his direct examination Lieutenant Tolve states that there is no doubt that accused was drunk when he first saw him, his eyes were bloodshot and there was an odor of alcohol about him (R. 36). He had difficulty in securing the attention of accused when he spoke to him and when he did answer his voice was hesitant and slow and the odor of alcohol on his breath was profuse. Private Gordon, the military policeman with Lieutenant Tolve, is positive that Lieutenant Callan was drunk on that occasion (R. 53,54). To offset this testimony the defense offered that of Miss Petrick and Miss Pattillo, women patrons of the place on the evening in question, one of whom is an occasional employee. It is apparent that their opportunities for, and powers of, observation of accused's condition and conduct are so limited and self-contradictory as to completely destroy the credibility of their statements. The only member of Lieutenant Callan's party on the evening in question called by the defense as a witness was Mr. John C. Williams, a Government employee. He makes the positive statement that Lieutenant Callan was not drunk (R. 73). He is, however, so evidently a biased witness, and his testimony otherwise so evasive and contradictory as to warrant disbelief. In the opinion of the Board of Review the testimony of these three witnesses as to the conduct and sobriety of the accused lacks plausibility as well as credibility.

5. Lieutenant Callan is now 31 years of age. He was born in Worcester, Massachusetts, on November 12, 1909. His home address is 241 Chestnut Street, Franklin, Massachusetts. His personal file in The Adjutant General's Office, War Department, discloses that in civil life he was last employed for about three years as a Correction Officer, State Prison Colony, Norfolk, Massachusetts, and that he had been a special police officer in Franklin, Massachusetts, for three years. He enlisted in the United States Marine Corps on June 3, 1926, honorably discharged on June 2, 1930, as private first class, character excellent; enlisted in the Marine Corps Reserve on June 3, 1930, honorably discharged January 6, 1933, as private first class to reenlist in regular Marine Corps; reenlisted in regular United States Marine Corps on June 6, 1933, and discharged March 15, 1934, as undesirable (fraudulently enlisted by concealing marriage); enlisted in the 181st Infantry, Massachusetts National Guard, September 17, 1935; honorably discharged as private on September 22, 1939; reenlisted on October 1, 1940. Appointed second lieutenant, Infantry, in the Massachusetts National Guard on December 27, 1940. He was promoted to temporary first lieutenant of Infantry, Army of the United States, effective April 3, 1941. In July 1941 he was ordered from Camp Edwards, Massachusetts, to Fort Benning, Georgia, to attend the Rifle and Heavy Weapons Course at the Infantry School from July 23, 1941, to October 17, 1941.

6. The court was duly constituted. No errors injuriously affecting the substantial rights of 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 of dismissal is mandatory upon conviction of a violation of the 95th Article of War.

L. W. Griffith, Judge Advocate.
William A. Rounds, Judge Advocate.
Charles H. VanBuskirk, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218409

NOV 17 1941

U N I T E D S T A T E S	)	35th INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Joseph T. Robinson, Arkansas, October 7, 1941. Confinement for four (4) months and forfeiture of twenty dollars ($20.00) per month for four (4) months. Camp Joseph T. Robinson, Arkansas.
Private JAMES E. CHADDERDON (20/23190), Company I, 134th Infantry.	)	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

1. The record of trial in the case of the soldier named above, which has been examined in the office of The Judge Advocate General and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review.

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

CHARGE I: Violation of the 63rd Article of War.

Specification: In that Private James E. Chadderdon, Company I, 134th Infantry, did at Camp Joseph T. Robinson, Arkansas, on or about 23 July 1941, behave himself with disrespect toward First Lieutenant Paul H. Jacobs, his superior officer, by refusing to parade in the American Legion Convention Parade.

CHARGE II: (Finding of not guilty.)

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

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

Specification 1: (Finding of not guilty.)

Specification 2: In that Private James E. Chadderdon, Company I, 134th Infantry, did, at Camp Joseph T. Robinson, Arkansas, on or about 23 July 1941, behave in an insubordinate and disrespectful manner toward First Sergeant Frank E. Conner, a noncommissioned officer who was then in the execution of his office, by refusing to parade in the American Legion Convention Parade.

Specification 3: (Finding of not guilty.)

Specification 4: (Finding of not guilty.)

The accused pleaded guilty to Specification 2, Charge III and to Charge III, and not guilty to all other Charges and Specifications. At the conclusion of the case of the prosecution, the law member sustained motions for a finding of not guilty of Specifications 1 and 2, Charge II, and of Specifications 1, 3 and 4, Charge III (R. 20). The accused was found, of the Specification, Charge I, guilty; of Charge I, not guilty, but guilty of violation of the 64th Article of War; of Specifications 1 and 2, Charge II, not guilty; of Specifications 1, 3 and 4, Charge III, not guilty; of Specification 2, Charge III, and of Charge III, guilty. Evidence of one previous conviction in violation of Article of War 65 for striking a moncommissioned officer was introduced. He was sentenced to be confined at hard labor for four months and to forfeit twenty dollars per month for four months. The reviewing authority approved the sentence and designated the Camp Stockade, Camp Joseph T. Robinson, Arkansas, as the place of confinement. The result of the trial was published in General Court-Martial Order No. 27, Headquarters 35th Infantry Division, Camp Joseph T. Robinson, Arkansas, dated October 13, 1941.

3. The only matters requiring consideration are the legal sufficiency of the findings of guilty of the Specification, Charge 1 and/Charge I, and the legal sufficiency of the record to support the sentence. Two questions are involved: first whether that Specification alleges an offense; and second, the effect of the finding of not guilty as to Charge I of a violation of the 63rd Article of War, but guilty of a violation of the 64th Article of War.

a. The Specification Charge I alleges that accused did -

"* * *behave himself with disrespect toward First Lieutenant Paul H. Jacobs, his superior officer, by refusing to parade in the American Legion Convention Parade."

Winthrop in his Military Law and Precedents, Second Edition, page 567, states:

"* * *the term* * *'who behaves himself with disrespect,'&c., is sufficiently general and comprehensive to include all kinds of personal disrespect, whether by acts or words.* * *'It contains no qualifications as to manner, time, or place, and is understood to cover' not merely 'all actions,' but also 'language spoken or written'. This construction is confirmed in practice.* * *.

* * *

"Disprespect toward a commander by acts may be exhibited in a variety of modes - as by neglecting the customary salute, by a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in his presence, by a systematic or habitual disregard of, or delay to comply with, his orders or directions or by issuing counter orders,* * *.

* * *

"* * *Where, however, it is doubtful whether an act, or language, not necessarily disrespectful in se, may properly be treated as amounting to disrespect, the animus of the party becomes a material inquiry.* * *."

In a case in which the accused was found guilty of a violation of Article of War 63 under a specification alleging behavior with disrespect toward a superior officer by "failing to show proper deference to the said _____, and by saying to him: 'I don't like the Major taking the telephone away from me'", The Judge Advocate General stated:

> "On its face the specification is unsatisfactory in that it fails to set out in the affirmative any acts or neglects essentially descriptive of the offense charged. The averment 'behave himself with disrespect * * * by failing to show deference' is obviously an indefinite negative allegation. In the second instance the averment that accused showed disrespect by saying to him 'I don't like the Major taking the telephone away from me' fails to set out the commission of any acts upon which an inference of disrespect might be based at law."

and although it was shown that the accused appeared to be in a "more or less belligerent attitude", the view was expressed that "the evidence is too slightly inculpatory to sustain a conviction under the specification as alleged and, therefore, disapproval of the findings of guilty and the sentence is recommended". (CM 197981, Lewey.)

In the instant case the specification fails to allege either acts or words as constituting disrespect to Lieutenant Jacobs, nor is there any proof of any disrespectful acts or words. In the opinion of the Board of Review, the specification fails to set out the commission of any act upon which an inference of disrespect might be based at law.

b. The court in its finding with respect to Charge I, in violation of the 63rd Article of War, found the accused not guilty, but guilty of violation of the 64th Article of War.

The offense alleged in the specification is behaving with disrespect toward Lieutenant Jacobs, his superior officer. The 63rd Article of War denounces behavior with disrespect to his superior officer. That article denounces no other offense. The

The 64th Article of War denounces striking a superior officer, or draws or lifts up any weapon or offers any violence against him in the execution of his office, or willfull disobedience of any lawful command of a superior officer. The offenses denounced in the 64th Article of War are entirely separate and distinct from the offense denounced in the 63rd Article of War, and are in no respect lesser than nor included within the offense denounced in the 63rd Article of War. In finding accused not guilty of the Charge in violation of the 63rd Article of War, and finding him guilty of the substituted 64th Article of War, the court has found him guilty of an Article of War of which he was not charged, and which was not included in,nor lesser than the 63rd Article of War, of which he was charged.

The maximum authorized punishment for behavior with disrespect to a superior officer is confinement for six months and forfeiture of two-thirds pay per month for a like period. The maximum authorized penalty for willful disobedience, except in time of war or grave public emergency, of the lawful order of a commissioned officer in the execution of his office is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement for five years, while there is no maximum limit of punishment for the other offense denounced by the 64th Article of War.

Winthrop states:

> "It need scarcely be noted that while a court-martial may always convict of a lesser kindred offence, it is not empowered to find a higher or graver offence than the one charged, nor an offence of a different nature. * * *.
>
> * * *
>
> "* * *And this though the evidence clearly shows that the greater or the distinct offence was the one actually committed; for a party cannot be convicted of an offence of which he has not been notified that he is charged and which he had had no opportunity to defend." (Military Law and Precedents, 2nd Ed. p. 383.)

The action of the court in making such a finding violates the rule that the power of courts-martial to make exceptions and

substitutions does not, where the identity of the offense is changed, extend beyond the power to convict of a lesser included offense. (par. 78 c, M.C.M., 1928; CM 186919, Sweat; CM 191 809, Price.)

The reviewing authority failed to exercise its power to correct the erroneous finding of the court by approving only so much of the finding of guilty of Charge I and involved a finding of guilty of violation of Article of War 63. (CM 209536, Cookingham.)

4. The maximum authorized punishment under Specification 2, Charge III - the only remaining specification of which accused was found guilty - for behaving in an insubordinate and disrespectful manner toward a noncommissioned officer in the execution of his office is confinement at hard labor for two months and forfeiture of two-thirds pay per month for a like period (M.C.M., 1928, sec. 104 c).

5. For the reasons stated, the Board of Review holds the record of trial not legally sufficient to support the findings of guilty of Charge I and its Specification, but legally sufficient to support the findings of guilty of Specification 2, Charge III, and of Charge III, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for two months and forfeiture of twenty dollars per month for a like period.

Since the conviction in this case is not of an offense involving moral turpitude or affecting the civil status of the accused, remedial action may be taken in the War Department in compliance with the policy directed by the Secretary of War in his approval of the opinion of The Judge Advocate General of April 13, 1923 (250.404 Review 4-13-23), relative to action under Article of War 50½.

Wm. T. Hill Jr., Judge Advocate.

Chas. L. Bresson, Judge Advocate.

Thomas H. Taffy, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218415

OCT 2 8 1941

U N I T E D S T A T E S	)	PHILIPPINE DIVISION
v.	)	Trial by G. C. M., convened at Fort William McKinley, Philippine Islands, August 25, 1941. Dismissal.
First Lieutenant ALVIN J. BETHARD (0-310686), 45th Infantry (PS).	)	

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, Judge Advocates.

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.

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

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

Specification: In that First Lieutenant Alvin J. Bethard, 45th Infantry (PS) did, at Fort William McKinley, P. I., on or about July 15, 1941, with intent to deceive Colonel Carl H. Seals, AGD, Post Adjutant, Fort William McKinley, P. I., officially state to the said Colonel Seals that he (Bethard) had not been out of his quarters the preceding night and that Lieutenant Gross had used his (Bethard's) car on the said night, which statements were known by the said First Lieutenant Bethard to be untrue.

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

Specification 1: In that First Lieutenant Alvin J. Bethard, 45th Infantry (PS), having been warned by Private First Class German Daquioag, 12th Military Police Company (PS), a sentinel in the

execution of his duty, that it was prohibited to blow his horn on the Post, did, at Fort William McKinley, P. I., on or about July 15, 1941, wrongfully use the following abusive and contemptuous language to the said Private First Class Daquioag, to wit: "God damn it, mind your own business", or words to that effect.

Specification 2: In that First Lieutenant Alvin J. Bethard, 45th Infantry (PS) was, at Manila, P. I. on or about April 29, 1941, drunk and disorderly at Sternberg General Hospital.

Specification 3: In that First Lieutenant Alvin J. Bethard, 45th Infantry (PS) was, at Fort William McKinley, P. I., on or about July 14, 1941, disorderly in station.

Specification 4: In that First Lieutenant Alvin J. Bethard, 45th Infantry (PS) was, at Fort William McKinley, P. I., on or about July 15, 1941, disorderly in station.

He pleaded not guilty to, and was found guilty of, all Charges and the Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The findings and sentence were announced in open court. The reviewing authority approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. Taking the events in the order of their happening the evidence of record shows that Lieutenant Gwendolyn L. Henshaw, Army Nurse Corps, a nurse on duty at Sternberg General Hospital, Manila, Philippine Islands, on the night of April 29-30, 1941, investigated a noisy disturbance in her ward about 9:20 p.m., and found that it was being caused by accused scuffling with another patient, both of whom were "loud and noisy" (R. 8). As accused was unclothed she first called the wardman who failed to quiet them, and subsequently Captain Berry, Medical officer of the day and in direct professional charge of the ward. Accused was not sober, was loquacious, talked with a thick tongue (R. 9), and later in the night became nauseated and vomited and the nurse could smell liquor (R. 10). When Captain Berry arrived on the scene, upon the call of Miss Henshaw, he found accused, with another officer, both

sitting on the same bed, dressed and talking and laughing loudly. He ordered them to go to bed and be quiet. Because of his incoherent speech, redness of his eyes, strong odor of liquor on his breath, his staggering walk and disorderly appearance, in his opinion accused was drunk (R. 13). About twenty minutes later Captain Berry was again called or went back and found the accused still up and that he had vomited all over his bed (R. 14) and it smelled of intoxicating liquor. The accused was perfectly well the next morning (R. 16). The fact that accused had been drunk in the alcoholic ward was placed on Captain Berry's routine report where it was noted the next morning by Colonel Wibb E. Cooper, Medical Corps, the commanding officer of the hospital. Colonel Cooper had accused brought to his office and talked the matter over with him, warning him that a recurrence would subject him to disciplinary action. This was a warning only, not a reprimand (R. 42).

On the nights of July 14 and July 15, 1941, Private First Class German Daquioag, 12th Military Police Company, Fort William McKinley, was posted as a sentry on the south gate to the Fort (R. 26). About 9:50 p.m., on the 14th, an American in civilian clothes, whom he identified in open court as accused, drove a car with plate number 14687 past his post and he took the plate number. The car horn was blowing as the car went through the gate. The next night about 8:15, and while the witness was posted as a sentry, the same car and driver, in uniform, came past with horn blowing and was stopped by him. He saluted accused and said (R. 19), "Sir, blowing the horn in on the post is not allowed." The driver of the car answered, "God damn it, mind your own business", and kept on blowing his car horn as he left (R. 19).

First Lieutenant Matt P. Dobrinic, 45th Infantry (PS), was officer of the day at Fort William McKinley on the night of July 14, 1941. He received and investigated a report of a disturbance on the post caused by the blowing of a car horn. He was given the license number by the gate sentry of a car whose horn had been blown unusually loud and long, and on checking with the license division in the provost marshal's office found that the car in question belonged to the accused (R. 23-24).

Also on the night of July 14, 1941, Colonel Carl H. Seals, Adjutant General's Department, adjutant of the Philippine Division, Fort William McKinley, was awakened sometime after nine o'clock by the very loud and continuous blowing of an automobile horn. Thinking it was a fire truck he arose, looked from the window and saw a car rapidly passing the house and shortly the noise stopped (R. 33). A half minute

later he again heard the same horn and the car repassed. It was a very loud horn and the car appeared to go as far as Quarters 20 when the noise stopped. On the next night, July 15, about 8:25, while sitting in the hall of his quarters, he again heard the loud and continuous blowing of an automobile horn similar to the horn he heard the night before (R. 33). He got his flashlight, went out in front of his quarters and flagged the car. The horn was blowing almost until the car stopped although there was no traffic. Accused was driving the car. The colonel stated, "I am Colonel Seals, the Post Adjutant. Do you understand", and repeated it. Accused answered, "Yes". The colonel then asked him who he was and was answered, "I am Lieutenant Bethard". On being asked what he meant by blowing his horn like that, he answered, "I don't know, I was just blowing". He was told he must be either crazy or drunk to blow his horn like that and in reply to the question where he had been, accused stated he had been down to the club and had something to drink but was not drunk (R. 34). The colonel then told him, "You did the same damn thing last night", to which the accused answered, "No, sir, I wasn't out of my quarters last night. Lieutenant Gross had my car". Accused was then told he would hear more of this in the morning, to go home and to bed and not to use his horn again except to avoid an accident (R. 34). The colonel was certain accused was the same man who had made the same noise the night before (R. 38), and on returning to his quarters wrote out a statement in longhand of what had just occurred with the intention of officially reporting the horn blowing as a disturbance on the post (R. 41).

First Lieutenant Gardner B. Gross, 45th Infantry (PS), Fort William McKinley, who shares the same bedroom and quarters with the accused, returned to his quarters about 6 p.m., on July 14, remaining there until about 8:15 p.m., when he left and spent the evening playing bridge with Captain Uglow and his wife in their quarters, returning to his own quarters about 11 p.m., where he found accused. Neither accused nor his car was at their quarters at the earlier time mentioned. Accused had said the lieutenant could use accused's automobile but he did not use it the night of July 14, 1941, as he had his own car (R. 30).

Captain Homer Uglow, 45th Infantry (PS), Fort William McKinley, and his wife entertained at their quarters on the night of July 14, 1941, from about 8:30 until about midnight, with bridge, two guests, Lieutenant Gross and Miss Henshaw (R. 31).

The defense produced no witnesses and the accused, having been fully advised of his rights as a witness in his own behalf, elected to remain

silent.

4. Specification 2 of Charge II is dependent on the testimony of nurse Gwendolyn L. Henshaw and of Captain Berry under whose medical care and military authority accused was placed on April 29, 1941. That accused was drunk and disorderly to the extent of its coming to the attention of Colonel Cooper, in command of the hospital, who warned accused against a recurrence of such action, is clearly shown.

The Specification of Charge I, and Specifications 1, 3 and 4 of Charge II grow out of the same chain of events. That it was accused who passed through the south gate of Fort William McKinley the night of July 14, 1941, despite his statement to Colonel Seals, post adjutant, who was then engaged in investigating a disorderly disturbance in the vicinity, that he was in his quarters the entire evening, and that Lieutenant Gross did not have accused's car on that night, is shown by the testimony of the sentry at the gate who saw and identified accused and who took his car license number that same night. The positive testimony of Lieutenant Gross that he had a car of his own and did not use the car of accused the night in question, that accused was not at his quarters from 6 to 8:30 p.m., and the further testimony of both Lieutenant Gross and Captain Uglow that Lieutenant Gross spent the entire evening of July 14, 1941, in the quarters of the latter, all clearly and conclusively establish the falsity of accused's statements to Colonel Seals.

Accused admitted his identity to the post adjutant on the night of July 15, 1941, when he was stopped for creating an admitted disturbance but, for no discernible reason, denied that he had been out of his quarters on the night before, and stated that Lieutenant Gross, his roommate, had used his car the previous night. He could not help but know both statements were not true. They were made to the post adjutant in an official capacity and are the false official statements charged in the Specification and Charge I.

Accused is shown to have been driving his car the night of July 15, 1941, being the same night he was stopped by the post adjutant, and that the gate sentry identified accused as the driver of the car with whom he had the conversation charged in Specification 1 of Charge II on that same night. Specifications 3 and 4, Charge II, are fully proved by the actions of the accused driving his car on the post on the nights of both July 14 and July 15, 1941, with his horn blowing very loudly and almost continuously. The driving of his car around a military post late at night with his horn blowing loudly and continuously to the annoyance and

disturbance of others, even after being warned that such action was in violation of post regulations, was clearly a disorderly action.

5. The charge sheet shows that Lieutenant Bethard was about 34 years of age at the time of the commission of the offenses. War Department records disclose that he had prior service as an enlisted man from July 15, 1929, to August 30, 1930, discharged as private with character excellent. He was appointed a second lieutenant, Infantry Reserve, on July 11, 1933; was promoted to first lieutenant on February 1, 1938; had two years' active duty with the Civilian Conservation Corps; entered on his present active duty at Randolph Field, Texas, on August 28, 1940; and was transferred to the Philippine Division pursuant to orders dated January 13, 1941.

6. The court was duly constituted. No errors injuriously affecting the substantial rights of 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 of dismissal is mandatory upon conviction of a violation of the 95th Article of War.

[signature], Judge Advocate.

[signature], Judge Advocate.

[signature], Judge Advocate.

1st Ind.

War Department, J.A.G.O., NOV 19 1941 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Alvin J. Bethard (0-310686), 45th Infantry (PS).

2. I do not concur in the opinion of the Board of Review that the record of trial is sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

3. First Lieutenant Bethard was convicted of making a false official statement to Colonel Carl H. Seals, Adjutant General's Department, the Post Adjutant at Fort McKinley, Philippine Islands, in violation of the 95th Article of War. He was also convicted of four offenses under the 96th Article of War as set out in the opinion of the Board of Review. Briefly those offenses and dates of commission were:

April 29, 1941 - Drunk and disorderly while a patient in hospital.
July 14, 1941 - Disorderly in station.
July 15, 1941 - Using abusive and contemptuous language towards a sentinel in the execution of his duty.
July 15, 1941 - Disorderly in station.

4. The drunkenness in hospital on April 29, 1941, was a comparatively mild offense and was apparently disposed of at that time by an admonishment given by the Commanding Officer. Some three months later after the commission of the other offenses, the offense was resurrected and included in the charges. The inclusion of the April offense appears to be a violation of the interdiction against "accumulation or saving up of charges" contained in paragraph 26, Manual for Courts-Martial, U. S. Army, 1928.

5. The remaining offenses charged relate to the alleged improper blowing of an automobile horn on the nights of July 14 and 15. By far the most serious of these is that of false official statement charged under Article of War 95. Conviction under that Article

carries with it mandatory dismissal. Unless the record of trial is sufficient to support the finding of guilty of violation of the 95th Article of War, I am of the opinion that the sentence of dismissal should be disapproved. The remaining offenses, convictions of which are, in my opinion, supported by the record, will be justly and adequately punished by a reprimand administered by the Commanding General, Philippine Division.

6. The facts of the offenses of July 14 and 15 are briefly as follows:

On the night of July 14, the accused, in civilian clothes, drove an automobile past the sentry post on the south gate of Fort William McKinley, at about 9:50, blowing his automobile horn. The next night about 8:15, he repeated that action. He was stopped by the sentry and informed that such use of the horn was not permitted. The accused cursed the sentry and told him to mind his own business. Shortly after 9 p.m., on July 15, Colonel Carl H. Seals, Adjutant General's Department, Post Adjutant, who had been awakened by the blowing of the horn on the previous night, again heard the blowing of the horn. Taking his flashlight, he went out in front of his quarters and stopped the car. Colonel Seals was not certain of all the facts (R. 36), but accepting his testimony in the aspect most unfavorable to the accused, the conversation was substantially as follows (R. 34,35):

Q. I am Colonel Seals, the Post Adjutant, do you understand? I am Colonel Seals.
A. Yes.
Q. Who are you?
A. I am Lieutenant Bethard.
Q. What do you mean by blowing your horn like that? You must be crazy or drunk, or you wouldn't be blowing your horn like that. Where have you been?
A. I have been down to the club and have had something to drink, but I am not drunk, and I am on my way home.
Q. What do you mean by blowing your horn like that?
A. I don't know, I was just blowing.
Q. You did the same damn thing last night.
A. No, sir. I wasn't out of my quarters last night. Lieutenant Gross had my car.
Q. You are going to hear more of this in the morning. You go home and to bed and don't use that horn any more except to avoid an accident.

Apparently Colonel Seals was in civilian dress, as he stated he introduced himself so that "whoever the person was would not waste time by asking some such fool question as 'Who the heck are you?'" (R. 34). Colonel Seals testified that Lieutenant Bethard might have been frightened because "I was talking pretty loud" (R. 35).

The crux of the whole matter is whether the conversation between Colonel Seals and the accused was official in nature. On this point Colonel Seals testified as follows (R. 39):

Q. "Do you believe that the accused at the time you were talking to him at the time was aware this was an official action on your part, in the nature of an investigation?
A. (Col. Seals) "I haven't the slightest idea; I wouldn't know whether he considered it an investigation or not. I thought I was investigating this matter.
Q. "Was there any basis on which the accused would have known that this was an investigation?
A. (Col. Seals) "None that I know of."

7. The making of a false official statement is regarded as one of the most serious of military offenses. It is chargeable as a violation of the 95th Article of War, conviction of which is punishable by mandatory dismissal. Care should be exercised to limit such allegations to those cases in which the false statement is made in the course of an interview, the official character of which is not in dispute. Official relationship does not necessarily depend on rank. The definition of the term official should not be extended to personal differences in order to provide balm for wounded pride. To constitute conduct unbecoming an officer and a gentleman under the provisions of the 95th Article of War, the conduct must be such, taking all the circumstances into consideration, as shows that the officer is "morally unfit to be an officer *** or to be considered a gentleman" (par. 151, M.C.M.). In my opinion, there is no such showing in this case.

8. War Department records disclose that Lieutenant Bethard was about 34 years of age at the time of the commission of the offenses. He was appointed a second lieutenant, Infantry Reserve, on July 11, 1933; and was promoted to first lieutenant on February 1, 1938. He had prior service as an enlisted man for one year, discharged as private with character excellent; had two years' active duty with the Civilian Conservation Corps; and entered on his present active duty on August 28, 1940.

9. I recommend that the findings of the Specification under Charge I be disapproved and that the sentence of dismissal be commuted to provide that First Lieutenant Alvin J. Bethard, 45th Infantry (PS), be reprimanded by the reviewing authority. Commutation of the sentence requires action by the President. Inclosed are a draft of a letter incorporating my recommendations for your signature, transmitting the record to the President for his action, and two forms of action. The form of action to accomplish the action recommended by me is included herewith, marked "A". A form of action to approve the findings and sentence, contrary to my recommendation, but in accord with the opinion of the Board of Review, is also attached, marked "B".

Allen W. Gullion,
Major General,
The Judge Advocate General.

4 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. War.
Incl.3-Form of action marked A.
Incl.4-Form of action marked B.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218520

NOV 14 1941

U N I T E D S T A T E S	)	GULF COAST AIR CORPS TRAINING CENTER
	)	
v.	)	Trial by G.C.M., convened at Brooks Field, Texas, October 13, 1941. Dismissal.
	)	
Second Lieutenant KENNETH E. COONE (0-358370), Quartermaster Corps.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

1. The record of trial 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.

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

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

Specification: In that 2nd Lieutenant Kenneth E. Coone was, at Brooks Field, Texas, on or about September 10, 1941, Drunk in uniform at his place of duty, to wit: the Post Garage, Brooks Field, Texas.

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

Specification: In that 2nd Lieutenant Kenneth E. Coone, having been duly placed in arrest in quarters on or about September 10, 1941, did, at Brooks Field, Texas, on or about September 10, 1941, break his said arrest before he was set at liberty by proper authority.

The accused pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specification. He was found guilty

of all Specifications and Charges. No evidence of previous conviction was introduced. He was sentenced "To be dismissed the service without honor". The reviewing authority approved the sentence and forwarded the record of trial for action under Articles of War 48 and 50½. The record is considered by the Board of Review under the provisions of the 48th Article of War.

3. The evidence for the prosecution is substantially as follows:

a. The accused was in command of the Second Platoon, Company C, 92nd Quartermaster Battalion, Light Maintenance, Assistant Property Officer in charge of Quartermaster warehouses, and Assistant Post Transportation Officer, Brooks Field, Texas (R. 18). At about 9 a.m., September 10, 1941, he telephoned First Lieutenant H. L. Jones, Q.M.C., Post Transportation Officer, that he would be at the Post garage - where his hours of duty were from 7:30 to 3:30 - in about thirty minutes (R. 22). Accused drove up to the Officers' Club between 9:30 and 10:00 a.m., and sat in uniform in his parked car, with his flight cap on crossways and his collar open (R. 13-14). When those facts were reported to Lieutenant Colonel Edwin C. McCoy, Q.M.C., Post Quartermaster, he directed Lieutenant Jones to bring accused to the Post Quartermaster Office (R. 16). Lieutenant Jones drove to the post garage between 9:30 and 10 a.m., found accused there in uniform, and drove him to Colonel McCoy's office.

Colonel McCoy was out when Lieutenant Jones and accused arrived at the Post Quartermaster Office shortly after 10:20 a.m. Accused stood up when Colonel McCoy came in. Colonel McCoy noticed that accused was not in normal condition, that his clothes appeared to have been slept in, that he was stuffing his shirt down into his pants, that he staggered, had a strong odor of liquor on his breath, and that his eyes were bloodshot. Colonel McCoy was of the opinion that accused was drunk (R. 16-17).

Four other officers, Captain Page, Captain Eck, Lieutenant Jones and Lieutenant Klinger, were present in Colonel McCoy's office (R. 20). The accused did not appear normal to Lieutenant Jones, was rather excited, his face was flushed, and appeared "like he might be ill". In view of the condition of accused, Lieutenant Jones would

not have sent him to perform duty (R. 24-25). In the opinion of Captain Page, the accused was drunk. The speech of accused was thick and he walked "not steadily" (R. 62). Captain Eck stated that accused staggered, stuttered, had a strong odor of liquor on his breath, and expressed the opinion that accused was under the influence of liquor and was not sober (R. 72-73). Lieutenant Klinger was of the opinion that accused was under the influence of an intoxicant and not fit for duty (R. 78).

b. Colonel McCoy, at the direction of the Post Commander, Lieutenant Colonel Stanton T. Smith, A.C., then placed accused in arrest in quarters because he was drunk and in no condition to perform his duties, warned him not to leave the Bachelor Officers' Quarters except to go to the Bachelor Officers' Mess for meals. The accused responded that he was sorry to have appeared before Colonel McCoy in "that condition" (R. 17, 63, 73). Colonel McCoy directed the Provost Marshal, Captain Page, to take accused to the hospital to let the doctors take a look at accused (R. 18-19). Captain Page explained the order again to accused, explained the limits of his arrest and directed his assistant, Lieutenant Klinger, to take accused to the hospital, then to his quarters, and to explain again to accused that he was allowed to leave his quarters only to go to the Bachelor Officers' Quarters Mess to eat (R. 63-64). In reply to a direct question from Captain Page if he understood it, accused replied, "Sir, I do" (R. 66).

c. At the Station Hospital accused was examined by the commanding officer, Major Robert C. Stokes, M.C., and by First Lieutenant Sam Lemkin, M.C. A blood sample was taken from accused and sent to Fort Sam Houston for laboratory test (R. 30-32).

Major Stokes made the usual tests for sobriety. Accused swayed perceptibly, walked a line only with a studied effort, with eyes closed touched nose with finger in a normal manner, read exact time of day from a watch, had no odor of acohol on breath but odor of cigarettes, speech was somewhat thick, general muscular activity was rather studied, and made a perceptible effort to deport himself normally (R. 32-33). In his opinion the accused was not normal and was not fit to perform his duties (R. 41). Major Stokes defined degrees of intoxication by the stages of stimulation, confusion, stupor and coma (R. 33-38). In his opinion, accused was in the stage of confusion, which is evident after larger doses of alcohol

are taken than in the first stage of stimulation, and where lack of inhibition appears, muscular incoordination is more apparent, speech thickened, and movements are uncontrolled and swaying (R. 40-41). The report of blood test (Ex. D) shows .3 percent blood alcohol, which percentage is within his definition of the stage of confusion (R. 39-40). In his opinion accused was able to understand clearly an order placing him under arrest (R. 43).

Lieutenant Lemkin, M.C., also examined the accused for sobriety. As the result of tests, he found that accused could write his name, his pupils reacted properly to light, could walk a straight line, was successful in the finger coordination test, and read the hour on a watch, and was of the opinion that accused was normal and perfectly sober (R. 51), and definitely could have understood an order placing him under arrest (R. 52). The fact that the blood test showed .3 percent alcoholic content did not change his opinion that accused was normal (R. 57).

d. After the examination Lieutenant Klinger took accused in a car to the Bachelor Officers' Quarters. En route accused asked the driver to turn up the road by the Quartermaster barracks and stop so that accused could get his car, but Lieutenant Klinger did not permit it (R. 79-80). Lieutenant Klinger followed accused into the Bachelor Officers' Quarters and to accused's room. Accused straddled a chair and started talking about what he supposed the Army would do to him. Lieutenant Klinger then repeated to accused at least twice the order as given by Captain Page in the Quartermaster Office, stating that accused was placed under confinement in quarters and that he was to remain there at all times except to go to the Bachelor Officers' Quarters Mess to eat (R. 79-80).

When Lieutenant Klinger told Captain Page that he did not think that accused would remain in his quarters, Captain Page directed the Officer of the Day to check each hour for the next twenty-four hours to see that accused remained in confinement (R. 81).

Second Lieutenant Norman C. Thomas, A.C., Officer of the Day, checked accused in his quarters every hour beginning at 12 noon until 7 p.m., when accused was absent. Accused had been asleep at each check except at 6 p.m. When he did not find accused in his quarters at 7 p.m., he hollered through the barracks and latrine in the normal manner of paging a person, and then went over to the

Officers' Club without locating accused (R. 84-85). Colonel Smith, the Commanding Officer, Brooks Field, did not authorize the release of accused from arrest on September 10, 1941 (R. 29).

e. At about 10:20 p.m., September 10, 1941, accused was detained by the sentry at the east gate as he drove into the post in a Chevrolet car with a Brooks Field blue tag 410-450 (R. 86). When Captain Page told accused that he was placing accused in arrest in the Station Hospital under guard, accused wanted to know what it was all about. Captain Page told accused that he had broken arrest in quarters and that the Commanding Officer, Brooks Field had directed that he be placed in the hospital under guard (R. 90). The accused was then sober (R. 91).

4. Defense:

a. The accused elected to make an unsworn statement. At about 5 p.m., September 9, 1941, he left the Quartermaster orderly room, went to the Officers' Club, and sat in a poker game until about 8 p.m. After a trip to town, he returned to the club, again sat in the poker game, had several drinks, and played until the following morning. He drove in his car from the club to the garage. After he had been in the garage a few minutes Lieutenant Jones drove him to Colonel McCoy's office. He can hardly remember going up there and sitting down. Colonel McCoy, with a lot of others, came in all at once and tried to say something to him but he does not know what was said. He did not know that Captain Page or "hardly anybody else" was present. They took a blood test at the hospital.

Lieutenant Klinger took him to his room in the barracks, where he wanted Klinger to leave him alone because he wanted to go to sleep. He went to bed, woke at about 6 p.m., finally rose, took a shower, shaved, and laid down again until about 7 p.m. When he found the mess hall closed, he remembered that his car was parked at the garage. He took the car, went out the east gate to town where he purchased some aspirin, got something to eat, and returned about 10 p.m. The sentry at the gate stopped him and told him Captain Page wanted him. To Captain Page's question where he had been, accused replied that he had been to town. To Captain Page's further question if he were not aware that he had been placed in arrest, he replied in the negative. When Captain Page stated that he had been told as

to his arrest that morning, he replied that it was the first he knew of it. Captain Page then took him to the hospital and placed him in arrest there (R. 93-96).

He was hungry on the evening of September 10th because he had nothing to eat since dinner on September 9th, and had not slept at all on the night of September 9th-10th. He can remember staying at the club all night, getting into his car there next morning, going to the garage and to Colonel McCoy's office and to the hospital, but does not remember what was said or the events which occurred during that time as everything seemed "fuzzy" to him. He did not know or realize prior to 10 p.m., September 10th, that he was under arrest, and would not have gone to town if he had known it (R. 98-99).

> "* * *But had not Captain Page stopped me that night at the out post, not knowing that I was under arrest, I would have reported to the garage the next morning for duty. I have had a lot of time to think this over and I am terribly sorry that it happened and if I am given the opportunity I will prove in the future that I shall and will be a credit to the military service.* * *!" (R. 96.)

b. Major Stokes, M.C., recalled for the defense, testified that it was possible, in view of the facts as to the condition of accused, that many details of events could either be forgotten or be very vague, as is possible in a normal, sober person and even more possible when a person has imbibed some certain amount of intoxicating liquor. Studied efforts to suppress symptoms would result in more pronounced symptoms after the studied efforts were abandoned (R. 102-103). It was Major Stokes opinion that accused was capable of receiving and understanding an order, and that it would take no more mental effort for accused to understand an order placing him in arrest than it would to tell the time by looking at a watch (R. 101-105).

5. a. The pleas of guilty and the evidence clearly support the findings of drunk in uniform at his place of duty under Charge I, in violation of Article of War 96, notwithstanding the opinion of the junior of the two medical officers who examined him that the accused was normal and perfectly sober.

b. The proof with respect to Charge II, breach of arrest, shows that the order placing accused in arrest in quarters was given

to him by Colonel McCoy, was repeated and explained to him by Captain Page, and again repeated and explained to him at least twice by Lieutenant Klinger, after Klinger had taken accused to his quarters. The accused responded to Colonel McCoy that he was sorry to appear before Colonel McCoy in that condition. After Captain Page had explained the order, the accused replied "Sir, I do" to Captain Page's question if he understood it.

From the above and the opinion of both of the medical officers who examined accused, it appears clear beyond any reasonable doubt that the accused was not so drunk that he could not, and did not understand the repeated orders placing him in arrest in his quarters, and his admitted departure from the post, it follows that he breached his arrest.

6. The form of the sentence adjudged, "To be dismissed the service without honor", is unusual. To be dismissed the service is in itself a dishonorable termination of a career as an officer of the Army. The words "without honor" are superfluous and add nothing to the sentence of dismissal.

7. The accused in a letter addressed to The Adjutant General dated October 30, 1941, stated after the trial he and his defense counsel contacted various members of the court to secure letters of recommendation for clemency and reduction of the sentence imposed. He stated that he -

> "* * *would have been very successful in obtaining the letters with the exception of one officer. This officer is S. S. Murphy, Major, A.C.-Res., President of the Court. The fact that he was the senior member of the court and his refusal to initiate the starting letter I failed in my efforts. I am certain in my belief that I can obtain the necessary two-thirds of the votes for the reduction of the sentence that I received if I could have the coordination of Major Murphy."

8. At the date of the trial accused was 34 years of age. The records of the Office of The Adjutant General show his service as follows:

Appointed Second Lieutenant, Quartermaster Corps

Reserve, July 2, 1937. Ordered to extended active duty March 19, 1941.

The accused introduced in evidence (Ex. 1) an honorable discharge from the Army by purchase dated November 22, 1929, with character "Excellent".

9. The court was legally constituted. 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 to support the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 69th or of the 96th Article of War.

Irwin T. Neff, Judge Advocate.

Gerald C. Gresson, Judge Advocate.

Thomas H. Dapp, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218521

NOV 8 1941

UNITED STATES v. Corporal RUBIN C. NIX (6921557), Battery A, 20th Field Artillery Battalion.	4TH MOTORIZED DIVISION Trial by G. C. M., convened at Fort Benning, Georgia, September 30, 1941. Dishonorable discharge and confinement for two (2) years. Federal Reformatory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Corporal Rubin C. Nix, Battery "A", 20th Field Artillery Battalion, did at Fort Benning, Georgia, on or about August 19, 1941, unlawfully enter the motor shop of the 20th Field Artillery Battalion, with intent to commit a criminal offense, to wit, larceny therein.

Specification 2: In that Corporal Rubin C. Nix, Battery "A", 20th Field Artillery Battalion, did at Fort Benning, Georgia, on or about August 19, 1941, feloniously take, steal and carry away one (1) car, 1941 blue Plymouth coupe, value about nine hundred dollars ($900.00), the property of Lieutenant Joseph B. Killgore, Battery "D", 20th Field Artillery Battalion.

Specification 3: In that Corporal Rubin C. Nix, Battery "A", 20th Field Artillery Battalion, did at Columbus, Georgia, on or about August 25, 1941, wrongfully and illegally dispose of, by pawning, one pistol, .32 Caliber, Iver Johnson, the property of Lieutenant Joseph B. Killgore, Battery "D", 20th Field Artillery Battalion.

He pleaded not guilty to, and was found guilty of, the Charge and all Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years. The reviewing authority approved only so much of the finding of guilty of Specification 2 of the Charge as involved a finding that accused did, at the time and place alleged, wrongfully convert the automobile described to his own use, in violation of the 96th Article of War, approved the sentence, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial under Article of War 50½.

3. The testimony of record shows that Second Lieutenant Joseph B. Killgore owned a blue 1941 Plymouth coupe, equipped with radio, white side wall tires, rear fender skirts, and that there was a .32 Iver Johnson pistol in the front compartment. The car had a L.S.U. sticker in front and rear (R. 17). When he left in August (1941) on maneuvers he left his car in the 20th Field Artillery motor shop. He gave no one permission to use it. When he returned from maneuvers his car was not in the motor shop where he left it, but he found it later, on the night of his return, parked near the 44th post exchange. The pistol was missing (R. 17). The sentry on the post around the motor park, in which area the motor shop was located, testified that he was approached by accused just before dark on August 19, 1941, who told him that a lieutenant's wife had asked him to get out a car in the "motor park", and he was going to try and get it. About eight or ten o'clock that same night the sentry found the big door to the "motor shop" open. At that time there were five cars and a "jeep" inside. On an afternoon within a few days after August 19, at the invitation of the accused, Private Harold T. Padgette rode to town with the accused in a 1941 coupe, having a radio in it and white wall tires (R. 9). Another soldier, Private Sherrill, saw accused in town around August 19 in, he believed, either a blue or a green 1941 Plymouth coupe which accused said was his uncle's

car. He rode in the car with accused when he, accused, took a pistol, having rust on it and a break in the top, out of the car and let a man in the "second station from the first red light going into Columbus" (underscoring supplied) hold it for some gas. He believed there was a sticker with three letters, "L.S.U., or something" on the car. He also stated that while he was sitting on the rear seat and accused was alone on the front seat, accused said there were some letters in the car addressed to Lieutenant Killgore (R. 13). Lieutenant Thomas C. Longnecker, in command of the detachment which was left at the post during maneuvers, found, after the battalion had left, that all buildings were locked except one and "that seemed to remain open" (R. 14); that it was reported to him that the motor shed had been broken into when he returned on the 21st after an absence but nothing was reported missing. At that time there were six (R. 14) automobiles there. No key to the motor shed and no list of cars were left. The following Saturday the motor shed was again broken into, and the name of accused came up in the investigation. Lieutenant Longnecker recovered a pistol, identified by Lieutenant Killgore as his, "from the first filling station on the right of the Cusseta Highway past the first traffic light in Columbus" (underscoring supplied), the owner of which gas station reported the pistol was given him as a pawn for five gallons of gasoline. Lieutenant Longnecker testified that there was no blue car in the motor shed when it was checked after the first break in.

Accused, in his unsworn statement, denied knowing anything of the car or pistol or that he knew either the sentry who was posted at the motor park, or Lieutenant Killgore. He said he drove Private Sherrill's black Pontiac four-door sedan, with his (Sherrill's) permission whenever he desired and that he never rode in a Plymouth, and that he had no reason to steal a car.

Private Sherrill was recalled as a witness, evidently for the purpose of rebutting accused's statement that he had Sherrill's permission to use his car at any time, and testified that he had in fact given accused such permission (R. 20-21).

4. Accused was convicted of the first Specification of unlawfully entering the 20th Field Artillery motor shop with the intent to commit the criminal offense of larceny therein, and under the second Specification was found guilty of wrongfully converting to his own use the automobile described, implying a lawful possession originally, which finding is inconsistent with the finding of the first Specification.

To support the finding as to Specification 1, it was necessary to prove that accused entered the motor shop and with intent to steal therefrom. There is, however, no evidence either direct or circumstantial that accused either entered the motor shop or that he intended to, or did, steal anything therefrom. Lieutenant Killgore testified he left his car in the motor shop and found it the night of his return to camp near the 44th post exchange. No blue car was at any time seen or found in the motor shop or shed or shown to be missing therefrom during the absence of the lieutenant. The accused told the sentry he was going to try and get a car from the "motor park" and not from the motor shop or shed. Accused had no need to steal a car as he had the continuing use of Private Sherrill's car.

As to Specification 2, it must be shown that accused had, and that he wrongfully used, the car belonging to Lieutenant Killgore. There is some testimony that accused was seen driving a car similar in some respects to that belonging to Lieutenant Killgore, and that on an occasion accused, who was seated alone on the front seat, told Sherrill, who was seated on the back seat, that there were some letters in the car addressed to the lieutenant, but Sherrill did not see the letters.

The evidence for the prosecution as to the taking and pawning of the pistol presents circumstances which, if accepted as established facts, might justify an inference of prima facie guilt, but the record discloses that the pistol was recovered at a different service station than the one at which Sherrill testified accused had pawned it. Most of the evidence adduced with respect to the pistol was in response to questions that were so leading in their nature as to almost amount to suggesting the desired answers to the witness. Such testimony is incompetent.

The evidence as a whole is vague and largely circumstantial and much of it can as easily be construed as consistent with the innocence of accused as otherwise.

> "In a criminal prosecution, where the evidence is purely circumstantial, the proof must exclude every reasonable hypothesis, except accused's guilt" (Sherman v. United States, 268 Fed. 516),

and

"Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused" (Sullivan v. United States, 283 Fed. 865).

The probative quality, value and test of sufficiency of circumstantial evidence in criminal proceedings is comprehensively set out in the following paragraph from the charge of the Federal Circuit Court to the jury in the case of United States v. Hart, 162 Fed. 192, 196-7:

"*** The value of such evidence depends mainly on the conclusive nature of the circumstances relied on to establish the controverted fact. Where circumstances are relied on entirely to justify a conviction, the circumstances must not only be consistent with guilt, but inconsistent with innocence. Just what state of circumstances will amount to proof can never be a matter of general definition. That circumstantial evidence is not only legal evidence and proper to be considered by you but a well-connected train of circumstances is as much conclusive of a fact as the greatest array of direct evidence. The true test always of such evidence is the sufficiency and weight of the evidence to satisfy your minds and consciences to the exclusion of every reasonable doubt of defendant's guilt."

In Buntain v. State (15 Tex. Crim. App. 490), the question on appellate review, as in this case, was not one of weighing conflicting evidence or passing upon the credibility of witnesses or determining whether facts relied on to prove the ultimate facts in issue were themselves proved, but merely the question of law whether certain circumstantial facts established by the evidence of record justified the conclusion of guilt as a logical inference from such circumstantial facts. On that question the court said:

"While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of the defendant's guilt. We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether

or not it fills that measure. It will not do to sustain convictions based upon suspicions ***. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizen."

"In a word: Justice according to law demands more than that accused be guilty; it demands that he be proved guilty" (CM 195705, Tyson).

Considering the evidence against the accused herein at its maximum value, we conclude that the conviction as to each of the three Specifications in this case must be set aside because (to adopt the language of the New York Court of Appeals in the circumstantial evidence case of People v. Razeziez, 99 N. E. 557) -

"The inferences from the facts shown are not sufficiently conclusive as we have seen to exclude all other inferences and to justify the judgment obtained against him."

5. For the reasons hereinabove stated, the Board of Review holds the record of trial legally insufficient to support the findings on any of the three Specifications and of the sentence.

, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

War Department, J.A.G.O., Washington, D. C., November 26, 1941 -
To The Secretary of War.

1. I do not agree with the findings of the Board of Review that the record of trial in the case of Corporal Rubin C. Nix, Battery A, 20th Field Artillery Battalion, is insufficient to support the findings and sentence.

2. The accused was convicted of three offenses charged under the 93rd Article of War. The first was housebreaking with intent to commit larceny, the second was larceny of an automobile, and the third was wrongful disposition of a pistol belonging to another. The reviewing authority approved only so much of the larceny finding as included a finding of wrongful conversion under the 96th Article of War.

3. The Board of Review holds that in view of the fact that the reviewing authority approved only so much of the larceny specification as involved unlawful conversion, the charge of unlawful entering with intent to commit larceny cannot be sustained. The Board states that to support the finding as to Specification 1 (housebreaking) it is necessary to prove that accused entered the motor shop with intent to steal therefrom. It then states that there is no evidence either direct or circumstantial that accused either entered the motor shop or that he intended to, or did, steal anything therefrom. The Board also says that no blue car was at any time seen or found in the motor shop or shed or shown to be missing therefrom during the absence of the owner.

4. In my opinion, the corpus delicti is established by the testimony of the owner that he left his car in the shop when he went on maneuvers, and that when he returned it was not there. The testimony of Private Keith shows that the accused came to the motor park at which Keith was on guard and stated that he wanted to get the car at the request of a lieutenant's wife. The Board of Review gave great weight to the use of the word "park". It is to be noted, however, that the words "park", "shop" and "shed" are used rather indiscriminately throughout the record. The statement attributed to the accused constitutes an admission against interest. With the use of the word "park", the statement is probably entitled to only slightly less weight if the word "shop" had been used. It shows opportunity and probably intent. As to the fact that the accused was in possession of the automobile fitting the description of the missing car, Private Padgette testified that he rode with the accused in a 1941 coupe with radio and white-wall tires. He did not remember the make of the car. With reference to the same point, Private Sherrill testified that he rode with the accused in a 1941 Plymouth coupe which was blue or green in color and that the accused told him that the car belonged to the accused's uncle who was a lieutenant in the Army. Sherrill also testified that he saw the accused take a pistol from the compartment of the car. On the witness stand he identified the pistol as being the one which was later claimed by Lieutenant Killgore. Witness was with the accused when the accused pawned the pistol to obtain gasoline.

Witness further identified the car by a sticker bearing the letters "L.S.U." Witness also testified that the accused saw some letters in the car which the accused said were addressed to Lieutenant Killgore. Lieutenant Killgore testified that his car was a blue 1941 Plymouth with white side-wall tires and an "L.S.U." sticker in front and one in back.

5. With reference to the charge of unlawfully pawning the pistol, the Board of Review appeared to consider of great importance the statement of Sherrill that the gasoline station at which the pistol was pawned was the second station from the first red light going into Columbus, while Lieutenant Long testified that he recovered it from the first filling station on the right of the Cusseta Highway after the first traffic light in Columbus. The important facts, in my opinion, are that the pistol, identified by the owner as having been left in the compartment of his automobile, was traced through the hands of the accused to the gasoline station from which it was recovered and produced and identified in court as the one which Sherrill saw the accused pawn at the gasoline station. The fact that one witness testified that it was the first gasoline station while another witness testified that it was the second station is of minor importance. The Board of Review considers the evidence on the charge of unlawful disposal of the pistol to be insufficient to support a finding of guilty. I cannot agree. In my opinion, the evidence on this point is about as clear and convincing as circumstantial evidence can be. In view of all the circumstances, it is not difficult for me to reconcile the two statements regarding the exact location of the gasoline station on the basis of unimportant errors in observation or in expression.

6. The accused was not charged with larceny of the pistol, but the evidence which clearly shows the theft of the pistol also proves the wrongful conversion of the automobile and serves to supply the additional proof of intent, if additional proof is needed, to support the finding of guilty of the offense of housebreaking. The record of testimony on this point refutes the statement of the Board of Review that there is "no evidence either direct or circumstantial that accused either entered the motor shop or that he intended to, or did, steal anything therefrom".

7. I am of the opinion that the record is legally sufficient to support the findings and sentence as approved by the reviewing authority. I recommend that the action of the reviewing authority approving the sentence be confirmed. A form of action to accomplish such confirmation is included herewith, marked "A". A form of action to disapprove the sentence in accord with the holding by the Board of Review, marked "B", is also inclosed for your use should you deem such action appropriate.

Allen W. Gullion,
Major General, U.S.A.,
The Judge Advocate General.

3 Incls.
Incl. 1 - Record of Trial.
Incl. 2 - Form of Action - "A".
Incl. 3 - Form of Action - "B".

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218579

NOV 1 8 1941

UNITED STATES)	VIII ARMY CORPS
)	
v.)	Trial by G. C. M., convened at
)	Singer, Louisiana, September
Captain EDGAR L. LOWRANCE)	13, 1941. Dismissal and total
(0-254331), 179th Infantry.)	forfeitures.

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, Judge Advocates.

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.

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

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

Specification: In that Captain Edgar L. Lowrance, 179th Infantry, did, at Camp Barkeley, Texas, on or about the 28th day of April, 1941, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Camp Barkeley, Texas, on or about the 10th day of May, 1941.

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

Specification: In that Captain Edgar L. Lowrance, 179th Infantry, did, at Camp Barkeley, Texas, on or about April 19, 1941, with intent to deceive Colonel Murray F. Gibbons, 179th Infantry, officially report to the said Colonel Murray F. Gibbons, that clothing, cook's white was not available for issue at Fort Sill, Oklahoma, and had not been available at Camp Barkeley, Texas, which report was false, was known by Captain Edgar L. Lowrance to be false, and was made by the said Captain Edgar L. Lowrance with the intent to deceive.

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

Specification: (Finding of not guilty)

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

Specification: In that Captain Edgar L. Lowrance, 179th Infantry, having received a lawful order from Colonel Murray F. Gibbons, Commanding Officer, 179th Infantry, his superior officer, to return to the 179th Infantry, Camp Barkeley, Texas, the said Colonel Murray F. Gibbons being in the execution of his office, did, at Holdenville, Oklahoma, on or about May 1, 1941, wilfully disobey the same.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charges I, II and IV and the Specifications thereunder, and not guilty of Charge III and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The findings and sentence were announced in open court. The reviewing authority approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence as to the Charges and Specifications of which accused was found guilty will be discussed in the order in which the offenses charged are alleged to have been committed. The evidence for the prosecution is substantially as follows:

Colonel Murray F. Gibbons, 179th Infantry, testified as to the Specification, Charge II, that on April 10, 1941, the accused was attached to the 179th Infantry, commanded at that time by witness. Prior to the inspection of his company kitchen witness had told accused, together with other company commanders "to give particular attention to the matter of having his kitchen personnel wear cooks clothing, white." Later, having been officially informed that this order was not complied with by accused, he made an investigation which disclosed that during the noon meal on the day in question the kitchen personnel of Company B, then commanded by accused, were not dressed in white clothing. At this point a letter, to which was attached three indorsements, was handed to witness, and was identified by him as a letter which was written to him by Major

General William S. Key, commanding 45th Division, under the date of April 12, 1941, directing his attention to the noncompliance with his orders that mess attendants would wear white clothing on Thursday, April 10. Particular attention was called to the fact that when the Chief of Staff of the Army, the Third Army Commander, the VIII Army Corps Commander, and the Division Commander inspected the kitchen of Company B, 179th Infantry, April 10, at 11:30 a.m., there was a total absence of white clothing. This letter was forwarded to accused by 2nd Indorsement for a statement from him as to whether or not the orders referred to in the basic communication were received by him. He replied by 3rd Indorsement as follows:

> "1. Orders referred to in Par 1 of basic communication were received by me.
>
> "2. Failure to comply with this order was due to clothing, cooks', white, not being available. Clothing, cooks', white, was not available for issue at Fort Sill, Oklahoma, and have not been available at Camp Barkeley, Texas. The supply of this unit was supplemented by purchases of these items from the Company Fund while in Fort Sill, Oklahoma. The disposition of this supply on this date was as follows: One (1) set was transferred with Private 1cl WALTER B. BRIM, 20825155, upon his assignment of Special Duty with the Corps Area Service Command. This was in compliance with Par. 2, Special Order 11, Headquarters, Camp Barkeley, Texas. The other two (2) sets were picked up by the Whiteside Laundry on April 4, 1941, and were not returned on the regular delivery of April 8, 1941."

The letter referred to above and the accompanying indorsements were, without objection by the defense, read to the court and true copies of same are attached to the record marked "Prosecution's Exhibit 'A'". Colonel Gibbons gathered from accused's 3rd Indorsement that his supply of cooks' clothing, white, was below normal, and that he had difficulty in securing the proper laundry and return of such clothing (R. 6-7). The witness was handed a paper which he identified as a true copy of a requisition for cooks' clothing, white, which was submitted by accused, dated April 10, 1941, which is as follows:

> "To: Supply Officer, 179th Infantry.
> Requisition No.---------- Date April 10, 1941
> Ship to Company B, 179th Infantry.
> Requisitioned By ***
> EDGAR L. LOWRANCE Capt. 179th Infantry
> Comdg. Co. B.

ARTICLES	UNIT	ON HAND AND DUE	REQUIRED	APPROVED
Aprons, White B&C	ea	24	8	0
Coats, White B & C	ea	13	3	3
Caps, White, B & C	ea	15	1	1
Trousers, White B & C	ea	12	4	0
Mittens, asbestos, M1935	pr	0	4	

X
X
X
X
X
X

BASIS: Table of Basic Allowances-four cooks and 8 Aprons, 4 Coats, 4 trousers, and 4 caps per cook.

Two pair of mittens per LMG

I certify that this is a true copy of requisition submitted to S-4 Office by Company B, 179th. Infantry.

(Signed) Byron F. Jolly
(Typed) Byron F. Jolly,
Major, 179th. Inf.,
R.S.O." (Pros. Ex.E)

On cross-examination Colonel Gibbons testified that there were some requisitions that were not filled and that sometimes when they were filled the clothing was too large or too small for the particular organization. His regiment moved from Fort Sill on February 28, 1941; that there was very little, if any, clothing available at Camp Barkeley, and no cooks' white clothing was available. On April 10, 1941, the White Side Laundry, located at Loffett, Texas, was doing laundry service for the 179th Infantry. The service was not satisfactory because of delay in returning articles sent to the laundry.

On April 10, at about 9 a.m., orders were issued to the battalion commanders with reference to the wearing of white clothing by cooks. Witness did not know of his personal knowledge that the battalion commanders issued the orders to the companies (R. 10-12). Colonel Gibbons was deceived by accused's 3rd Indorsement because he assumed from that

indorsement that cooks' clothing was not available to the cooks on the day in question. About April 6, 7 or 8, some member of Company B was transferred to the Service Command of the Corps. Orders were given that individuals would take certain clothing with them. Cooks were transferred about that time. Special Orders Nos. 11 and 12 were introduced at this point by the defense, showing that certain men were transferred from Company B, 179th Infantry, on March 11 and 12, respectively. These orders were received in evidence and are attached to the record, marked Defense Exhibits A and B (R. 13-14).

Major Quinten M. Spradling, Executive Officer, 179th Infantry, testified that he heard accused admit to Colonel Gibbons that his cooks were not dressed in white when inspected by the Chief of Staff, and that orders had been issued to all company officers of the 179th Infantry, that cooks should wear white upon the occasion of this inspection (R. 16-17).

Captain Harold S. Moler, Company C, 179th Infantry, testified that at about 11 o'clock a.m., and prior to the inspection, on April 10, the battalion commander assembled his officers in the company street and ordered that all cooks and kitchen police would be dressed in white for inspection. He did not know whether accused received the order, but accused was present when it was given (R. 18,19).

Private First Class Fred Nicodemus, Company B, 179th Infantry, testified that on April 10, 1941, he was first cook in his company and that he was present in his kitchen, and was wearing a mixed uniform, fatigues, white cap and white apron, when the Chief of Staff made an inspection. No orders had been given with reference to wearing white uniform for the inspection so far as he knew, but he did know that he was supposed to be in white clothing. Witness had white clothing other than that which he wore, but by his mistake it had not been sent to the laundry. He had plenty of white clothing on April 10 (R. 20-22).

Private Charles Dillingham, Company B, 179th Infantry, testified that he was second cook of his company. He had been ordered to wear white cooks' clothing on April 10, 1941, but he had been issued but one suit of whites and it was dirty. The accused had told the mess sergeant that white cooks' clothing was to be worn for the inspection (R. 22-23).

Staff Sergeant Cecil H. Kirbry, Company B, 179th Infantry, testified that he was mess sergeant of his company on April 10, 1941, and was present when the Chief of Staff inspected his kitchen; that white clothing was required for that occasion but that they did not wear

white because "what we had were dirty". After the inspection he was asked why the cooks were not dressed in white and replied that "we had white uniforms but a part of them was in the laundry and the rest we had not sent. I insisted that they were dirty" (R. 24-25).

Sergeant Henry E. Rogers, Company B, 179th Infantry, was shown Prosecution's Exhibit E, and identified it as a true copy of a requisition, the original of which he had typed on April 10, 1941, at 3 or 4 o'clock in the afternoon. This requisition "shows on hand 24 aprons, 13 coats, 12 trousers", and was signed by accused (R. 28-29).

As to the Specification, Charge I, and the Specification, Charge IV, alleging desertion and willful disobedience, respectively, Colonel Gibbons testified that late Saturday night, April 26, or early Sunday morning, April 27, accused called him at his, witness', home by long distance telephone and told him that he, the accused, had been relieved of command of Company B, and that it looked like he could not get along and that he had made up his mind just to leave. Witness told accused that he would be at Camp Barkeley that night and suggested to him that he wait until he had an opportunity to talk to him. The following morning, Monday the 28th, witness called accused by telephone at the Hillton Hotel, Abilene, and was informed that his room did not answer, whereupon witness told Captain Dowell to go to Abilene and attempt to locate him. Later Captain Dowell reported that he could not find him, and further investigation developed the fact that accused was not present with his command. On April 29 witness received a telegram from Holdenville, Oklahoma, signed "Edgar L Lowrance", stating "Have retired to my home 110 North Hinckley Street, Holdenville, Oklahoma. Am available at any time to transfer or adjust any responsibilities which came under my command." This telegram was received in evidence without objection by the defense, was read to the court and is attached to the record as Prosecution's Exhibit B. Upon receipt of this telegram Colonel Gibbons issued a formal written order addressed to Captain Lowrance under date of May 1, 1941, directing him to return immediately to his proper station and duty. The letter was dispatched to accused by registered mail, and later witness received a receipt for same, dated May 3, and bearing Captain Lowrance's signature. True copies of the letter and the receipt were, without objection by defense, received in evidence and are attached to the record as Prosecution's Exhibits C and D, respectively. Accused did not return to his station immediately, although the trip from Holdenville to Camp Barkeley requires but from 7 to 7½ hours by automobile (R. 7-10). Witness could not state just when accused returned to his station, but said that official records will show the date of his return (R. 13). Later he testified that he knew of his own personal knowledge

that accused was absent without leave from April 28 to May 10, 1941 (R. 15).

Captain Harold S. Moler, Company C, 179th Infantry, testified as to Charge I and its Specification, that he was accused's tent mate prior to April 28, 1941. After that date some of his, accused's, clothing had been removed from the tent, but he could not state that all of it had been removed, and that accused was not present as his tent mate after April 28 (R. 18).

First Lieutenant Rolla A. Hurley, Company B, 179th Infantry, testified as to the Specification, Charge I, that he was placed in command of Company B, 179th Infantry, on April 28, and that he is the custodian of the morning reports of that company. He identified the morning reports for April and May, 1941, for Company B, 179th Infantry, which show accused absent without leave as of 6 a.m., April 28, 1941, and from absence without leave to duty as of May 10, 1941. These reports were received in evidence without objection by defense, and extract copies of same are attached to the record as Prosecution's Exhibits F and G. Witness further testified that after he took command of Company B the council book and company fund vouchers were sent to him by special delivery letter from some little post office. He could not remember the name of the post office. He was shown a receipt for a registered package through United States mail from Captain Lowrance. He believed that he got the council book and check book from Major Jolly.

The evidence for the defense is substantially as follows:

Major Curtis L. Williams, 179th Infantry, defense counsel, was sworn as a witness for the defense and produced an original memorandum from regimental headquarters, signed by Major Jolly under date of May 14, 1941, "showing the standing of Company 'B' 179th Infantry pertaining to Cooks Whites as of 10 April 1941", as follows:

"Date issued	APRONS	CAPS	COATS	TROUSERS
Sept. 16, 1940 U S P & D O	6	4	4	4
Oct. 31, 1940	22	12	8	8
I & I Nov. 26, 1940	4	4		
Balance 4/10/41	24	16	12	12"

This report was received in evidence and is attached to the record as Defense Exhibit C.

The accused, having been advised of his rights as a witness in his own behalf, elected to remain silent.

4. The evidence as to the Specification, Charge I, and as to the Specification, Charge IV, is clear and conclusive. It is shown that accused left his station on the morning of April 28, 1941, without any vestige of authority, notwithstanding the kindly suggestion made by Colonel Gibbons by telephone that he defer his departure until he, Colonel Gibbons, returned. Inquiry was made for accused at the Hillton Hotel, Abilene, on the morning of April 28, and it was reported that he was not there, and a later investigation developed the fact that he was not present with his command. On April 29 his colonel received a telegram, which was signed by accused, saying that he had retired to his home. Colonel Gibbons testified that he knew of his own personal knowledge that accused was absent from his station without authority from April 28, 1941, until May 10, 1941, and the morning reports of his organization show that he was so absent between these dates. The fact that accused voluntarily returned to his station after an absence of twelve days, while material in extenuation, is no defense. The accused is a mature man, who has had considerable military experience and must have known that this very serious offense could not be condoned by his superior officers without materially impairing military discipline in his organization.

The evidence as to the Specification of Charge IV shows that on May 1, 1941, Colonel Gibbons issued a formal written order to accused to report "immediately" (underscoring supplied) to his proper station and duty. This order, the receipt of which is evidenced by accused's signature, was ignored and it was not untilsevendays later that accused reported to his station. The order related to a military duty, the officer issuing it was authorized to give it, and the wholly unexplained disobedience of accused showed an intentional and deliberate defiance of authority. Disobedience of the lawful order of a superior officer strikes at the very foundation of military discipline and is one of the most serious of all offenses denounced by military law.

The evidence as to the Specification of Charge II, alleging the utterance of a false official statement, is not conclusive. The testimony as to the time when the accused was told that his kitchen personnel must wear white clothing for inspection varies, as does the testimony as to the quantity of serviceable white clothing which was on hand in accused's company at the time the order was given. Several enlisted men

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NAVY DEPARTMENT

of the company testified that while there was a limited quantity of white cooks' clothing belonging to Company B, most of it was in a soiled or unserviceable condition, or was at the laundry on April 10. It is therefore possible that accused, when he told Colonel Gibbons that there was no white cooks' clothing available in his company on the date in question, meant that there was no white clothing in his company which was in a serviceable condition at that time. If this theory be accepted, then the statement of accused to his superior officer, while careless, does not constitute the very serious offense of a false official statement in violation of the 95th Article of War. The evidence raises a reasonable doubt as to the intention of the accused to deceive his superior officer, and as the rule as to reasonable doubt extends to every element of the offense charged, the accused is entitled to the benefit of that doubt.

5. The charge sheet shows that accused was 44 years of age at the time of the commission of the offenses. He has had over eighteen years' service in the Oklahoma National Guard; was appointed a second lieutenant, Infantry, on February 16, 1923; was promoted to first lieutenant on March 16, 1939; and to captain about September 15, 1940. He entered on active duty on September 16, 1940.

6. The court was duly constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Charges I and IV and the Specifications thereunder, and the sentence, and legally insufficient to support the findings of guilty of Charge II and its Specification. A sentence of dismissal and forfeiture of all pay and allowances due or to become due is authorized upon conviction of violation of the 58th and 64th Articles of War.

G. L. McSmith, Judge Advocate.

William N. Pounds, Judge Advocate.

On Leave, Judge Advocate.

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WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218643

DEC 1 6 1941

CAMP CROFT

UNITED STATES v. Second Lieutenant TEMUS R. BRIGHT (0-388270), Infantry.	Trial by G. C. M., convened at Camp Croft, South Carolina, October 16, 17, 1941. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, Judge Advocates.

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.

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

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

Specification: In that Second Lieutenant Temus R. Bright, Infantry, did, at Camp Croft, South Carolina, on or about September 10, 1941, with intent to commit a felony, viz., rape, commit an assault upon Dorothy Deene Israel by wilfully and feloniously attempting to have sexual intercourse with and carnal knowledge of the said Dorothy Deene Israel, forcibly and against her will.

CHARGE II: Violation of the 95th Article of War. (Finding of not guilty)

Specification: (Finding of not guilty)

He pleaded not guilty to both Charges and the Specifications thereunder. He was found guilty of the Specification, Charge I, except the words,

> "with intent to commit a felony, viz., rape, commit an assault upon Dorothy Deene Israel by wilfully and feloniously attempting to have sexual intercourse with and carnal knowledge of the said Dorothy Deene Israel, forcibly and against her will",

substituting therefor the words,

> "wrongfully commit an assault of a highly aggravated and indecent nature upon Dorothy Deene Israel with the intent to coerce the said Dorothy Deene Israel to submit to sexual intercourse",

of the excepted words, not guilty, of the substituted words, guilty, of the Charge, not guilty of violation of the 93rd Article of War, but guilty of violation of the 96th Article of War, and not guilty of Charge II and the Specification thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50½. The record of trial should have been forwarded for action under Article of War 48.

3. The evidence for the prosecution is substantially as follows:

Miss Dorothy Deene Israel, who was employed as a nurse at the Mary Black Hospital, Spartanburg, South Carolina, testified that she met the accused on September 8, 1941, at which time he made an engagement to take her to a dance to be given at Camp Croft in honor of General Patch on the night of September 10. Pursuant to this engagement he called for Miss Israel at the nurses' home at about eight o'clock. On the way to the dance they stopped at Fews' barbecue stand, where accused took a drink of whiskey and Miss Israel also took a small drink of whiskey. From Fews' place they drove to the Camp Croft service club, where they attended the dance until the intermission, at about 10:30 p.m., during which time they each had two beers inside the service club. During the intermission period accused asked Miss Israel if she would drive with him to get a beer, to which she agreed. He drove her to the officers' quarters, where he had a beer, but she took none. Accused then suggested that as they had about eight minutes before the dance would be resumed that they take a little ride, to which suggestion she offered no objection. Shortly after leaving the officers' quarters

accused stopped his car on the paved road, where he attempted to hug and kiss Miss Israel and asked if she did not want to play a little, at the same time attempting to feel her leg. She repulsed him and got out of the car, saying that she would not go with such a person. Accused came after her, and she asked if he would take her back to the service club if she would get back in the car, and he promised that he would. Instead of returning to the club accused drove out another road, across the range to an isolated spot near an abandoned house, where he stopped, got out and came around to her side of the car, with his pants undone and his privates exposed. She was greatly alarmed and asked what he wanted, whereupon he said,

> "I am going to rape you. *** Butch, maybe you haven't been around much, but I don't go out with girls unless I do rape them, unless they let me do it --either one-- and he said, 'Come on, get out *** we are going to have intercourse here.'"

Miss Israel tried to get out of the car on the further side, but accused caught her and pulled her back, causing her back to hit the steering wheel and her leg to strike the side of the car. He began to twist her arm and hit her on the right shoulder until she could hear the bones cracking. She started "hollering" and crying and told him to quit and he would not do it. Accused said that it would do no good to "holler", that no one would hear, that he could kill her and that nobody would ever find her. She scratched him on the left side of the face and tried to kick him. They struggled for about ten minutes, he finally separated her legs, partly with his knee, got her dress up and scratched her in trying to get to her private parts, "*** he didn't have an intercourse, before he finished the discharge was all over my pants" (R. 7-13). The witness described the injuries on her shoulders, back, legs and scratches on and within her private parts which she sustained during the struggle (R. 16-17). When the witness got back to the nurses' quarters, between 11:30 and 12 o'clock, she immediately called Miss Finch, the night supervisor at the hospital, who examined her clothing and gave her a sedative. The next afternoon the bruises on her body and the scratches on her private parts were examined by Miss Wilkins, Dr. Hugh Black and Dr. Scott, and later she was catheterized by Miss Wilkins, a nurse at the hospital (R. 20-23,29). On the day following the attack upon Miss Israel she communicated with the sheriff and Solicitor General at Spartanburg. Later, upon the advice of the Solicitor General, Mr. Watt, she went to Camp Croft with General Patch and Dr. Black to locate the spot where the attack occurred.

After some difficulty she found the place which was located on the Camp Croft reservation (R. 26). On October 9, witness had a telephone call from a man who said that he was Lieutenant Coggin and that he was calling for Lieutenant Bright. Among other things, he said:

> "I guess you know what he is going to do to you, don't you? *** he is going to attack your character *** there is going to be a lot of publicity and *** to call the whole thing off."

On the afternoon of the same day Lieutenant Kasaback called her and said that he wanted to talk to her about the case with Lieutenant Bright. He told her that Lieutenant Bright had two good lawyers, that it was not going to do her any good to call the case, and that Lieutenant Bright was not going to be convicted, that that was already understood (R. 28-29).

Miss Sarah O. Finch, night supervisor, Mary Black Hospital, Spartanburg, South Carolina, testified that she has known Miss Israel for about four years and three months, and that they are and have been for some time past employed at the Mary Black Hospital. On the night of September 10, between 11:30 and 12 o'clock, Miss Israel called her to one of the offices on the first floor of the hospital and told her what had just happened to her. Miss Israel was crying and was hurt and very nervous and upset. Witness found bruises and a red spot on her knee, and on her shoulders and back there were some reddish bruises. Her dress was wrinkled and the front of her slip and step-ins were moist in spots. Witness gave her an amytal capsule, a sedative. She did not examine her private parts that night. Later she examined the bruises on her back, leg and shoulders, and they had become bluish discolorations. The next morning she examined her genital organs, not carefully, but she saw a swelling on the left side (R. 57-66).

Miss Catherine Eloise Wilkins, operating room supervisor, Mary Black Hospital, testified that she saw Miss Israel on the morning of September 11, about 7:10. At that time she was extremely nervous, her face was red and her eyes were swollen and she was practically hysterical. At 2:30 or 3 o'clock she catheterized her and found her private parts to be so sore that she complained of pain when she sponged her, "and it was swollen on the left side of the labia and there was a small scratch on the right side of the labia." Later she was with Dr. Hugh Black and Dr. W. S. Scott when they examined Miss Israel. She saw

a bruise on her left leg, just below the knee, a bruise on each shoulder which extended around the armpit on each shoulder and a bruise on the back, the lower part of the thoracic cavity. Witness had examined clothing worn by Miss Israel on the night of September 10, and found her dress to be wrinkled, a small hole on one side at the waist and pulled at the seams, and on the pants there was a discharge of some kind, a yellowish white substance that had dried (R. 66-72).

Dr. Hugh S. Black, Spartanburg, South Carolina, testified that he has known Miss Israel for about twelve years, and that she is now a nurse in his hospital, having entered training there in 1937. He saw her on the morning of September 11 at about 8 o'clock, at which time her eyes were filled with tears and swollen, - "she was in agony, distress, highly nervous, walking--very unusual for her--like someone who has ridden a horse and had never ridden for a year or never before." She told him what had happened the night before. He examined her body and found the injuries substantially as described by the two preceding witnesses. During the afternoon he examined her private parts in the presence of Miss Wilkins and Dr. Scott and found the same injuries described by Miss Wilkins. He found no evidence of penetration. At the instance of Miss Israel he communicated with the sheriff of Spartanburg County, who later came to the hospital. Several days later he drove around Camp Croft reservation with General Patch and Miss Israel for the purpose of locating the spot where the alleged attack occurred. After some difficulty she found the place where she had been attacked. The place located corresponded perfectly with the place previously described by Miss Israel (R. 77-85).

Dr. William S. Scott, Spartanburg, South Carolina, who was present when Dr. Black examined Miss Israel, testified:

> "There was a moderate amount of swelling on the left labia, 2 or 3 abrasions on the right side of the labia, bruises about the left knee, bruises on both shoulders and about the middle of the back *** the abrasions were between the labia majora and labia minora" (R. 93-95).

First Lieutenant Earle R. Coggin, Adjutant General's Department, was introduced by the prosecution for the purpose of proving that at the instance of Lieutenant Bright he had communicated with Miss Israel, and told her that her character would be attacked at the hearing and suggested that she drop it. The president of the court informed witness as to his right to decline to answer any question which might incriminate

him, whereupon the witness "stood upon his rights" and declined to answer most of the questions propounded to him. However, he did testify that Lieutenant Bright did request or suggest to him that he communicate with Miss Israel, and upon cross-examination he answered the direct question, "Did Lt. Bright tell you to communicate with Miss Israel for any particular reason", as follows: "That would be admitting guilt of a crime against the United States" (R. 98-103).

First Lieutenant Harry Y. Kasaback, Medical Corps, was introduced by the prosecution for the same purpose for which Lieutenant Coggin was interrogated. He too was advised as to his constitutional rights, after which advice he refused to answer further than to say that Lieutenant Bright had discussed the case with him (R. 103-105).

4. The evidence for the defense is substantially as follows:

Private Frank H. Fox, 47th Field Artillery, testified that he does not know accused, but has known Miss Israel since "some time last summer" when he met her on a week-end party, but she was with another man. Witness did not know her reputation with reference to chastity (R. 109-113).

Private John A. Thomas, Company A, 27th Infantry Training Battalion, testified that on the night of September 10, at about 10:30 or 11 o'clock, he was in front of the service club when accused approached in a car from the direction of the hospital. A young lady was in the car with him. Accused got out and walked around the car and opened the door. The lady must have been leaning against the door, for when it was opened she fell out on her knees. She got back in the car and accused asked her if she did not want to go to the dance. She replied that her dress was wrinkled and that she did not care to go to the dance and suggested that they go for a drive. Witness was about ten feet from the car but he is not able to identify the lady who was riding with accused. Witness has known accused for about six years. They were in the same training company in the C.M.T.C. in 1935 (R. 116-123).

Captain Earle W. McFadden, Company B, 29th Infantry Training Battalion, testified that on the night of General Patch's reception he saw and spoke to accused, who was in a car which was parked next to his car near the service club; this was shortly before or during the intermission and between 10:30 and 11 o'clock p.m. Witness did not see accused drive away (R. 123-124).

Captain Francis Keenan, Company A, 30th Infantry Training Battalion, testified that he saw accused on September 11; that he did not see any scratches or bruises on his face or forehead upon that occasion, but he could not positively swear that there were none (R. 125-126).

Mr. Henry B. Harris, barber at post exchange No. 558, testified that he gave accused a shave and hair cut on September 11, 1941, and that he did not observe any bruise or scratch on his face (R. 127-130).

Mr. Marvin Byrd, principal of the high school at Jonesville, which is about fifteen miles from Camp Croft, testified that he has known Miss Israel since about a year before she graduated and that "her reputation in the community for chastity" is bad, but when examined by the court he said that he could mention only one person who had heard anything about the young lady's reputation. Lieutenant Bright, whom witness had known but a short time, came down and talked to him about Miss Israel about a week and a half before the trial. He did not remember the date (R. 130-133).

Mr. William C. Thornton, Spartanburg, South Carolina, testified that he has known Miss Israel since January 1939; that her reputation for chastity is "Bad, bad, as far as I know from just the few people I have talked to." He never "dated" her (R. 133-136).

Accused, having been fully advised as to his rights as a witness in his own behalf, elected to be sworn, and testified substantially as follows: He is 24 years old and was commissioned a second lieutenant in the Infantry Reserve on March 27, 1940. Several days before the dance and reception given for General Patch at Camp Croft he telephoned a friend of his at the hospital (presumably the Mary Black Hospital) to inquire as to whether she knew of a girl who would go with him to the dance. He was told that there was a Miss Israel there who "looked good enough to take to a dance". Monday night he drove down to the hospital to see Miss Israel. He saw a nurse on the sidewalk and asked if she knew a Miss Israel. The nurse replied that she was Miss Israel, whereupon he asked her if she would accompany him to the dance on Wednesday night. It was so agreed and on Wednesday night he called for the young lady at about 7:45. They drove to Fews, where they had a drink, as was related by Miss Israel in her testimony. On the way over Miss Israel "wasn't dignified", she sat over near him and put her hand on his crotch, whereupon he

said, "Butch, you'll cause me to rape you." Before this she had told him a very broad story. Arriving at the service club at around 8:30 p.m., they had a beer, talked, danced and had another beer. In dancing she leaned close in against him. At intermission they drove to the officers' quarters, where he had a beer. While he was drinking his beer she would "scooch" her dress up and "raise her leg over." After "necking" for a while they drove back to the service club, he opened the door and she fell out. He asked if she wanted to go in to the dance and she said that her dress was wrinkled and that she did not care to go in and suggested that they take a drive. They drove down Range Road about half a mile and parked, where they "necked" a while without any objection by Miss Israel. After ten or fifteen minutes he drove on out Range Road and stopped on the right side of Highway 176, and after some conversation they drove to a little road and he backed in near a house and parked, and there they had sexual intercourse, she making no objection and cooperating. On the way back to town he told Miss Israel "a big tale" to the effect that he had arranged to take her out and find out what kind of a girl she was so that the girl with whom he had made the arrangement could write to a boy in Brooklyn, New York, to whom Miss Israel was engaged, what kind of a girl she was. She began to cry and he told her to stop crying, "there was nothing to it". She continued to cry and said that she wanted to go home so he took her around to the nurses' home. At no time did she scream. He did not grab her wrists, put his knee in her stomach or twist her arms. She did not resist him in any way and never kicked or scratched him. Sometime after the above described occurrence he took Lieutenant Colonel Walthour and Lieutenant Slesinger to the scene of the act and the place was not on the post (R. 137-162).

Second Lieutenant Morris L. Slesinger, Infantry, was shown an aerial photograph of Camp Croft and was asked whether he went to a certain spot with Colonel Walthour and Lieutenant Bright, and whether that spot was on the reservation. He answered the first question in the affirmative and the second in the negative, adding the spot is to the right of Highway "176". On cross-examination he was asked whether he had ever gone with Miss Israel to a spot that she pointed out, and he replied that he had not (R. 162-177).

Colonel Walthour, defense counsel, then addressed the court as follows:

> "If it please the court, in my capacity as defense counsel, it seems to me that the court can take judicial

notice of the fact that an officer can look at a map and state where he went and state that point is west of a certain road and I know that all members of this court knows that all land lying west of '176' is not on the reservation. That seems to me the most logical judicial notice. Any people reading maps as long as we have can testify to that fact.

"The President: The court takes judicial notice of that fact."

Mr. J. Andy Jones, Spartanburg, South Carolina, testified in rebuttal that he was subpoenaed as a witness for the defense. Asked as to Miss Israel's general reputation for chastity and character in the community in which she lived, he replied, "Everything that I ever heard was that she was perfectly a lady". He knows her general reputation and it is "good, as far as I know" (R. 178-179).

Mr. Charles J. Lutz, Spartanburg, South Carolina, testified in rebuttal that he has lived in Spartanburg since 1927; that he knows Miss Israel's reputation for chastity and character and that it is "very good" (R. 180).

Mr. F. H. Weedon, Administrator for Mary Black Hospital, Spartanburg, South Carolina, testified in rebuttal that he has known Miss Israel for three years, while she was a student at the hospital; that her general reputation for chastity and character in the community in which she resides is good (R. 181-182).

It was conceded by the defense that if Dr. Hugh S. Black was recalled as a witness he would testify that Miss Israel's reputation for chastity in the community in which she lives is good (R. 182).

5. The aggravated and indecent assault of which accused was found guilty by the trial court, which finding was approved by the reviewing authority, was an act committed in the night at an isolated spot in the open country beyond the sight or hearing of any known persons other than the complainant and the accused. The complainant's testimony and the narration of the same events by the accused, as a witness in his own behalf, so harmonize the details of time, place and surrounding circumstances, such as the actions and conversation of the two parties involved leading up to, and succeeding, the alleged criminal conduct of the accused, as to limit consideration by the Board of Review in this case to a determination of credibility of the principal

opposing witnesses and of the weight to be given to their testimony. The gist of Miss Israel's testimony is to the effect that the accused attempted to have sexual intercourse with her forcibly and against her will but was unsuccessful because of her determined resistance, by reason of which penetration was not accomplished, although accused had an emission on her undergarments during the attack. Accused, on the other hand, testified in effect that he did, at the time and place alleged, actually fornicate with Miss Israel, but that the act of sexual intercourse was performed between them not only with her voluntary consent but with her collaboration and cooperation (R. 142,145,161).

In corroboration of Miss Israel's testimony the prosecution introduced in evidence, over the emphatic objection of the defense, the testimony of Miss Finch, the night superintendent of nurses at the Mary Black Hospital, to whom she made complaint of the attack between 11:30 and 12 on the night of September 10, 1941, the date on which it occurred (R. 58,59); her complaint on the following day, September 11, to Miss Wilkins, a graduate nurse at the same hospital, in which she stated what had happened the night before and named Lieutenant Bright as her assailant (R. 70,71); and finally the testimony of Dr. Black (R. 80), whose testimony covers not only the fact of Miss Israel's complaint, but recites in minute and specific detail all the circumstances of the assault as related to him by her. The objection by defense counsel to this testimony rested chiefly on the ground that it was hearsay. The prosecution contended that these statements should be admitted as part of the res gestae. The court overruled the objection and allowed the testimony to stand. It is the opinion of the Board of Review that the rulings of the court in this respect were legally correct and that the introduction of this testimony was not in violation of the substantial rights of the accused.

In criminal trials for assault with intent to rape the courts are unanimous in holding that it may be shown, not only by the testimony of the prosecuting witness, but also by that of other witnesses, that the prosecutrix made complaint of the outrage soon after its commission (Barnes v. State, 88 Ala. 204, 7 So. 38, 16 Am. St. Rep., 48, in which the husband testified that his wife made complaint to him; State v. Freeman, 100 N.C. 429, 5 S.E. 921; Jenkins v. State, 115 Tex. Crim. Rep., 53, 27 S.W. (2d) 164). Complaints of this nature are admitted on the theory that they are a part of the res gestae of the crime. It was formerly material in prosecutions for rape, where the ravished woman was a witness, to require that she

should have complained of the outrage while it was recent (Wigmore, Evidence, 2d Ed., par. 1135). The rule now is that the length of time intervening between the injury and the complaint will not of itself exclude proof of it, but that the court will look into all of the circumstances surrounding the facts, and on these it may exercise its discretion as to the admission or rejection of such evidence (Higgins v. People, 58 N.Y. 377; Com. v. Cleary, 172 Mass. 175, 51 N.E. 746; People v. Mayes, 66 Calif. 597, 6 P. 691, 56 Am. Rep. 126). In this case the proximity of the complaint to the assault is not merely a question of the time intervening between the two events, but it is further established by the spontaneous utterances of Miss Israel to the two nurses and to Dr. Black, which, in the light of the surrounding circumstances, that is, her immediate complaint to Miss Finch at the hospital where she was returned by accused after the assault, her coherent repetition of the same complaint to another nurse and to a doctor the following morning, and the appearance of her clothing immediately following the assault and of her body at a physical examination the afternoon following the assault, all compel the conclusion that the complainant may be deemed to have spoken the truth.

In the case of State v. Sudduth, 52 S.C. 488, 30 S.E. 408 (1898), which was a prosecution for the crime of rape, the evidence of a mother that her daughter told her that she had been outraged the first time she saw her after the crime was committed, which was about twenty hours thereafter, was held admissible. In the same case it was held that one who is not examined as an expert in a rape case, but who was present three days after the outrage when a physician examined the victim, may testify as to the appearance of the victim's body. This citation is particularly pertinent in the instant case because the scene of the offense here involved is also located in South Carolina, and further because the testimony of the two nurses who were present at the time, and of Doctors Black and Scott, who made the examination of Miss Israel's body on the day following the assault, was introduced by the prosecution over the objection of the defense. Wharton sets forth the rule that

> "There are no limits of time within which the res gestae can be arbitrarily confined. These limits vary in fact with each particular case",

citing in support thereof Alderman v. United States (C.C.A. 5th), 31 F. (2d) 499, writ of certiorari denied in 279 U.S. 869), and numerous other state court decisions (p. 755, Vol. I, Wharton's Criminal Evidence (11th Ed.)).

The Board of Review has carefully considered the question of whether or not the complaint of the attack in this case should be considered in the nature of a prepared narrative of past events, and is of the opinion that it was not. This conclusion is amply supported by the similarity in detail of the complainant's version with the testimony of the accused, wherein commission of the same act which constitutes the basis of the complaint is admitted, but recited by accused as a voluntary act and therefore devoid of the essential elements of an attempt to rape, that is, force and lack of consent. The proof of this complaint is considered by the Board as original evidence admissible only as corroborative of the testimony of the prosecutrix, but not as independent evidence of the offense charged.

With respect to the testimony of Dr. Black (R. 80-88), the further question is raised as to whether or not the details of the assault as related to him by the prosecutrix and recited by him on the witness stand may be received as legally competent testimony. Although, as shown above, the fact that a complaint has been made by the prosecutrix is admissible, the courts are by no means unanimous on the question of permitting the party to whom the prosecutrix complains to go beyond the fact of the complaint itself and to testify as to the specific details of the assault as recited by the complainant. However, the weight of authority is to the effect that such details will not be received in evidence on direct examination unless the complaint is so intimately connected with the injury that the details thereof and of the assault form a part of the res gestae (par. 521, pp. 830,831, Wharton's Criminal Evidence (11th Ed.), Vol. I; Barnett v. State, 83 Ala. 40, 3 So. 612; Barnes v. State, 88 Ala. 204, 7 So. 38, 16 Am. St. Rep. 48; Stephen v. State, 11 Ga. 225; McMath v. State, 55 Ga. 303; State v. Jerome, 82 Iowa 749, 48 N.W. 722; Fletcher v. Com., 123 Ky. 571, 96 S.W. 855; State v. Peter, 14 La. Ann. 527). It will be remembered that the story of the attack testified to by Dr. Black was received by him from Miss Israel at approximately 8 o'clock in the morning after the attack occurred. At that time Miss Israel was still in his hospital and was in agony, distress and a highly nervous condition (R. 79,80,81) as a result of her experience the night before. In the case of People v. Baker, 251 Mich. 322, 232 N.W. 381, the court said:

"It was an ancient rule of the common law that the fact of complaint by a victim of rape could be shown in

corroboration of the prosecutrix, but the details could not. Wigmore speaks of the exclusion of the details as originally a rule of thumb afterward repudiated by the British courts. 3 Wigmore, 2d ed. Sec. 1760. The basis of the admission of the fact of complaint is that an assaulted woman will tell about it at the first opportunity; failure to make complaint impeaches her claim of assault; so complaint may be shown to corroborate her claim. The American courts sought a logical principle upon which to admit or exclude the details of complaint, and their reasoning has produced diverse results. A majority, including this court, adhere to the ancient ruling, upon precedent. Others permit the details of complaint to be shown upon a rather liberal extension of the res gestae doctrine. Others received the testimony upon the argument that, if the fact of the complaint is competent in corroboration of the prosecutrix, there is no good reason for excluding the rest of the statement. Still others permit the details in corroboration of the prosecutrix if and after her testimony has been impeached. 2 Wigmore, Ev. Secs. 1134 et seq.; vol. 3, Sec. 1760; 2 Ann. Cas. 234, note; 11 Ann. Cas. 99, note." (Underscoring supplied)

The theory of the defense in this case is based on the consent of the prosecutrix. In prosecutions for rape, or assault with intent to rape, the bad reputation of the prosecutrix for chastity may be shown as bearing on the probability of consent. The defense here introduced several witnesses in an attempt to establish the bad reputation in her community of Miss Israel for chastity. Such testimony was also apparently directed at her credibility as a witness. On either ground this testimony may be considered as legally competent, but in weighing this evidence the Board is of the opinion that neither her reputation for chastity, nor for truth and veracity, in her community was successfully impugned. On the whole, therefore, the Board is of the opinion that the testimony of Miss Israel is clear and convincing, that her reputation for chastity and truth is good, that the identification of the offender is self-admitted, and that both the circumstantial and direct evidence of record corroborate her testimony and legally sustain the finding of guilt.

Because of some confusion as to the exact boundaries of the Camp Croft military reservation, the evidence of record does not clearly establish whether or not the spot at which the assault was

made was on or off the limits of Camp Croft (R. 26,162-177, incl.). It is well settled that an offense which has no essential connection with the place in which it is committed, although charged to have been committed in a particular locality, may be proved to have been committed anywhere within the jurisdiction (Nudelman v. United States, (C.C.A. 9th) 264 F. 942). The variance in this case could not have misled accused in his defense and it is not a material error. Moreover, in military law the jurisdiction of general courts-martial, in general, does not depend on where the offense was committed, it is personal rather than territorial.

6. The record of trial presents the further question of whether or not the offense of which accused is found guilty is one which "does not change the nature or identity of any offense charged in the specification or increase the amount of punishment that might be imposed for any such offense" (par. 78c, p. 65, M.C.M.). Assault and battery is necessarily a lesser included offense under assault with intent to commit rape.

In the case of Norton v. State, 14 Tex. 387, 393, the court said:

> "An 'aggravated assault' is, at the common law, one that has, in addition to the mere intent to commit it, another object, which is also criminal; but it may be doubted whether at common law the term had a technical and definite meaning. It seems rather to have been a phrase used by the commentators and text-writers, in contradistinction to 'common assault', to include all those species of assault which, for various reasons, have come to be regarded as more heinous than common assaults, or had been singled out and made the subject of special legislative provisions. In the criminal codes of some of the states of the Union, the term 'aggravated assault' is given a definite and peculiar meaning of its own."

In the case of Ellers v. State (Tex.), 55 S.W. 813, it was held that an assault becomes aggravated when committed by an adult male on the person of a female or child. In the case of Commonwealth v. DeGrange, 97 Pa. Super., 181, 185, an indecent assault was defined as the taking by a man of indecent liberties upon the person of a female without her consent and against her will, but with no intent to commit the crime of rape. It has been held that an indecent assault is an "aggravated assault" and simple assault is necessarily included therein (State v.

Waid, 67 P. (2d) 647, 648, 92 Utah 297).

The terminology of this finding is inapt, but nevertheless it does set forth a form of assault known to the ciminal law, and the intent it alleges, while it omits the allegation of felonious, still retains the element of wrongful, that is, unlawful, compulsion to submit to sexual intercourse. This assault, which is an act in violation of the common law, committed under such circumstances as to bring discredit upon the military service, and which is not elsewhere made punishable by any specific article of war, is clearly an offense under the 96th Article of War, of the violation of which Article the accused was convicted.

7. War Department records disclose that this accused was born on July 18, 1917, at Dorchester, Virginia. He was 24 years of age on September 10, 1941, the date of the commission of the offense here alleged. He attended Norton High School, Norton, Virginia, for three years, and the High School Department of Bluefield College, Bluefield, Virginia, for one and one-half years, graduating therefrom in 1938. He attended Milligan College, Tennessee, for a period of over one and one-half years. In the summers of 1935 to 1938, inclusive, he attended the C.M.T.C. camp at Fort Meade, Maryland, and completed the Infantry course. He was appointed a second lieutenant, Infantry Reserve, on February 19, 1940, and ordered to extended active duty at Fort Meade, Maryland, for the period from July 25, 1940, to July 24, 1941. He completed the Refresher Course for Rifle and Heavy Weapons Company Officers at the Infantry School, Fort Benning, Georgia, on November 8, 1940. War Department orders promoting him to first lieutenant to have been effective November 1, 1941, were revoked on October 30, 1941, by reason of this trial.

8. The court was legally constituted. 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 sentence imposed by the court and approved by the reviewing authority is grossly inadequate as punishment for the offense of which the accused has been convicted. The Manual for Courts-Martial provides:

> "The imposition by courts-martial of inadequate sentences upon officers and others convicted of crimes which are punishable by the civil courts would tend to bring the Army, as to its respect for the criminal laws of the land, into disrepute." (par. 80, p. 67)

Unfortunately it does not lie within the power of the confirming authority to impose an appropriate penalty in this case which would correspond to the sentence normally imposed by a civil court for a similar type of assault. 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. L. M. Smith, Judge Advocate.
William H. Founds, Judge Advocate.
Charles M. Van Benschoten, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218647

JAN 14 1942

UNITED STATES	)	44th INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Dix, New Jersey, Septem-
First Lieutenant WILLIAM	)	ber 18 and 19, 1941. Dis-
C. MOODY (0-400747), 174th	)	missal and confinement for
Infantry (Rifle).	)	one (1) year.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

1. The record of trial 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.

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

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

Specification: In that 1st Lt. William C. Moody, 174th Inf. (R) did at Fort Dix, N. J. on or about July 28th, 1941 feloniously embezzle by fraudulently converting to his own use, a check of the value of $375.00, the property of Pvt. Theodore Mazur (deceased), entrusted to him by said Pvt. Theodore Mazur (deceased).

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

Specification: (Finding of not guilty.)

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

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

Specification 3: In that 1st Lt. William C. Moody, 174th Inf. (R) did at Trenton, N. J. on or about August 24th, 1941 wrongfully and falsely introduce a woman, one Evelyn Neuman, as his wife to 2nd Lt. Lloyd A. Mack, 174th Inf. (R) when in fact the said woman was not the wife of said 1st Lt. William C. Moody, 174th Inf. (R) as he then well knew.

Specification 4: (Finding of not guilty.)

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

Specification 1: (Finding of not guilty.)

Specification 2: In that 1st Lt. William C. Moody, 174th Inf. (R) being then and there a married man, having a lawful, living wife and not being divorced, did at Georgetown, N. J., from on or about August 24th, 1941 to on or about August 25th, 1941, wrongfully, dishonorably and unlawfully live and cohabit with one Evelyn Neuman, a woman not his wife.

The accused pleaded not guilty to all Charges and Specifications. At the conclusion of the case of the prosecution, the motion of the defense for findings of not guilty was sustained as to Specifications 1, 2, and 4, Charge III, and Specification 1, Charge IV (R. 111). He was found guilty of Charge I and its Specification, not guilty of Charge II and its Specification, guilty of Specification 3, Charge III, and of Charge III, guilty of Specification 2, Charge IV, and not guilty of Charge IV, but guilty of a violation of the 95th Article of War. 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 findings of guilty of Charge I and its Specification, of Specification 3, Charge III and Charge III, of Specification 2, Charge IV, and only so much of the finding of guilty of Charge IV in violation of the 95th Article of War, substituted by the court for the original 96th Article of War, as involved a finding of guilty of Charge IV in violation of the 96th Article of War, approved

the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution upon the specifications of which accused was found guilty is substantially as follows:

a. Specification, Charge I:

The accused as Officer of the Guard at Fort Dix went to the home, in Passaic, New Jersey, of Private Theodore Mazur, now deceased (R. 28-29), and took into custody Mazur, who had escaped from the guardhouse (R. 28). While at home Mazur showed his sister (R. 85) a check for $375, a death benefit from a Roman Catholic Benevolent Association (R. 81, 84), payable to Mazur, before accused came for Mazur on July 27, 1941 (R. 85), and returned him to custody at Fort Dix, New Jersey.

On July 28, 1941, the accused came into the office of Major McGuire, Police and Prison Officer, Fort Dix, with reference to the check payable to Mazur for $375 (Ex. 4) from the Benevolent Association, which Major McGuire had received either from a letter addressed to Mazur, or turned in by Mazur for safekeeping. In the presence of accused, Mazur stated that he wanted to have the check given to accused to have it cashed and the proceeds returned to Mazur. Major McGuire took the check from the safe, gave it to Mazur, who endorsed the check and turned it over to accused, who gave a receipt to Mazur (R. 11-14, 104). Mazur gave Major McGuire a receipt for the check (Ex. 1).

The accused stated to the investigating officer that Mazur handed the check to him with the request that he cash it, return $250 to Mazur and the balance to Mazur's sister in Passaic (R. 28). Miss Anna Mazur, sister of accused, never received any part of the $375 (R. 87).

It was stipulated that the indorsement on the $375 check was that of accused (R. 103-104), that the bank stamp was authentic, and that the check had been cashed (R. 110).

Private Mazur was shot and killed on August 22, 1941,

(R. 87), in attempting to escape from guards (R. 34). On the evening of that day First Lieutenant Ernest L. Rosenbower, an officer of Company H, 113th Infantry, of which Mazur was a member, had a conversation with accused. He informed accused of Mazur's death, told accused he had seen a letter addressed to Mazur signed by a Lieutenant Moody stating an intention to repay the $375 at $100 a month, discussed the loss of the money with accused and asked accused what action he would take in the case. In reply to a request for his opinion, Lieutenant Rosenbower suggested that accused visit the family of Mazur to clarify the position of accused to avoid unfavorable publicity (R. 37-49).

Prior to the preferring of charges against accused, some two or three weeks prior to the trial, Major Blyth P. L. Carden, 174th Infantry, made an investigation in which, after he advised accused that it was not necessary for him to make any statement but that if he did it could be used against him, the accused stated in the presence of Captain Howard Shaw, J.A.G.D., 44th Division, that he received from Mazur a check for $375 of some association payable to Mazur and arising out of the death of Mazur's mother; that he cashed the check the following day and put the proceeds in his wallet with his own money; that he undressed in his car at Browns Mills that evening; left the wallet containing the $375 in the glove compartment of his locked car and went swimming; upon his return he found one of the car windows forced, his car entered, and the wallet on the seat but the money missing; and that he made no report of the loss either to the civil or military authorities (R. 21-29, 80-82). The accused later told Major Carden that after a certain period, he informed Mazur of the loss of the money (R. 29).

b. Specification 3, Charge III:

Second Lieutenant Lloyd A. Mack testified he once - no date shown - drove the accused to Trenton to pick up a party at the depot; that they picked up a young woman and a two year old child; and that the woman was introduced to him and his wife as "Evelyn" (R. 89).

When Miss Evelyn Neuman came to New Jersey in the latter part of August with her two year old child, she was met

in Trenton by the accused, and Lieutenant and Mrs. Mack. She did not remember whether she was introduced by accused to Lieutenant and Mrs. Mack at the Trenton station (R. 75-78).

In his statement to Major Carden, accused stated that he left the post with Lieutenant and Mrs. Mack, met Miss Neuman at the station, and then went to Mrs. Well's home in Georgetown (R. 100-101).

c. Specification 2, Charge IV:

The accused, Evelyn, the child, and Lieutenant and Mrs. Mack left the Trenton station and went to the home of Mrs. Wells in Georgetown. When they entered Mrs. Well's home, Lieutenant Mack introduced accused and Evelyn as Lieutenant and Mrs. Moody. There was no denial by anyone that the young lady was Mrs. Moody. The room which was rented to Evelyn was on the second floor, right hand, across the hall from the room occupied by Mrs. Mack. The accused, Lieutenant and Mrs. Mack then left and returned to Fort Dix. When Lieutenant Mack returned to Mrs. Wells' home at about 10:30 that evening, he noticed in the rear of the house the automobile of accused, a Dodge and the same car in which they drove to the Trenton station. Lieutenant Mack next met accused the following morning around 5 o'clock. When he knocked on the door of the room on the right hand side, the room rented to Evelyn, the accused answered the door and was about ready to leave. When Mrs. William C. Moody came into the court room, Lieutenant Mack stated that she was not the young lady whom he, Mrs. Mack and the accused met at the Trenton station, and was not the young lady whom he introduced as Mrs. Moody (R. 87-94). Miss Neuman was never married to accused (R. 77). She had remained in Georgetown for four weeks (R. 75).

Mrs. William C. Moody of Buffalo, New York, was sworn as a witness, but her attorney stated that she claimed her privilege to refuse to testify against her husband. She stated that she did not wish to testify at all (R. 95).

Colonel Joseph W. Becker, Commanding Officer, 174th Infantry, knew the wife of accused although he was not present

at the marriage ceremony. He knew Mrs. Moody in Buffalo, New York, where her last address within his knowledge was on Highland Avenue. He had also met her at various places around and in the general vicinity of Fort Dix. When Miss Evelyn Neuman was brought into the court room, Colonel Becker stated that she was not Mrs. Moody. He had been present several times when accused held out a woman to be his wife. The young lady (Miss Neuman) was never held out to him by accused to be the wife of accused. The last time that he recalls Mrs. Moody was so held out to him was when he visited accused in the hospital in March and found Mrs. Moody there (R. 69-75).

Miss Evelyn Neuman rented a room at the home of Mrs. Wells, when she went there in the latter part of August with accused and Lieutenant and Mrs. Mack. She did not wish to state the name which she gave to Mrs. Wells, nor how long on that day the accused was with her, nor whether accused was ever present with her during the night at the home of Mrs. Wells (R. 75-78).

In his conversation with Major Carden, after being warned that he need made no statement and that any statement made could be used against him, accused stated that he had rented a room for Evelyn Neuman at Mrs. Wells' home; that he visited Miss Neuman there on a Sunday night; that he did not state when he returned as to time but stated that he had returned and was accompanied by Lieutenant Mack on Monday morning (R. 100-101).

4. Defense:

a. The accused elected to remain silent (R. 113).

b. The sole witness for the defense was Captain John Seager, Chaplain, 174th Infantry. He had known accused for three years in Buffalo and for one year in the service. The reputation of accused was that of a good soldier generally. In Buffalo his reputation in industry, in social, and in church life was excellent. He had visited accused frequently in confinement and had not changed his opinion of accused during that time (R. 112-113).

5. a. The evidence shows with respect to the Specification, Charge I - embezzlement of check of the value of $375 - that Private Theodore Mazur, a prisoner, turned over to accused on July 28, 1941, a check for $375, payable to Mazur on account of a death benefit, to be cashed and to return the proceeds either to Mazur, or in part to Mazur and the balance to Mazur's sister. The accused cashed the check and put the proceeds in his wallet. The accused stated that the money was stolen from his wallet which he had left in his locked car while swimming. The loss was not reported to the civil or military authorities. The accused later told Mazur of the loss. Mazur was killed on August 22, 1941, while attempting to escape. Mazur's sister has received no portion of the proceeds of the check.

The Specification alleges embezzlement of the check by the accused while the proof shows that it was the proceeds of the check rather than the check itself which the accused fraudulently converted to his own use. There is no evidence in the record to show that accused converted the check to his own use. The proof shows that the check was entrusted to him for the purpose of being cashed. Insofar as the check is concerned there is no proof, direct or circumstantial, that accused did anything with it other than he might lawfully have done according to his trust, or that he entertained any fraudulent intent with respect to the check while it was in his possession. To show that after the check was cashed, accused converted the money obtained therefrom is wholly insufficient to prove that the check itself was converted as alleged. Such variance between the allegation of embezzlement of the check, and the proof of embezzlement of the proceeds thereof must be held to have been fatal to the conviction, since embezzlement of

personal property is an offense separate and distinct from embezzlement of the proceeds of the property (CM 188571, Simmons; CM 189741, Mulkey; State v. Crosswhite (32 S.W. (Mo.) 991); State v. Mispagel (106 S.W. (Mo.) 513); State v. Sheets (289 S.W. (Mo.) 553); People v. Davis (110 N.E. (Ill.) 9; 20 Corpus Juris 479)). In the Sheets case the court said -

> "One cannot be convicted of embezzling money under an information charging embezzlement of a draft, check, note, or other instrument. Nor can one be convicted of embezzling a draft under an information charging embezzlement of money. Proof of the one constitutes a fatal variance from the allegation as to the other." (289 S.W. 554.)

As stated by the Board of Review in the Simmons case (CM 188521) -

> "It is elementary that an accused cannot legally be found guilty of offenses distinct and separate from those charged (Paragraph 75 c, M.C.M.), as would, because of the variance, be the result of the conviction upon these specifications. The injurious effect of such variance upon the substantial rights of accused, within the meaning of the 37th Article of War, is self evident."

For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of the Specification, Charge I, and Charge I.

b. With respect to Specification 3, Charge III, the evidence entirely fails to furnish any proof that accused intro-

duced Evelyn Neuman as his wife to Second Lieutenant Lloyd A. Mack at Trenton, New Jersey, about August 24, 1941. Lieutenant Mack, the only witness, who testified with respect to the introduction, stated that accused there introduced a woman to him and to his wife as "Evelyn".

The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specification 3, Charge III, and, as that Specification is the only Specification supporting Charge III, is legally insufficient to support the finding of guilty of Charge III.

c. The evidence with respect to Specification 2, Charge IV - live and cohabit August 24 to 25, 1941, with Evelyn Neuman, a woman not his wife - shows that after accused and Lieutenant and Mrs. Mack met Evelyn Neuman and her two year old child at the Trenton station, they drove to the home of Mrs. Wells in Georgetown, New Jersey. Lieutenant Mack introduced accused and Evelyn to Mrs. Wells as Lieutenant and Mrs. Moody. There was no denial by anyone that the woman was Mrs. Moody. Mrs. Wells rented to Evelyn a room on the second floor across from the room occupied by Mrs. Mack. The accused and Lieutenant and Mrs. Mack then left for Fort Dix. When Lieutenant Mack returned to Mrs. Wells' home at about 10:30 that evening, he noticed the automobile of accused in the rear of the house. Lieutenant Mack next saw accused the following morning around 5 a.m., when he knocked on the door of the room rented to Evelyn. The accused answered the door and was about ready to leave.

When Mrs. William C. Moody, whom Colonel Joseph W. Becker had known as the wife of accused in Buffalo, New York, and at Fort Dix, came into the court room, Lieutenant Mack stated that she was not the young lady whom he and accused met at the Trenton station and whom he introduced to Mrs. Wells as Mrs. Moody. When Mrs. William C. Moody was sworn as a witness she claimed, through her attorney, her privilege to refuse to testify against her husband, and herself stated that she did not wish to testify at all.

Miss Evelyn Neuman testified that she rented a room at the home of Mrs. Wells when she went there in company with

the accused and Lieutenant and Mrs. Mack. She did not wish to state the name she gave Mrs. Wells, nor how long on that day the accused was with her, nor whether accused was ever present with her during the night at the home of Mrs. Wells.

The accused admitted to the investigating officer that he rented a room for Evelyn Neuman at the home of Mrs. Wells; that he visited Miss Neuman there on a Sunday night and that he had returned to Fort Dix accompanied by Lieutenant Mack on Monday morning.

The nature of proof required in cases of this general character has been well expressed as follows:

> "In adultery, from the very nature of the offense, direct proof can seldom be adduced; hence, facts and circumstances are relevant from which guilt can be established, but this must be to a degree that will satisfy the jury beyond a reasonable doubt. The circumstances that are common to the offense, such as mutual disposition, opportunity, and frequently, reputation for chastity, in connection with testimony showing opportunity, are all relevant." (Wharton's Criminal Evidence, vol. 1, sec. 252.)

> "Direct evidence of the act of sexual intercourse can seldom be obtained. Proof of opportunity and inclination will support a conviction of adultery." (Underhill Criminal Evidence, 3d ed., sec. 581.)

> "Adultery may be established by circumstantial evidence, provided the circumstances adduced exclude every other reasonable hypothesis save the guilt of accused, mere suspicion and conjecture being insufficient to sustain a conviction for adultery." (2 C.J.S., p. 489, sec. 24 a.)

> "If direct proof of the act of illicit sexual intercourse can be obtained, upon a showing of the other elements of the offense, it is sufficient to sustain a conviction, but the act of sexual intercourse, from the natural secrecy which attends it, is usually to be

> proved by circumstantial evidence, which is sufficient, if the circumstances are such as to lead the guarded discretion of a reasonable and just man to the conclusion that the offense has been committed, and it must exclude every other reasonable hypothesis than that of the guilt of accused.
>
> "The act of sexual intercourse may be inferred from the man and woman occupying the same bed and room, occupying the same room, * * *." (2 C.J.S., p. 491, sec. 24 c.)

The fact that Miss Neuman had come to the vicinity of Fort Dix, that accused had gone to Trenton to meet her and brought her to the home of Mrs. Wells, where accused had rented a room for her, that accused had, without any direct statement to that effect, permitted Lieutenant Mack to believe that Miss Neuman was the wife of accused, that neither accused nor Miss Neuman made any denial when Lieutenant Mack introduced them to Mrs. Wells as Lieutenant and Mrs. Moody, that the car of accused was parked in the rear of Mrs. Wells' house at 10:30 p.m., on the night Miss Neuman arrived, and the fact that at 5 a.m., on the next morning Lieutenant Mack rapped on the door of the room rented to Miss Neuman and the accused answered the door and was about ready to leave, are circumstances which convincingly establish beyond any reasonable doubt that accused spent the night in Miss Neuman's room for purposes inconsistent with his status as a married man. A consideration of these circumstances in the light of ordinary human tendencies and experience can leave no doubt as to the nature of the relations between accused and Miss Neuman on the night of Miss Neuman's arrival at the house of Mrs. Wells.

The Specification alleges that accused did "from on or about August 24, 1941, to on or about August 25, 1941, * * * live and cohabit with one Evelyn Neuman * * *." The only direct proof thereon is with respect to the period of about six and one-half hours from about 10:30 p.m., on the night of Miss Neuman's arrival in Georgetown until about 5 a.m., the next morning.

Bishop states that "to cohabit is to live together"

(Marriage and Divorce, 6th ed., vol. 1, sec. 777).

Bouvier defines lascivious cohabitation as -

"The act or state of a man and woman, not married, who dwell together in the same house, behaving themselves as man and wife.

"In statutes forbidding unlawful cohabitation that term involves the idea of habitual sexual intercourse, or living together in such a way as to hold out the appearance of being husband and wife, and it is the scandal resulting therefrom which constitutes the mischief against which the statutes are directed; * * * and proof of occasional acts of intercourse is not sufficient; * * *" (Bouvier Law Dictionary, Rawles 3d revision, vol. 2, p. 1868).

Black defines cohabitation as -

"Living together; living together as husband and wife.

"Cohabitation means having the same habitation, not a sojourn, a habit of visiting or remaining for a time; there must be something more than mere meretricious intercourse. * * *." (Black's Law Dictionary, 2nd ed., p. 213.)

"* * * it has been said that cohabitation is not a sojourn, nor a habit of visiting, nor even a remaining with for a time, but the term implies continuity; * * *." (14 C.J.S. 1312.)

In construing section 3, act of May 22, 1882 (22 Stat. 31) providing that any male person who "cohabits with more than one woman" shall be deemed guilty of a misdemeanor, the Supreme Court held:

"* * * The offence of cohabitation, in the sense of this statute is committed if there is a living or dwelling together as husband and wife. It is, inherently, a continuous offence, having duration; and not an offence consisting of a single act." (in re Snow, 120 U.S. 274, 281.)

Although there is some support for the interpretation that to constitute cohabitation, "They must live together, if only for a short time, as for a single day, as though the marriage relation existed, and the evidence must be such that a continuance of the adultery may be inferred" (Underhill's Criminal Evidence, 3rd ed., sec. 584), the weight of authority clearly requires more than a single sojourn for a portion of a single night to constitute cohabitation. The use of the word "live" likewise gives to the phrase "live and cohabit" a meaning of permanence in the sense of dwelling and residing and of something more than a sojourn for a single night.

In the opinion of the Board the proof fails to support the allegation that accused did "live and cohabit" with Miss Neuman, but does support the lesser included offense of occupying a room with Miss Neuman under the circumstances alleged.

It is, accordingly, the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the finding of guilty of Specification 2, Charge IV, as involves a finding of guilty of the lesser included offense that accused, a married man, having a lawful living wife, did, wrongfully and dishonorably occupy, at the place and for the period alleged, a room with one Evelyn Neuman, a woman not his wife.

6. The accused is twenty-five years of age. The records of the Office of The Adjutant General show his service as follows:

> Private, Company C, 174th Infantry, New York National Guard, February 22, 1938; Corporal, January 16, 1939; Second Lieutenant, Infantry, National Guard of the United States, to date from September 16, 1940; entered upon active duty September 16, 1940, pursuant to the order of the President, dated August 31, 1940; temporarily promoted First Lieutenant, Infantry, to date from February 4, 1941.

7. A request for clemency with respect to the confinement imposed was received from the Honorable Alfred F. Beiter, Repre-

sentative in Congress.

A letter was received from the accused reciting his services which had resulted in his promotion from the ranks, and expressing the hope that clemency might be exercised at least with respect to the confinement adjudged, so that he might be able to accept one of several excellent offers of civilian employment, and thereby provide for those who are dependent on him.

8. The 201 file of this officer in the Office of The Adjutant General contains a copy of a letter addressed to Senator James M. Mead, in which accused recites at length facts which he states were not, for various reasons, brought out at his trial.

9. The court was legally constituted. 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 insufficient to support the findings of guilty of the Specification, Charge I, and Charge I; legally insufficient to support the findings of guilty of Specification 3, Charge III, and Charge III; legally sufficient to support only so much of the finding of guilty of Specification 2, Charge IV, as involves a finding of guilty of the lesser included offense that accused, a married man, having a lawful living wife, did, wrongfully and dishonorably occupy at the place and for the period alleged, a room with one Evelyn Neuman, a woman not his wife; legally sufficient to support Charge IV; and legally sufficient to support the sentence, and warrants confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Lester S. Hill, Judge Advocate.

Chas. L. Bresson, Judge Advocate.

Thomas H. Tappy, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218667

DEC 2 1941

UNITED STATES v. Private MILLARD T. JOHNS (14018867), Service Battery, 44th Field Artillery Battalion.	)	4TH MOTORIZED DIVISION Trial by G. C. M., convened at Fort Benning, Georgia, September 30, 1941. Confinement at hard labor for three (3) months. Fort Benning, Georgia.

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Millard T. Johns, Service Battery, 44th Field Artillery Battalion, did, at Fort Benning, Georgia, on or about September 17, 1941, with intent to do him bodily harm, commit an assault upon Sergeant George L. Midgett, Service Battery, 44th Field Artillery Battalion, by cutting him in the abdomen, with a dangerous weapon, to wit, a pocket knife.

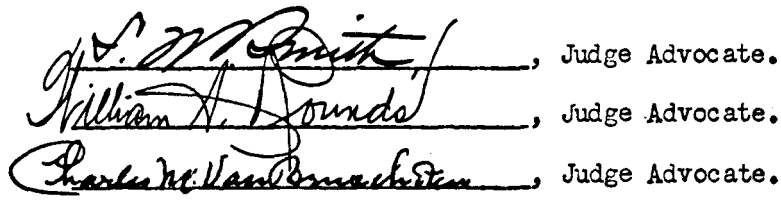
He pleaded not guilty to the Specification and Charge, and was found guilty of the Specification except the words

"with intent to do him bodily harm, commit an assault upon Sergeant George L. Midgett, Service Battery, 44th Field Artillery Battalion, by cutting him in the abdomen with a dangerous weapon, to wit, a pocket knife",

substituting therefor the words "attempt to strike a noncommissioned officer with his fist while the noncommissioned officer was in the execution of his office", of the excepted words, not guilty, of the substituted words, guilty, of the charge, not guilty, but guilty of violation of the 65th Article of War. No evidence of previous convictions was introduced. He was sentenced to be confined at hard labor for six months and to forfeit two-thirds of his pay for a like period. The reviewing authority approved only so much of the findings of guilty of the Specification and Charge as involves a finding that the accused did, at the time and place alleged, "wrongfully attempt to strike Sergeant George L. Midgett, Service Battery, 44th Field Artillery Battalion, in the face with his fist, in violation of the 96th Article of War", and only so much of the sentence as involves confinement at hard labor for three months, ordered the sentence as thus modified to be duly executed, and designated Fort Benning, Georgia, as the place of confinement.

3. Under the long recognized doctrine that an accused is acquitted of all material allegations which were excepted by a court-martial in its finding (par. 2, sec. 1560, Dig. Ops. J.A.G., 1912-30), the accused herein was acquitted by the court of all the material allegations which are excepted by its finding, namely, assault with intent to do bodily harm with a dangerous weapon, in violation of the 93rd Article of War. By excepting in its finding the word assault and any other word or words stating or implying that the action was wrongful, unlawful and felonious, the legal presumption arises that the act was lawful and innocent (par. 4 sec. 1471, and pars. 4,5, sec. 1559, Dig. Ops. J.A.G., 1912-30). However, the court thereupon substituted a finding of guilty of an attempt to strike a noncommissioned officer with his fist while the latter was in the execution of his office, in violation of the 65th Article of War. This finding cannot be sustained for the obvious reason that accused was not charged with this offense, which is not included in and is totally different from the offense with which he is charged. This variance is a fatal error (CM 164042, Rodden). Thereafter the reviewing authority purported to approve only so much of the finding of guilty of the original Charge and Specification as involves a finding that the accused wrongfully attempted to strike Sergeant George L. Midgett in the face with his fist, in violation of the 96th Article of War. Since, under the 47th Article of War, the reviewing authority has only the power, in connection with a finding, to approve a lesser included offense where his action "does not change the nature or identity of any offense charged in the specification", and where the evidence proves the commission "of a lesser offense necessarily included in that charged" (par. 78c, p. 65, M.C.M.), it clearly follows that the action of the reviewing authority in this case is erroneous for the reason that since there was actually no finding of guilty of any offense, there could be no legal approval of a finding of any "lesser included offense".

4. For the reasons above stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the sentence and that since the execution of the sentence is based upon findings which are null and void, the confinement approved and ordered executed in pursuance thereof was without lawful authority and of no legal effect.



, Judge Advocate.

, Judge Advocate.

, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218753

DEC 17 1941

UNITED STATES	)	40th INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp San Luis Obispo, California,
Captain CHARLES R. PAGE	)	November 4, 1941. Dismissal and
(0-278102), 185th Infantry	)	confinement for five (5) years.
(Rifle).	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocate.

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.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Captain Charles R. Page, 185th Infantry (Rifle) did, at Camp San Luis Obispo, California, on or about the First day of July, 1941, feloniously embezzle by fraudulently converting to his own use the sum of $368.54 more or less, in lawful money of the United States, being the property of Company Fund, Company H, 185th Infantry (Rifle) which said fund was entrusted to him as Commanding Officer of said Company H, 185th Infantry (Rifle)

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

Specification 1. In that Captain Charles R. Page, 185th Infantry (R), did, at Camp San Luis

Obispo, California, between the dates of June 30, 1941 and October 21, 1941 feloniously embezzle by fraudulently converting to his own use the sum of $275.00 more or less, in lawful money of the United States, being the property of Company Fund, Company "H", 185th Infantry (R) which said fund was entrusted to him as Commanding Officer of said Company "H", 185th Infantry (R).

Specification 2. In that Captain Charles R. Page, 185th Infantry (R), did, at Camp San Luis Obispo, California, between the dates of July 31, and October 21, 1941 feloniously embezzle by fraudulently converting to his own use the sum of $326.00 more or less, in lawful money of the United States, being the property of Special Fund, Company "H", 185th Infantry (R) which said fund was entrusted to him as Commanding Officer of said Company "H", 185th Infantry (R).

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

Specification: In that Captain Charles R. Page, 185th Infantry, did, at Camp San Luis Obispo, California, on or about October 10, 1941, with intent to deceive, wrongfully and unlawfully make, utter and pass, or cause to be made, uttered and passed a certain check in words and figures as follows, towit:

No. 19

San Luis Obispo, California, October 10, 1941

Pay to the order of 40th Division Post Exchange $332.50

Three hundred thirty two and 50/100 Dollars

San Luis Obispo Branch (
Security First National)
Bank of Los Angeles (
90-236 799-Higuera) Company Funds, Co, "H", 185th Inf
12 San Luis Obispo (by Charles R. Page

> he, the said Captain Charles R. Page, then well knowing that there were not sufficient funds in the said bank for the payment of said check; such said act and behavior constituting an act and behavior unbecoming an officer and a gentleman.

He pleaded guilty to the Specification, Additional Charge II, and to Additional Charge II, and not guilty to all other Specifications and Charges. He was found guilty of all Specifications and Charges. 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 and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution is substantially as follows:

a. The accused was in command of Company H, 185th Infantry, from June 16, 1941, to October 18, 1941. During that period he was the custodian and responsible officer for all unit funds of that company (R. 6).

A check for $332.50 drawn on the San Luis Obispo Branch, Security-First National Bank of Los Angeles, signed "Company Funds, Co. 'h' 185th Inf By Charles R. Page" in payment of the account of that Company, received by the 40th Division Post Exchange, Camp San Luis Obispo, California, on October 16, 1941, was returned to the Post Exchange by the bank marked, "Insufficient Funds" (R. 30-31; Ex. 14). When the accused on October 21, 1941, was called upon for an explanation by the acting regimental commander, he replied that he could not understand why there should not be plenty of money in the company accounts. That afternoon the accused brought all of the records of his Company Fund and Special Fund for a conference with the Executive Officer, Lieutenant Colonel Fred H. Hover and the Adjutant, Captain John W. Guerad. The accused then volunteered the statement that he knew his accounts were short due to the loss of some $900 in June (R. 28).

b. Specification of the Charge:

The accused stated during the course of the investigations that he had gone downtown in June with some $900

in currency of which some $200 belonged to him, $368.54 was received on company collection sheet for June, and the balance was company money. He became intoxicated and did not know what happened, but that the money must have been taken from him. He altered the bank statements for about three months to cover the shortage, securing a purple typewriter ribbon to correspond with the ribbon used by the bank on the statements in order that the alterations might appear legitimate (R. 25, 28-29; Ex. 1, 3). The Council Book shows the receipt on July 1st of $368.54, company collections for June. The customer's statement retained by the bank (Ex. 9A) does not show any deposit of that amount, but the copy thereof delivered to accused shows a deposit of $368.54 on July 2, 1941, an entry not made by the bank bookkeeping machine (R. 15), with a deposit slip for that amount attached (Ex. 8, p. 3). The accused stated to the investigating officer, after being warned that he need make no statement, that he made the alteration on his copy of the customer's statement (Ex. 8, p.3) and altered by ink eradicator the deposit slip attached thereto, to show a deposit of $368.54 on July 2 (R. 23).

c. Specification 1, Additional Charge I:

A counter check dated Chehalis, Washington, August 27, 1941, for $50, payable to Captain Charles R. Page, drawn on the Security-First National Bank, San Luis Obispo, California, signed, "Co. Funds, Co. 'H' 185th Inf. by Charles R. Page", and indorsed, "For cash purchases, Co. 'H' on Maneuvers. Capt. Charles R. Page 185th Inf. Camp San Luis Obispo, Cal", was paid on September 3, 1941 (Ex. 6, No. 2), and charged to the Company Fund, Company H, 185th Infantry (Ex. 9A). A similar counter check dated Chehalis, Washington, August 28, 1941, for $50, payable to Captain Charles R. Page, stating on its face, "Cash purchases, Washington Maneuver", and indorsed, "Capt. Charles R. Page", was paid on September 3, 1941 (Ex. 6, No. 1), and charged to the Company Fund, Company H, 185th Infantry (Ex. 9A). Accused stated to the investigating officer, Major Earle G. Granger, that these two checks were drawn for his own use, were withdrawn from the statement delivered to him by the bank, and the entry of those checks removed from the statement (R. 24). Neither of the above checks were entered in the Company Fund check book (Ex. 4).

Check No. 19, dated San Luis Obispo, California,

October 9, 1941, for $150, drawn on the Security-First National Bank of Los Angeles, San Luis Obispo Branch, payable to the order of Captain Charles R. Page, signed "Company Funds, Co. H 185th Inf by Charles R. Page", and indorsed, "For change collection sheet, Capt. Charles R. Page", was paid on the same day (Ex. 6 No. 3), and charged to the Company Fund, Company H, 185th Infantry (Ex. 9A). A second check, No. 19, dated San Luis Obispo, California, October 9, 1941, for $25, payable to the order of Captain Charles R. Page, stating on its face, "Cash for small purchases", drawn on the Security-First National Bank of Los Angeles, San Luis Obispo Branch, signed "Company Funds, Co. 'H' 185th Inf. by Charles R. Page", indorsed "Capt. Charles R. Page, Co. 'H' 185th", "Camp Exchange Br. 2", and "Post Exchange, 40th Division Exchange, Camp Exchange, Camp San Luis Obispo", was paid on October 11, 1941 (Ex. 6, No. 4), and charged to the Company Fund, Company H, 185th Infantry (Ex. 9A). Accused stated to the investigating officer, Major Granger, that these two checks were likewise drawn for his own use, but had not been returned from the bank (R. 24). Neither of the above checks were entered in the Company Fund check book (Ex. 4) or Council Book (Ex. 1).

d. Specification 2, Additional Charge I:

Check No. 1828, dated San Luis Obispo, California, October 6, 1941, for $100, payable to the order of Company Funds, Company H, 185th Infantry, drawn on the Security-First National Bank of Los Angeles, San Luis Obispo Branch, signed "Special Fund, Co. 'H' 185th Inf. by Charles R. Page", and indorsed, "Company Fund, Co. 'H' 185th Inf. by Charles R. Page", was paid October 9, 1941 (Ex. 7), charged to Special Fund, Company H, 185th Infantry (Ex. 10) and credited to the Company Fund, Company H, 185th Infantry (Ex. 9A). Check No. 1829, dated San Luis Obispo, California, October 9, 1941, for $50, payable to the order of Captain Charles R. Page, drawn on the Security-First National Bank of Los Angeles, San Luis Obispo Branch, signed, "Company 'H' 185th Inf. Special Funds by Charles R. Page", and indorsed, "For change collection sheet Capt. Charles R. Page", was paid October 9, 1941 (Ex. 7), and charged to Special Fund, Company H, 185th Infantry (Ex. 10). Neither of the above checks were entered in the Special Fund check book (Ex. 5) or Council Book (Ex. 2).

There was received in evidence a copy, stated by the prosecution to be a true copy, of check No. 1878, dated San

Luis Obispo, California, October 14, 1941, for $176, payable to Bank of America, drawn on the Security-First National Bank of Los Angeles, San Luis Obispo Branch, signed, "Special Funds, Co 'H' 185th Inf by Charles R. Page", and indorsed, "Bank of America NT& SA San Luis Obispo Br. SAN LUIS OBISPO, CALIF." (Ex. 11). The check was presented to the San Luis Obispo Branch, Security-First National Bank of Los Angeles, on October 18, 1941, and payment refused because the balance in that account was $23.05. The check was again presented on November 3, 1941, and paid as a deposit had been made to cover it. It was not canceled because it was still (Nov. 4, 1941) going through the books of the bank (R. 20). That check was not entered in the Special Fund check book (Ex. 5) or Council Book (Ex. 2). The record contains nothing to indicate the purpose for which this check was drawn.

In his written statement dated October 23, 1941, to Major Granger, the investigating officer, accused stated that two checks were outstanding in the amount of $332.50 and $176 - not stated whether on Company Fund or Special Fund - with insufficient funds to cover them (Ex. 14).

e. Specification, Additional Charge II:

The accused pleaded guilty to this Charge and its Specification.

On October 16, 1941, the 40th Division Post Exchange, Camp San Luis Obispo, California, received a check, No. 19, dated October 10, 1941, for $332.50 drawn on the San Luis Obispo Branch, Security-First National Bank of Los Angeles signed "Company Funds, Co. 'h' 185th Inf By Charles R. Page", in payment of the account of that company. The check was returned to the Post Exchange by the bank, marked, "Insufficient Funds". That account had not been paid at the date of trial (R. 30-31; Ex. 14). The accused stated to the investigating officer that a check for $332.50 was outstanding with insufficient funds to cover (R. 25). The Company Fund account at no time after October 8, 1941, had a balance sufficient for the payment of this check. The balance on October 16, 1941, was but $45.56.

4. Defense:

a. The accused testified that the document read into

the record by Major Granger, investigating officer (Ex. 12), was his statement in his handwriting. On June 30, he had collected about $360 on his collection sheet, had some $350 in change borrowed from the bank to make collections, and a little over $200 of his own. He went into town after dinner with all of that money in his pocket, went to several bars, became intoxicated and the evening was a blank after about 10 p.m. When he woke in camp the next morning all of the money was gone except for a few small bills in his purse. He became upset because his monthly audit was coming on and because his wife had not been well. He altered his records, got away with it that month, and had been covering up ever since. Exhibit 6, in four parts (checks on Company Fund for $50, August 27th; $50, August 28th; and $150 and $25, October 9th), and Exhibit 7, in two parts (checks on Special Fund for $100, October 6th, and $50, October 9th), constitute a juggling of funds between the Special Fund and the Company Fund and a covering up of the shortage. He never extracted any money from either the Company or Special Fund for his own purposes or for anyone else. All of the money juggled was used for the company and the only shortage was the original shortage which he lost on the night of June 30th (R. 32-33). The total amount of the shortage was $1145.50. The collections for September, made on October 1, 1941, amounted to $453.79, but he deposited $680.54, $226.75 in excess of his collections (R. 41-42; Ex. 9A).

b. Upon cross-examination accused stated that he drank at four bars on the night of June 30th. With respect to the two checks made out in Centralia, Washington, counter checks for $50 each, dated August 27th and 28th, he had received a letter from the bank that the Company Fund account had been overdrawn. His first thought was to send money down but thought better of it because the Company Funds had been charged incorrectly to the other account. He cashed the two checks, carried the money in his pocket for about a week until he returned to Camp San Luis Obispo where he deposited it with his monthly collection. He did not notify the police, his battalion commander, or the Provost Marshal, of the robbery (R. 33-35). The $100 check deposited October 9th (in Company Fund account) came from Special Funds (R. 43) The $50 check which he took out for change (Check No. 1829, Company Fund, October 9, 1941) was used in paying back the money owed for change. The sum of $368.54 received on

June collection sheet was not deposited. Two Company Fund deposits on July 10th (shown on bank record as July 12th) of $80 and $50 were made to help make up that shortage, reducing the Company Fund shortage to $238.54 at end of July. The two checks, one for $100, one for $50 on Company Fund in October (No. 1928, Oct. 6; No. 1929, Oct. 9), were to help cover the shortage that he lost. He never dipped into the funds over $950, used the money he got for change and personal money in covering up that shortage. Restitution has been made in the amount of $1154.54, an amount in excess of the shortage. To pay the $350 loan from the bank for change, he took money of his own and then paid himself off with the Company Fund (R. 44-48).

c. Upon examination by the court accused stated that he had been an officer since June 22, 1940. The first report of the $900 loss was to Colonel Kellas and Captain Guerad about the 21st (October). He had made no effort to reimburse shortage out of his salary, but had just carried the shortage along. He returned the $350 change loan to the bank the next day or so by using Company Funds and some of his own money. Then in juggling the accounts he took Company Funds to cover his advance. The notation "For Company supplies" was written on checks but the proceeds, except in one case, were not used to purchase supplies. The only transaction involving transfer of funds between the Company and Special Funds was the two checks aggregating $150 (R. 36-38). He had no account in any other bank. He ascertained shortage through computation at the end of each month and it remained at approximately $900. The Council Book for the month of October was never made up. The certificate and voucher were fraudulent during October, but were not discovered by the auditors (R. 43-44).

d. Captain Louis E. Patterson took over command of Company H, 185th Infantry, from the accused. He never received the Council Books because they were in the hands of the Inspector. On the morning of November 4, 1941, he received three cashier's checks from Lieutenant Ward on behalf of Mr. Forrest E. Page for the accused, voluntary contributions to cover an existing shortage: (1) Special Fund, $326; (2) Special Fund, $176; and (3) Company Fund, $643.54. The checks were deposited the same day to credit of the Special Fund and of the Company Fund, Company H, 185th Infantry, in the Security-First National Bank of Los Angeles, San Luis Obispo Branch (R. 38-41).

5 a. With respect to the Specification of the Charge - embezzlement of $368.54 - the accused received $368.54 on the company collection sheet for June, and entered the same in his Company Fund Council Book as of July 1, 1941. He did not deposit that money in the bank, but did alter the copy of the customer's statement furnished him by the bank to include the deposit of that amount, on July 2, 1941, and supported it by an altered deposit slip.

The explanation of accused was that that sum formed a part of some $900 which he carried downtown on the night of June 30th, where he became intoxicated, and woke up in camp the next morning with all of his money except a few bills gone. He then altered his records to cover the loss and carried the alterations forward to, and failed to make any report of the loss until, the date of the return of the dishonored Post Exchange check.

The Board of Review has held:

> "* * * that an officer may be convicted of embezzlement upon the uncorroborated evidence of the books kept by him in the course of his duties. CM 130989; sec. 1563 (4), Dig. Ops. JAG, 1912-30. And it is also held that one who receives large sums of money from others for which he is responsible and accountable, who wholly fails either to account for or to turn them over when his stewardship terminates cannot complain if the natural presumption that he spent them outweighs any explanation he may give, however plausible, uncorroborated by other evidence. CM 123488; sec. 1563 (2), Dig. Ops. JAG, 1912-30." (CM 202601, Sperti).

It cannot be said that the accused has offered any plausible explanation of the shortage, in view of his continued falsification of the records, his failure to make any report of the loss until asked for an explanation upon the dishonor of the check to the Post Exchange nearly four months later, and his testimony that he took company funds to cover his own accounts after repaying with company funds and his own money the $350 he borrowed from the bank to make change. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings

of guilty of the Charge and its Specification.

b. Specification 1, Additional Charge I - embezzlement of $275 - is based upon four checks, two of $50 each, one of $150, and one of $25.

(1) The accused drew two counter checks payable to himself, dated respectively August 27 and 28, 1941, at Chehalis, Washington, for $50 each on the account of the "Company Funds, Co.'H' 185th Inf.", in the Security-First National Bank of Los Angeles, San Luis Obispo Branch. Each check bore a notation for cash purchases on maneuvers. Both checks were indorsed by accused, paid on September 3, 1941, and charged to the Company Fund account. Accused stated to the investigating officer that these two checks were drawn for his own use, that he withdrew the two checks from the statement delivered to him by the bank and removed the entry of the two checks from the customer's statement furnished by the bank. Neither of these checks were entered in the Company Fund check book.

The accused testified on cross-examination that he drew and cashed those checks because he had received a letter from the bank that the Company Fund account had been overdrawn. His first thought was to send the money but thought better of it because the "Company Funds" had been incorrectly charged to the other account, and carried the money in his pocket until he returned to Camp San Luis Obispo where he deposited it with his monthly collection.

The statement of accused and his testimony are inconsistent in that the former admits the drawing of the checks for his own purposes while in the latter he states that he carried the proceeds in his pocket for a week and then deposited them. The bank records refute the testimony of accused that the Company Fund account was overdrawn, but do show an overdraft of the Special Fund account from August 15 to September 4, 1941.

In view of the admission of accused that he drew the checks for his own purposes, his false statement as to the account, the concealing of the canceled checks, and the falsification of the bank customer's statement, the Board of Review is of the opinion that the record of trial supports the embezzlement of these two items aggregating $100.

(2) The accused drew a check, No. 19, for $150 payable to himself dated October 9, 1941, on the account of the "Company

Funds, Co. 'H' 185th Inf" in the Security-First National Bank of Los Angeles, San Luis Obispo Branch. The check was indorsed "For change collection sheet, Capt. Charles R. Page", was paid by the bank on the same day and charged to the Company Fund, Company H, 185th Infantry. This check was not entered in the Company Fund check book or Council Book. The accused stated to the investigating officer that this check was drawn for his own use. The bank records do not show a deposit in the Company Fund or the Special Fund account of as much as $150 on that day or on any day thereafter to include the last entry in the account on October 15, 1941, although two separate deposits of $130.46 and of $100 were credited to the Company Fund on October 9, 1941.

> "* * *The act of a custodian of such funds in borrowing them for even temporary use constitutes the offense of embezzlement. The fraudulent conversion, which is the essence of the offense of embezzlement, exists in such case despite the fact that the accused may have intended to return the money (CM 167487, Nihoof; CM 192128, Strickland)" (CM 192530, Browne.)

The Board of Review is of the opinion that the record of trial supports the embezzlement of this item of $150.

(3) The accused drew a check, likewise numbered 19, for $25 dated October 9, 1941, on the Company Fund account, payable to himself, which stated on its face "Cash for small purchases". The check was indorsed by accused, by "Camp Exchange Br. 2", and by the 40th Division Exchange to the order of the Security-First National Bank of Los Angeles, and charged to the Company Fund, Company H, 185th Infantry on October 11, 1941. The accused stated to the investigating officer that this check was also drawn for his own use. This check was not entered in the Company Fund check book, or Council Book.

The Board of Review is of the opinion that the record of trial supports the embezzlement of this item of $25.

c. Specification 2, Additional Charge I - embezzlement of $326 - is based upon three checks; of $100, of $50 and of $176.

(1) The accused drew a check No. 1828 for $100 dated October 6, 1941, on the account of "Special Fund, Co. 'H', 185th Inf" in the Security-First National Bank of Los Angeles, San Luis Obispo Branch, payable to the Company Fund, Company H, 185th Infantry. This check was indorsed "Company Fund, Co 'H' 185th Inf. by Charles R. Page", was paid October 9, 1941, and on that date charged to the Special Fund account and credited to the Company Fund account. This check was not entered in the Special Fund check book. Neither the Council Book of the Company Fund nor of the Special Fund contain any October entry.

Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come (Moore v. U.S. 160 U.S. 268). The drawing of a check on the Special Fund of the Company payable to the Company Fund and the deposit of that check three days later to the credit of the Company Fund fails to disclose any fraudulent appropriation or conversion by the accused. The amount covered by the check has never been removed from the possession of the company.

The Board of Review is of the opinion that the record of trial is legally insufficient to support the embezzlement of this item of $100.

(2) The accused drew a check, No. 1829, for $50, dated October 9, 1941, on the same account payable to himself. This check was indorsed "For change collection sheet Capt. Charles R. Page", was paid, and was charged to the Special Fund account on October 9, 1941. The Company Fund account shows no credit of that amount from that date to the last entry on that account, October 15, 1941. This check was not entered in the Special Fund check book. Neither the Council Book of the Company Fund nor of the Special Fund contain any October entry.

The accused testified that the two checks on Special Fund for $100 (supra (1)) and this check for $50 constituted a juggling of the funds between the Special and Company Funds and a covering up of the shortage lost on night of June 30. There is nothing in the record, however, to indicate that the proceeds of the $50 check were deposited by accused to the credit of either fund. Accused testified that he used that $50 in paying back the money he owed for change.

The Board of Review is of the opinion that the record of trial supports the embezzlement of this item of $50.

(3) A true copy of check No. 1878, for $176 payable to the Bank of America, dated October 14, 1941, signed "Company H, 185th Inf, Special Funds, Co 'H' 185th Inf by Charles R. Page" was received in evidence. The check was presented for payment on October 18, 1941, but payment was refused because the balance in the account was $23.05. The check was again presented on November 3, 1941, and paid as a deposit had been made to cover it. The check was not entered in the Special Fund check book or Council Book. The record contains nothing to indicate the purpose for which this check was drawn. The accused in his written statement dated October 23, 1941, to the investigating officer stated that a check for $176 was then outstanding with insufficient funds to cover it.

The Board of Review is of the opinion that the evidence does not establish beyond a reasonable doubt the conversion of $176 and that the record of trial is legally insufficient to support the embezzlement of this item of $176.

The Board of Review is, accordingly, of the opinion that the record of trial is legally sufficient to support the embezzlement under Specification 2, Additional Charge I, of $50 only.

d. With respect to the Specification, Additional Charge II, the plea of guilty and the record support the allegation that the check for $332.50, dated October 10, 1941, was wrongfully and unlawfully drawn and uttered with intent to deceive when accused well knew that there were not sufficient funds in the bank for the payment of the check. The Company Fund account at no time after October 8, 1941, had a

balance sufficient for the payment of the check. The balance on October 16, 1941, the date it was received by the Post Exchange, and thereafter was $45.56.

Winthrop defines conduct unbecoming an officer and a gentleman as -

> "Action or behaviour in an official capacity, which, in dishonoring or otherwise disgracing the individual as an officer, seriously compromises his character and standing as a gentleman; Or action or behaviour in an unofficial or private capacity, which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms." (Military Law and Precedents, reprint, p. 713.)

The offense alleged in this Specification is not included within any instance cited by Winthrop as coming within that definition.

Neither an intent by accused finally to defraud through the use of the check, nor an absence of an intent that there should be funds to meet the check, as would bring the offense within the meaning of Article of War 95, is alleged in the Specification, but the wrongful and unlawful making, uttering and passing of the check with intent to deceive as alleged, was nevertheless discreditable within the meaning of Article of War 96 (CM 208870, Moore; CM 213993, Casseday). The bald conclusion alleged at the end of the Specification that such act and behavior constituted an act and behavior unbecoming an officer and a gentleman, is not sufficient to bring within the purview of Article of War 95, an offense which would not otherwise fall within that article. Neither does a plea of guilty by an accused support a finding of guilty of a charge in violation of Article of War 95 where the act alleged is not one which falls within the purview of that article.

This Specification may be distinguished from the Specifications under Article of War 95 which were held fatally defective in the Sperti case (CM 202601), as those Specifications failed to allege an intent to deceive.

The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty of the Specification, Additional Charge II, and legally sufficient to support only so much of the finding of guilty of Additional Charge II, in violation of Article of War 95, as involves a finding of guilty of that Charge in violation of Article of War 96.

6. On the morning of the day of tr al, November 4, 1941, the successor of accused in command of Company H, 185th Infantry, received three cashier's checks on behalf of Mr. Forrest E. Page as a voluntary contribution to cover an existing shortage, which checks he deposited (1) $326, and (2) $176 to the credit of the Special Fund, and (3) $643.54 to the credit of the Company Fund. Those checks, totaling $1145.54, comprise full restitution of the amount stated by the accused to be the total amount of the shortage shown by the bank. It exceeds by $176 the sums alleged to have been embezzled by accused in the three Specifications in the Charge and Additional Charge I.

7. At the date of trial the accused was forty years of age. The records of the Office of The Adjutant General show his service as follows:

> Federally recognized as 2nd Lieutenant, Infantry, California National Guard, and appointed to that grade in the Army of the United States to date from October 20, 1930; Federally recognized as 1st Lieutenant, Infantry, California National Guard, and appointed to that grade in the Army of the United States to date from April 25, 1932; appointed 1st Lieutenant, Infantry, in the National Guard of the United States to date from April 4, 1934; entered upon active duty March 3, 1941, pursuant to the order of the President, dated January 14, 1941; appointed Captain, Infantry, Army of the United States to date from July 22, 1941.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of the Specification of the Charge, and of the Charge, and of

Specification 1, Additional Charge I; legally sufficient to support only so much of the finding of guilty of Specification 2, Additional Charge I, as involves a finding of guilty of embezzlement by accused of $50 at the time, place, and of the ownership alleged; legally sufficient to support the findings of guilty of Additional Charge I and of the Specification, Additional Charge II, and to support only so much of the finding of guilty of Additional Charge II, in violation of Article of War 95, as involves a finding of guilty of Additional Charge II, in violation of Article of War 96; and legally sufficient to support the sentence, and warrants confirmation of the sentence.

A sentence of dismissal is authorized upon conviction of the 93rd Article of War, or of the 96th Article of War. Confinement in a penitentiary is authorized under Article of War 42 for the offenses involved in the Specification of the Charge, and in Specification 1, Additional Charge I, said offenses being recognized as offenses of a civil nature and so punishable by confinement in a penitentiary for more than one year by section 98, title 6, Code of the District of Columbia, 1929.

The confinement at hard labor for five years adjudged is believed to be unnecessarily severe. Although separately stated, the acts alleged are, in substance, concerned with the original embezzlement and in aid of its concealment. This appears to have been the first offense of the accused. While confinement in a penitentiary is authorized in this case, it does not appear that the purposes of punishment demand penitentiary confinement, or that confinement of accused in association with misdemeanants and military offenders would be detrimental to them (par. 90 a, M.C.M., 1928). The Board of Review, accordingly, recommends that three years of the confinement adjudged be remitted and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

_____, Judge Advocate.

_____ Judge Advocate.

_____ Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218818

NOV 29 1941

UNITED STATES	)	PANAMA MOBILE FORCE
v.	)	Trial by G. C. M., convened at Fort Clayton, Canal Zone, October 17, 1941. Each: Dishonorable discharge and confinement for one (1) year and one (1) day. Each: Penitentiary.
Private FRANCIS A. ARTIBEE (12004398), and Private First Class EBEN BARROW (12007476), both of Company E, 5th Infantry.	)	

HOLDING by the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

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

(Artibee) CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Francis A. Artibee, Company "E" 5th Infantry did, at the latrine of Building Number 215, Fort William D. Davis, Green Area, Canal Zone, on or about 9:00 P.M. September 19, 1941, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per anus with Private First Class Specialist 4th Class Eben Barrow, Company "E" 5th Infantry, a human being.

(Barrow) CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Specialist 4th Class Eben Barrow, Company "E" 5th Infantry did, at the latrine of Building Number 215, Fort William D. Davis, Green Area, Canal Zone, on or about 9:00 P.M. September 19, 1941, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per anus with Private Francis A. Artibee, Company "E" 5th Infantry, a human being.

Each pleaded not guilty to, and was found guilty of, the Charge and its Specification. No evidence of previous convictions was introduced. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years. The reviewing authority approved only so much of the finding of guilty of the Specification and Charge as to each as involved a finding of guilty of attempt to commit sodomy, at the time and place and in the manner alleged, in violation of the 96th Article of War. Only so much of the sentence as to each was approved as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and one day. The United States Penitentiary, Lewisburg, Pennsylvania, was designated as the place of confinement as to each accused, and the record was transmitted to this office under Article of War 50½.

3. The reviewing authority in this case has approved findings of guilty of attempt to commit sodomy, in violation of the 96th Article of War, because of a reasonable doubt as to whether or not one of the essential elements of required proof as to sodomy, viz, penetration, could be legally inferred from the evidence disclosed at the trial. The Board of Review is of the opinion that this approved finding is amply supported by clear, conclusive and competent evidence of record, and for that reason no summary of the testimony is deemed necessary. However, two questions are raised by the action of the reviewing authority in imposing a sentence of confinement in excess of one year and designating a penitentiary as the place of confinement as to each accused, - first, whether the approved sentence is legally permissible, and second, whether the designated place of confinement is legally authorized.

An attempt to commit sodomy is not listed in the Table of Maximum Punishments, paragraph 104c, Manual for Courts-Martial. Section 3, part 1, title 6, Code of the District of Columbia (formerly section 906) provides as follows:

> "3. Attempts to commit crime. -- Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by this title, shall be punished by a fine not exceeding one thousand dollars or by imprisonment for not more than one year, or both." (Mar. 3, 1901, 31 Stat. 1337, c. 854, sec. 906)."

This provision fixes one year as the maximum period of confinement upon conviction of an attempt to commit any crime, the punishment for which

attempt is not otherwise fixed. It has been held by the Board of Review and The Judge Advocate General for many years that a court-martial might not lawfully impose, by way of punishment for an attempt to commit sodomy, confinement for a period longer than that permitted by the District of Columbia Code, namely, one year (CM 145155, Gambrell (1921); CM 145266, Baker (1921); CM 147074, Murphy (1921); CM 153722, Owens (1922); CM 159285, Millett (1924)). Later cases have allowed confinement for terms longer than one year (CM 192456, Ciambrone (1930); CM 196922, Killalea (1931); CM 209651, Palmer (1938)). In the case last cited the reason for the change in rulings is thus stated:

> "Paragraph 104 c, of the Manual for Courts-Martial, 1928, contains the following:
>
> > 'The punishment stated opposite each offense listed in the table below is hereby prescribed as the maximum limit of punishment for that offense, for any included offense if not so listed, and for any offense closely related to either, if not so listed.' (Underscoring supplied).
>
> "The offense of sodomy is listed in the table referred to with a stated maximum limit of punishment by confinement of five years. The offense of attempting to commit sodomy is not listed in the table. Inasmuch as it is not listed and is included in the offense of sodomy, it is punishable as for sodomy. ***."

In the case of Ray W. Smith, CM 212056, August 17, 1939, the Board of Review was of the opinion that

> "a limitation by the District of Columbia Code is relevant to this extent only, that it is an indication of what Congress thinks an appropriate punishment for the offense involved. As the Board said in the Valeroso case (CM 210762, 1938) with respect to the statute of a state or insular possession fixing a limit of punishment, it is, to a court-martial or reviewing authority, 'not controlling, but persuasive only, as to the limit of punishment'".

The Board of Review is of the opinion that the permitted maximum confinement legally imposable by the sentence of a court-martial for an attempt to commit sodomy is dishonorable discharge, total forfeitures, and confinement at hard labor for five years (CM 212056, Smith (1939)), and that

therefore the confinement of the sentences in the instant case (one year and one day) is legal (CM 192456, Ciambrone (1930); CM 213191, Rhodes, (1940)).

Article of War 42 provides:

> "Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, ***."

There is no statute of the United States of general application fixing the penalty for an attempt. 6 District of Columbia Code 3 fixes the period of confinement at one (1) year. It follows that penitentiary confinement is not authorized upon conviction by court-martial of attempt to commit sodomy, and it has been so held many times. Dig. Ops. JAG 1912-30, sec. 1613; CM 192456, Ciambrone (1930); CM 196922, Killalea (1931); CM 209651, Palmer (1938)).

4. For the reasons above indicated, the Board of Review holds the record of trial legally sufficient to support the sentences as modified by the reviewing authority provided accused be confined at a place other than a penitentiary.

J. L. M. Smith, Judge Advocate.

William H. Sounds, Judge Advocate.

Charles McVan Bundelson, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218876

JAN 30 1942

UNITED STATES v. Sergeant KYLE E. WYRICK (15053734), Private First Class EDWARD W. ZUVER (15012575), Privates JOHN C. GAUVEY (6639517), and CHARLES HARRIS (15046560), all Company B, 759th Tank Battalion.	1st CAVALRY DIVISION Trial by G.C.M., convened at Fort Bliss, Texas, October 30, 1941 As to each: Dishonorable discharge and confinement for one and one-half (1½) years. Reformatory.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

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

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

Specification 1: In that Sergeant Kyle E. Wyrick, Company "B", 759th Tank Bn., and Private Charles Harris, Company "B", 759th Tank Bn, and Private Edward W. Zuver, Company "B", 759th Tank Bn, and John C. Gauvey, Company "B", 759th Tank Bn., acting jointly and in pursuance of a common intent, did, at Fort Bliss, Texas, on or about September 11, 1941, unlawfully enter Post Exchange No. 19 with the intent to commit a criminal offense, viz, larceny therein.

Specification 2: In that Sergeant Kyle E. Wyrick, Company "B", 759th Tank Bn., and Private Charles Harris, Company "B", 759th Tank Bn., and Private Edward W. Zuver, Company "B", 759th Tank Bn., and Private John C. Gauvey, Company "B", 759th Tank Bn., acting jointly and in pursuance of a common intent, did, at Fort Bliss, Texas, on or about 12:00 o'clock Midnight, September 11, 1941, feloniously take, steal and carry away 140 packs of cigarets, value about

$17.50; 94 cigars, value about $4.70; 6 tins of Revelation Pipe tobacco, value about $0.90; 8 packs of Union Standard chewing tobacco, value about $0.80; 8 packs of Brown Mule chewing tobacco, value about $0.40; 8 plugs of Spark Plug chewing tobacco, value about $0.40; 6 plugs of Star chewing tobacco, value about $0.60; 3 plugs of Day's Work chewing tobacco, value about $0.30; 3 packs of playing cards, value about $1.35; 2 bracelets, value about $2.00; 2 watch straps, value about $1.20; 8 cans of beer, value about $1.20; 1 sewing kit, value about $0.30; 2 collar ornaments of 759th Tank Bn. Corps, value about $1.20; 1 Schick razor, value about $0.85; 1 Gem razor, value about $0.25; 1 Gillet razor, value about $0.45; 1 billfold, value about $3.00; 1 billfold, value about $3.50; 1 pack of Gem blades, value about $0.25; 5 dice, value about $0.50; 2 Harmon watch cases and watches, value about $25.00; 1 pack of Gillet blades, value about $0.20; 1 cigaret lighter, value about $2.00; 2 pen and pencil sets, value about $1.50; 1 paper weight, value about $0.50; 4 watches, value about $4.00; and 1 Rifle paper weight, value about $1.00, a total value of about $75.85, the property of Post Exchange No. 19, Fort Bliss, Texas.

Accused Gauvey was in addition tried upon the following Charge and Specification:

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

Specification: In that Private John C. Gauvey, Company "B", 759th Tank Bn., having been properly placed on guard in the Area of the 759th Tank Bn., Fort Bliss, Texas, and having knowledge that the Post Exchange No. 19, which was included on his post was going to be burglarized during his tour on post, and after seeing three men break and enter Post Exchange No. 19 and coming away with merchandise, property of the Post Exchange, Fort Bliss, Texas, did, at Fort Bliss, Texas, on or about 12:00 o'clock Midnight, September 11, 1941, fail to prevent or

> report this robbery and officially stated upon being questioned by Lt. James N. Foreman, state to Lt. Foreman that he saw or heard nothing unusual on his post during his tour, knowing such statement to be untrue.

Each pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced, except one against accused Harris (Ex. G). Each accused was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for eighteen months. The reviewing authority approved the findings of guilty, except with respect to four watches, value about $4 (Spec. 2, Chg. I), and, accordingly, reduced the total value under that Specification from $75.85 to $71.85, approved the sentence, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence, including the testimony of the accused Wyrick, Harris and Zuver, conclusively shows that these three accused unlawfully entered Post Exchange No. 19, Fort Bliss, Texas, at the time and place and under the circumstances alleged in Specification 1, Charge I, took and carried away the articles, property of the Post Exchange, of the approximate value as alleged in Specification 2, Charge I, and fully supports the findings of guilty of those Specifications and Charge I.

The only question requiring consideration is whether the record of trial is legally sufficient to support the findings of guilty of all Specifications and Charges as to the accused Gauvey. The evidence as to the accused Gauvey is substantially as follows:

4. a. On the night of September 11, 1941, Wyrick, Harris and Zuver, after returning from town where they had been drinking gin and beer, decided to break into the Post Exchange and obtain more beer (R. 38-39, 42, 45). On their way from the barracks to the Post Exchange they passed the accused Gauvey who was walking his post near Company A Barracks where he had previously been placed on duty. They told Gauvey that they were going to break into the Post Exchange. After breaking

in Wyrick and Harris removed the articles described in Specification 2, Charge I, while Zuver stood watch outside the building. The three accused then proceeded to a manure pile and buried the articles (R. 46-47) where they were later recovered and identified as the same property in stock at the Post Exchange prior to the commission of the offense (R. 12, 13). While standing watch outside accused Zuver saw Gauvey, who was walking his post, come up in the area of the Post Exchange, and suspecting that Gauvey had tipped somebody off, he, Zuver, ducked behind the building. When he came out Gauvey was still walking his post (R. 46). Zuver did not think that Gauvey knew what was going on or that Gauvey believed they were going to break into the Post Exchange, but likely thought they were just blowing off or were under the weather (R. 47).

b. On the morning of September 12, 1941, following the commission of the offenses, all members of the guard, including accused Gauvey, were questioned by Lieutenant James N. Foreman, Battalion Officer of the Day. To this officer's inquiries, Gauvey stated that he had not seen or heard anything unusual during his tour of duty the night before (R. 33-34).

c. Private Gauvey testified that he met the other three accused on the night of September 11th while on guard duty and heard them say they were going to break into the Post Exchange (R. 48-49), but forgot what they told him as he thought they were trying to kid him or were drinking. He did not see them break in and did not learn about it until the next morning. He neither saw them carry anything out of nor heard any noise in the building. His post carried him close to the door of the Post Exchange but it was dark (R. 51). When he learned of the robbery the next morning, he went to guard the door and keep people from entering and disturbing fingerprints. He never told anyone about his conversation with the other three accused the night before to the effect that they were going to rob the Post Exchange and did not see any of the accused again that night. He was told that the other accused had made a confession and that he would get off easier if he did likewise (R. 52-53). He denied making the statement which he signed and never saw any of the statements signed by the other accused. He stated that Sergeant Harris prepared the remarks or suggested the language used in the statement, and that another person wrote them down and he signed it (R. 54).

5. a. The only direct evidence of his participation in

the offenses alleged in Specifications 1 and 2, Charge I, is the statement (Ex. F), which he, Gauvey, signed while confined by the military authorities in the County Jail at El Paso, Texas, his own testimony, that of several prosecution witnesses, and of the coaccused. This testimony is, in substance, to the effect that Gauvey was told that the breaking and entering was to be accomplished, that he was at or near the scene where the offenses thus charged were committed but only after the coaccused had entered the building from which the articles were stolen, and did not thereafter see any of the three participants, nor any of the property taken.

b. Assuming, but not conceding that the statement of accused Gauvey was admissible as a voluntary statement, it contains no facts which would place him in the category of either a principal or an accessory before the fact. The evidence is clear that he did not enter the Post Exchange, nor remove any of the articles taken therefrom. There is proof that he saw the other three accused while walking his post near Company A Barracks, as they were on their way to the Post Exchange, just prior to the time the building was entered and that they told him they were going to break in. It is also shown by the evidence that Gauvey was walking his post within the area where the Post Exchange was located at sometime while the larceny was being committed, but his presence in this instance occurred after the building had been entered. Considering all of the evidence, however, in the light most favorable to the prosecution, it is insufficient to form the basis of a reasonable inference that accused Gauvey intended to, or did encourage, advise, assist, or that he stood guard while the others committed the crime, or that he otherwise aided or abetted the commission of the offenses alleged in Specifications 1 and 2, Charge I.

> "Where the accused was present at the commission of the felony, but did not by word or act encourage or assist the perpetrator, although he intended to render assistance if needed, it is necessary, in order to render him criminally liable, that his presence should have been by preconcert. And preconcert is necessary where the accused, at a point distant from the scene of the felony, keeps watch with the intention of giving or suppressing information and thereby facilitating the consummation of the felony. * * *." (16 Corpus Juris, p. 129, sec. 116 b, and cases cited.)

c. There is no proof that the acts of Wyrick, Harris and Zuver were conceived in any plan agreed upon by them and the accused Gauvey, nor that there was any preconcert between them and Gauvey.

> "* * * The mere presence of a person at the scene of the commission of an offense by another, in the absence of evidence of preconcert or evidence of intent to participate, if need be, is not sufficient basis for an inference of his participation as an accessory or principal therein (Hicks vs. United States, 150 U.S. 442; 16 Corpus Juris 132). * * *." (CM 186947, Bopp & Aldrich.)

It follows that the evidence is not legally sufficient to support the findings of guilty as to Gauvey of Specifications 1 and 2, Charge I, and Charge I.

d. By the Specification, Charge II, it is alleged that accused Gauvey failed to prevent or report the commission of the offenses alleged in Specifications 1 and 2, Charge I, and upon being questioned about their commission, made a false official statement in regard thereto. Thus, three separate and distinct acts were alleged in this single Specification, which is contrary to good pleading and renders the Specification multifarious in character. The accused submitted to trial without specific objection to the form of the Specification, Charge II.

The Board of Review has held, in substance, that if one of the charging parts of a specification is sufficiently definite and clear in its language to inform accused with what he is charged, although the same specification contains other allegations indefinitely stated, such a specification is not fatally objectionable for multifariousness so long as the allegations of such a specification do not injure the substantial rights of accused, nor prevent him from, nor hinder him in, presenting his defense of the case (CM 192530, Browne; CM 202601, Sperti, pp. 37 and 68).

6. The Board of Review is, therefore, of the opinion that although it is multifarious in character by reason of the several acts alleged therein, the Specification substantially alleges neglect of duty, in violation of Article of War 96, and that it contains the necessary elements to acquaint the accused of such an offense without injury to his substantial rights.

7. There is no maximum penalty prescribed in the table of maximum punishments (par. 104 c, M.C.M., 1928) for the offense of neglect of duty in its general terms. The Board of Review is

of the opinion that the most closely related offense is that of suffering through neglect military property to be lost, spoiled, damaged, or wrongfully disposed of, denounced by the 83rd Article of War, for which the maximum punishment prescribed is dishonorable discharge, total forfeitures, and confinement at hard labor for one year where the property involved is, as here, of a value of more than $50.

Confinement in a penitentiary in the cases of Wyrick, Harris and Zuver is authorized under Article of War 42 for the offenses involved in Specifications 1 and 2, Charge I, said offenses being recognized as offenses of a civil nature and so punishable by confinement in a penitentiary for more than one year by sections 823 (title 6, sec. 60, 1929 D.C. Code) and 826 (title 6, sec. 826, 1929 D.C. Code), respectively, of the Code of the District of Columbia. Confinement in a penitentiary is not authorized in the case of Gauvey.

8. For the reasons stated, the Board of Review holds as to the accused Wyrick, Harris and Zuver, the record of trial legally sufficient to support the findings of guilty of Specifications 1 and 2, Charge I, and Charge I, and legally sufficient to support the sentence; as to the accused Gauvey, not legally sufficient to support the findings of guilty of Specifications 1 and 2, Charge I, and Charge I, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

In the case of Gauvey, the Board believes that the maximum authorized punishment is unduly severe under the circumstances shown in this case and, accordingly, recommends that the period of his confinement be reduced to six months.

Walter J. Hall, Jr., Judge Advocate.

Bryan L. Bessons Judge Advocate.

Thomas N. Jeffrey Judge Advocate.

RECEIVED FEB 23 1942

1st Ind.

War Department, J.A.G.O., FEB 7 1942 - To the Commanding General, 1st Cavalry Division, Fort Bliss, Texas.

1. In the case of Sergeant Kyle E. Wyrick (15053734), Private First Class Edward W. Zuver (15012575), Privates John C. Gauvey (6639517), and Charles Harris (15046560), all Company B, 759th Tank Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support, as to the accused Wyrick, Harris and Zuver, the findings of guilty of Specifications 1 and 2, Charge I, and Charge I, and legally sufficient to support the sentence: as to accused Gauvey, not legally sufficient to support the findings of guilty of Specifications 1 and 2, Charge I, and Charge I; legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. It is recommended as to accused Gauvey, that the findings of guilty of Specifications 1 and 2, Charge I, and Charge I, be disapproved. Under the provisions of Article of War 50½, you will then have authority to order the execution of the sentence, provided, in the case of Gauvey, a place other than a penitentiary, Federal correctional institution, or reformatory is designated as the place of confinement.

2. In view of the circumstances shown in the case of Gauvey, it is my opinion that the maximum authorized confinement of one year is unduly severe. I recommend, accordingly, that the period of confinement in his case be reduced to six months.

As in the case of Gauvey, the only offense which is legally supported by the record of trial is a purely military offense, it is within the policy announced in War Department letter dated July 2, 1941 (AG 253 (4-29-41) EP-A), subject: "Restoration to duty of certain general prisoners", intended to prevent premature release of enlisted men from their military obligations in certain instances. If there are no factors other than those revealed in the record of trial, your final action in this case should provide for the suspension of the execution of the dishonorable discharge so as to make possible Gauvey's eventual restoration to duty and fulfillment of his military obligation, should such be deemed advisable.

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

(CM 218876).

Myron C. Cramer,
Major General,
The Judge Advocate General.

RECEIVED
FEB 23 1942
J A G
1st Cav. Div

1 Incl -
Record of trial.

2nd Ind.

Hq 1st Cav Div, Ft Bliss, Tex, March 2, 1942. To: The Judge Advocate General, War Department, Washington, D. C.

Inclosed herewith, five copies of GCMO No. 18, this headquarters, dated February 23, 1942, complying with your remarks and recommendations in your letter of January 30, 1942.

For the Commanding General:

REC'D
MAR 6 1942
J.A.G.O.

CHAS. A. SHELDON,
Major, A. G. D.,
Adjutant General.

1-Incl.
1-GCMO No. 18, in quint.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218883

JAN 1 1942

UNITED STATES)	THIRD AIR FORCE
)	
v.)	Trial by G.C.M., convened at
)	Tallahassee, Florida, October
Private DALLAS G. LONG)	2, 1941. Dishonorable dis-
(6894399), 55th Materiel)	charge and confinement for
Squadron, 41st Air Base)	two (2) years. Disciplinary
Group.)	Barracks.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

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

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Dallas G. Long, 55th Materiel Squadron, 41st Air Base Group, did, at Dale Mabry Field, on August 18, 1941, strike 1st Lt. Robert K. Roulston, Air Corps, his superior officer, who was then in the execution of his office, on the left side of the neck with his right fist.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction for drunkenness and breach of arrest was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due

or to become due, and to confinement at hard labor for five years. The reviewing authority approved the sentence, remitted three years of the confinement adjudged, ordered the execution of the sentence as modified, but suspended the execution of the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 22, Headquarters 3rd Air Force, Tampa, Florida, dated October 27, 1941.

3. The only question requiring consideration is whether the record of trial is legally sufficient to support the allegation that First Lieutenant Robert K. Roulston was in the execution of his office when the accused struck him.

4. The evidence shows that the accused was working as a paroled prisoner. His written parole permitted him to work on Dale Mabry Field without being under armed guard during the period from 5 a.m., to 6:30 p.m. When not at work in the mess hall he was required to return to the Guard House and work in and about the Guard House as directed. "At no time will Prisoner Long talk with any one while outside of the guard house unless it is in the line of duty * * *." (Def. Ex. 1.)

At about 9 a.m., August 18, 1941, the accused was seated behind the fence and by the tool shed sharpening a grass cutter (R. 5, 21). First Lieutenant Robert K. Roulston, Air Corps, stopped while walking along on the opposite side of a ditch from accused, and wished the accused "Good Morning" or "How are you this morning". When the accused failed to reply, Roulston crossed the ditch and again spoke to accused. The accused then rose to his feet, stated that he was a paroled prisoner and could not speak to Lieutenant Roulston, and, furthermore, that he did not wish to speak to Lieutenant Roulston because he held Lieutenant Roulston in great contempt (R. 5-6). The accused stated that he would call the Sergeant of the Guard if Lieutenant Roulston persisted in talking to him, and did actually call for the Sergeant of the Guard (R. 6, 9). Lieutenant Roulston told accused he wanted to know why accused had adopted that attitude, that he wanted to talk to accused as man to man and get the feeling of accused toward him cleared up in the mind of accused (R. 7). Lieutenant Roulston stated that the whole gist of the conversation had to do with the animosity which the accused very

obviously had toward him and the reason for it (R. 8). With respect to the assault, Lieutenant Roulston testified that while he was trying to find out the reasons for that animosity, the accused became excited and with his right hand struck Lieutenant Roulston on the left side of the neck (R. 9). The accused testified with respect to the assault that after a considerable discussion Lieutenant Roulston leaned so close to him that Lieutenant Roulston's chin almost touched that of accused, that Lieutenant Roulston stepped with his left foot to the rear, that it seemed as if he was preparing to throw a blow at accused, and that accused then brought up his right hand and struck Lieutenant Roulston on the cheek (R. 22).

The accused called the sentry of the guard (R. 23), went to the Acting Provost Sergeant, and related the whole story of what had happened, including a statement that Lieutenant Roulston had "ducked under the rail" and stood close to accused during their conversation (R. 13).

5. Winthrop defines, "In the execution of his office", as:

> "* * * in the performance of an act or duty either pertaining or incident to his office, or legal and appropriate for an officer of his rank and office to perform. An officer is deemed to be in the execution of his office when engaged in any act or service required or authorized to be done by him, by statute, regulation, the order of a superior, or military usage. * * *." (Winthrop's Military Law, reprint p. 571.)

The Manual for Courts-Martial, 1928, states -

> "An officer is in the execution of his office 'when engaged in any act or service required or authorized to be done by him by statute, regulation, the order of a superior, or military usage.' (Winthrop.) It may be taken in general that striking or using violence against any superior officer by a person subject to military law, over whom it is at the time the duty of that superior officer to maintain discipline, would be striking or using violence against him in the execution of his office." ,

and that the term, "in the execution of his office", is used in the 65th Article of War in the same sense as in the 64th Article, to which the language of the Manual quoted above pertains (M.C.M., 1928, p. 148, 149; Dig. Ops. JAG 1912-30, sec. 1522; JAG 250.46, Apr. 3, 1929; CM 203718, Adams).

The Board of Review has held that an officer in command of a Civilian Conservation Corps camp was constantly on duty and was in the execution of his office when he was struck while asleep in his bed, citing an opinion of The Judge Advocate General (JAG 250.46, Apr. 3, 1929) with respect to a noncommissioned officer (CM 203718, Adams).

6. The evidence in this case fails to establish that Lieutenant Roulston was the commanding officer of the air field, or of the accused, or was Officer of the Day, or that he was at the time of the alleged offense performing any act or duty pertaining or incident to his office or executing any authority legal or appropriate to his rank, and in consequence, "in the execution of his office", as alleged. Such a status is an essential element of the offense inhibited by Article of War 64, under which the charge is laid, and must be proven before an accused legally may be found guilty of that offense (CM 150434, Pace; CM 156431, McSwain).

On the contrary, the evidence affirmatively shows that Lieutenant Roulston crossed a ditch and ducked under a rail to reach the accused who, as a paroled prisoner, was performing assigned duties behind the fence and by the tool shed, that he persisted in addressing the accused after the accused had informed him that he was a paroled prisoner and could not speak to him, that he persisted in talking to him after the accused called for the Sergeant of the Guard, that the whole gist of their conversation had to do with the animosity of accused toward him, and his efforts were to find out from the accused the reasons for that animosity.

It clearly appears from his own testimony that Lieutenant Roulston took advantage of his rank to force upon the accused, over the respectful and vigorous protests of accused, a conversation upon a purely private matter as to the reasons for the animosity of accused toward him. The evidence not only wholly fails to show that Lieutenant Roulston was in the execution of his office at the time of the striking, but af-

firmatively shows that he was forcing the discussion of a purely private matter upon the accused.

It is the opinion of the Board of Review that Lieutenant Roulston was not in the execution of his office when the accused struck him, and that upon the failure to establish an essential element of the offense alleged, the record is legally insufficient to support the findings of guilty in violation of Article of War 64.

7. The words of the Specification follow the language of form 25, page 242, Manual for Courts-Martial, 1928, and import a wrongfulness in the allegation of striking an officer who was then in the execution of his office. The mere fact that the proof does not support the allegation that the officer was in the execution of his office, does not remove from the Specification the element of wrongfulness implied in the Specification as written.

In the opinion of the Board of Review the record of trial is legally sufficient to support a finding of guilty of a lesser included offense of assault and battery upon Lieutenant Roulston, in violation of Article of War 96 (CM 150434, Pace).

The maximum authorized punishment for assault and battery, in violation of Article of War 96, is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period.

8. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involves findings of guilty of the lesser included offense of assault and battery upon Lieutenant Robert K. Roulston, in violation of the 96th Article of War, and to support only so much of the sentence as involves confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period.

In view of the fact that it clearly appears from the testimony of Lieutenant Roulston himself that he took advantage

of his rank to force upon the accused, over the respectful and vigorous protests of accused, who was a paroled prisoner and forbidden by order to talk to anyone except in line of duty, a discussion of a purely private matter, and that the assault was in fact provoked, though not legally justified, by such actions, the Board of Review recommends that the unexecuted portion of the sentence be remitted.

Judge Advocate.

Judge Advocate.

Thomas H. Taffy Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218924

DEC 2 1 1941

UNITED STATES	6TH DIVISION
v.	Trial by G. C. M., convened at Camp Bowie, Texas, October 22 and 23, 1941. Dismissal, total forfeitures, and confinement for one (1) year. Camp Bowie, Texas.
Second Lieutenant WILLIAM S. FOSTER (0-410380), 144th Infantry.	

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, Judge Advocates.

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.

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

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

Specification 1: In that Second Lieutenant William S. Foster, 144th Infantry, did, at Camp Bowie, Texas, on or about July 25, 1941, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to wit: The Citizens National Bank of Denison, Denison, Texas, 7-25-1941, No. 10, Pay to the Order of William S. Foster, $4.25 Four & 25/100 Dollars, A. L. Carnes, William S. Foster, 2nd Lt., Co. L, 144th Inf., which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 2: In that Second Lieutenant William S. Foster, 144th Infantry, did, at Camp Bowie, Texas, on or about August 21, 1941, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to wit: Denizen, Texas, 8-21-1941, Citizens National Bank, Denizen, Pay to Cash or Order $7.00, Seven & 00/100 Dollars, Fred K.

Specification 3: (Finding of not guilty)

CHARGE IV: Violation of the 85th Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

Specification 3: (Motion for finding of not guilty sustained)

Specification 4: In that Second Lieutenant William S. Foster, 144th Infantry, did, at Camp Bowie, Texas, on or about July 31, 1941, with intent to deceive Colonel William E. Lake, Commanding Officer, 144th Infantry, officially report to said Colonel William E. Lake, 144th Infantry, that a certain debt owing by the said Second Lieutenant William S. Foster to Safety Tire & Battery Company of Brownwood, Texas, had been paid in full, which report was made by the said Second Lieutenant William S. Foster as true when he did not know it to be true, in that said debt had not been paid.

CHARGE VI: Violation of the 64th Article of War.
(Finding of not guilty)

Specification 1: (Finding of not guilty)

Specification 2: (Motion for finding of not guilty sustained)

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

Specification 1: (Finding of not guilty)

Specification 2: In that Second Lieutenant William S. Foster, 144th Infantry, having been duly placed in arrest at Fairfield, Texas, on or about August 8, 1941, did, at Fairfield, Texas, on or about August

8, 1941, break his said arrest before he was set at liberty by proper authority.

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

Specification 1: In that Second Lieutenant William S. Foster, 144th Infantry, did, at Camp Bowie, Texas, on or about July 25, 1941, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to wit: The Citizens National Bank of Denison, Denison, Texas, 7-25-41, No. 10, Pay to the Order of William S. Foster, $4.25, Four & 25/100 Dollars, A. L. Carnes, William S. Foster, 2nd Lt., Co. L, 144th Inf., which said check was a writing of a private nature, which might operate to the prejudice of another.

Specification 2: In that Second Lieutenant William S. Foster, 144th Infantry, did, at Camp Bowie, Texas, on or about August 21, 1941, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to wit: Denizen, Texas, 8-21-41, Citizens National Bank, Denizen, Pay to Cash or Order $7.00, Seven & 00/100 Dollars, Fred K. Lawler, William S. Foster, 2nd Lt. Co. L, 144th Inf., which said check was a writing of a private nature which might operate to the prejudice of another.

Specification 3: In that Second Lieutenant William S. Foster, 144th Infantry, did, at Camp Bowie, Texas, on or about August 25, 1941, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to wit: Denisen, Texas, 8-25-41, Citizens National Bank, Pay to William S. Foster, or Order $5.00, Five & 00/100 Dollars, Fred J. Lawler, William S. Foster, Co. L, 144th Inf., which said check was a writing of a private nature which might operate to the prejudice of another.

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of Charges I and II and their Specifications, of Charge III and Specification 2 thereunder, of Charge V and Specification 4 thereunder, of Charge VII and Specification 2 thereunder, and of

Additional Charge I and its Specifications. He was found not guilty of Specifications 1 and 3, Charge III, of Charge IV and its Specification, of Specifications 1 and 2, Charge V, of Charge VI and Specification 1 thereunder, and of Specification 1, Charge VII. The court, after the pleas of accused, granted the motion of the prosecution to strike Specification 4 of Additional Charge I, and the Specification under Additional Charge II from the charge sheet for lack of evidence (R. 17); and at the conclusion of the testimony for the prosecution, sustained the motions of defense for findings of not guilty of Specification 3, Charge V (R. 99), and Specification 2, Charge VI (R. 100). No evidence of previous convictions was introduced. Accused 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 findings and sentence were announced in open court. The reviewing authority approved the sentence, designated Camp Bowie, Texas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Consideration has been given to the motion made by the defense (R. 11-12, 97-100), and denied by the court, for the dismissal of the various Specifications and Charges as shown on the charge sheet, together with the objection of the defense to the introduction of certain testimony (R. 36) permitted by the court, and it is the opinion of the Board of Review that no error prejudicial to the accused has occurred by reason of the rulings of the court thereon.

4. The same three separate offenses of forgery of a check alleged in Specifications 1, 2 and 3, respectively, of Charge I (93rd Article of War) are repeated in, and are identical with, the allegations set forth in Specifications 1, 2 and 3 of Additional Charge I (95th Article of War). The first check was drawn on The Citizens National Bank of Denison, Denison, Texas, dated July 25, 1941, No. 10, payable to the order of accused for $4.25, signed A. L. Carnes, and indorsed by accused with his correct name, rank and organization. The second and third checks were identical, except the second check was dated August 21, 1941, was for $7.00, and signed Fred K. Lawler, payable to cash, and the third check was dated August 25, 1941, was for $5.00, and signed Fred J. Lawler, payable to accused. By stipulation (R. 56) it was admitted at the trial that the bank on which they were drawn had no such accounts.

Private First Class August L. Carnes, Company H, 144th Infantry, testified (R. 60) that he has served in the same company with accused

and is familiar with his handwriting; that accused, just prior to trial, told witness he had written the check (R. 69), that the check (Exhibit E) was "hot", but only accused could press the charges in connection with it (R. 68), and had asked him as a favor to say that he (Carnes) had written it (R. 61), and witness had so informed the investigating officer, but had since considered the position he was putting himself in, and now testifies that he in fact "had not written the check or signed the check myself and hadn't given it to Lt. Foster" (R. 62). Carnes further identified both the signature and indorsement on this check as being in the handwriting of accused.

Sergeant John C. Turner, Company H, 144th Infantry, testified he saw the handwriting of accused many times and was familiar with it. He identified Exhibit C (letter written by accused to Colonel Lake) as being in the handwriting of accused. He also recalled calling Private Carnes to the phone in the orderly tent about October 7 at the request of accused. Witness recognized the voice on the other end of the wire as that of Lieutenant Foster (R. 73).

Mr. L. H. Thomas and Mr. E. N. Martin, both of Austin, Texas, as handwriting expert witnesses, testified that the three checks in question and Exhibit C, the letter written by the accused to Colonel Lake, were all written by the same person (R. 85).

Mr. George Allen, an employee of the Camp Bowie post exchange, identified the three checks (Exs. E, F, G) as cashed through the post exchange and for which the exchange was reimbursed by the accused on September 25, 1941 (R. 90).

Accused, as a witness in his own behalf, testified that Carnes owed him a small debt (R. 114), and when asked for it said he would give accused a check. Carnes wrote this check while in his tent with accused standing by, and gave it to accused who cashed it at the post exchange. Accused explained the other two checks by saying that about five or six months before he was inducted into the Army he was involved in an automobile accident on Greenville Avenue (Dallas) between his car and a truck belonging to two men whom accused understood to be brothers named Lawler. They said they lived "in the vicinity of McKinney". At the time they gave him $5.00 in cash in part payment of $20.00 which "we" estimated was the total damage to his car (R. 115).

The Lawlers stated that they would be back the following Saturday, but although accused went back there at that and various other times he did not again locate them until about two months prior to the trial when he was driving down the street and saw one of the boys standing in front of the Dallas National Bank in Dallas; that accused double-parked his car and ran to him, being the first time he had seen the man since the accident, and told him he (accused) wanted his money. The man seemed to be drunk, and while talking with accused the other Lawler came up. They went into the bank but could find no blank checks so accused got some from his car and they went back in the bank where these two checks were written by the Lawlers and given to accused who "didn't scrutinize the checks" (R. 116). This was the last accused saw of them or heard from the checks until the charges were preferred against him. He cashed them at "a gas station out here at Camp". Accused did not know the address of the Lawlers (R. 124). He was told by the Lawlers that the checks were postdated, but he did not notice at the time that they were both named Fred (R. 132), nor could he explain why each spelled Denison differently and each spelled it wrong. Accused's description of the Lawlers was vague, as was his recollection of where they said they lived (R. 134), and he did not think the Lawlers had a license on their truck in Dallas (R. 145). Accused admitted telephoning Carnes at his company not to get excited about the check that accused had been charged with forging, that the investigating officer was coming to see Carnes, but not to be afraid as accused was the only person who could file charges against him. Accused again insisted Carnes wrote the entire face of the check (R. 143).

By Specification 1 of Charge II, accused, having been restricted to the limits of Camp Bowie, Texas, was charged with breaking same by leaving the camp on or about September 3, 1941.

Lieutenant Colonel Louis W. Eggers, 144th Infantry, testified that he was present on or about August 26 or 27, 1941, when Colonel Berry, camp commander, issued an order to accused restricting him to the limits of Camp Bowie (R. 91).

Corporal Jarvis Copeland, Company H, 144th Infantry, testified that he was in Camp Bowie from and after September 1, 1941 (R. 44), and saw accused either the 2nd or 3rd with his wife when accused took Copeland and Private Bond to town where they all had supper (R. 45).

Private Robert D. Bond, Company H, 144th Infantry, testified that on September 2 or 3 he went to Llano with the accused in his (accused's) car.

Major Alvin H. Moore, Cavalry, testified that accused was assigned to work with him at the camp prison on August 27, and worked as such until Saturday, August 30 (R. 56), when accused disappeared and witness did not again see accused until the morning of September 4 when Colonel Underwood gave witness orders that accused was being turned over to him in arrest by order of the camp commander (R. 56).

Accused admitted he left Camp Bowie while under restriction (R. 125), and that he made a trip to Llano and to Brownwood.

By Specification 2, Charge II, accused was charged with failing to obey a lawful order at Camp Bowie on or about September 1, 1941.

Lieutenant Colonel Louis W. Eggers, 144th Infantry, testified that on September 1, 1941, he ordered accused to report to Colonel Lake at De Ridder, Louisiana, and identified Exhibit A as the order (R. 91).

Sergeant Willie V. Sims, Antitank Company, 144th Infantry, testified that he delivered the order, Exhibit A, to accused (R. 96).

Under date of September 1, accused wrote a letter (Exhibit C) to Colonel William E. Lake, reciting accused had that day received an order to report to Colonel Lake not later than September 2, and stating this to be utterly impossible, admitting that he (accused) had been a pretty sorry specimen and a disgrace to his fellow officers, that he would "go so far as to exterminate myself rather than have such a life as I have had in the past 3 months", and stating that he could not come to Louisiana when ordered.

Accused admitted that he did not obey the order (R. 117).

By Specification 2, Charge III, accused was charged with absenting himself from his organization without proper leave, at Fairfield, Texas, from August 6 until August 8, 1941.

Colonel William E. Lake, 144th Infantry, testified that accused reported to him at Fairfield, Texas, on the evening of August 6, 1941, said that he wanted to go to Dallas and knew that permission would not be given him "so he went anyway." The next day accused was directed by witness to "set in front of my tent", and some ten minutes later accused was gone (R. 26). Accused was absent without leave three different times between the 5th, 8th or 9th of August (R. 30).

The morning report of Company L, 144th Infantry, shows accused from special duty to absent without leave at 7:00 a.m., August 7, 1941; August 8, 5:30 a.m., accused from absent without leave to arrest; August 8, 8:00 p.m., from arrest to absent without leave (R. 47), and then on August 10, 6:30 a.m., accused from absent without leave to arrest (R. 42-43).

Accused's wife testified that accused talked on the telephone with her on August 5 (Tuesday), when she was sick in Dallas, and he came home (Dallas, Texas - R. 121), arriving about eleven o'clock Wednesday night. He left two or three hours later. On Friday night he came back around eleven and left about three in the morning. On Saturday night he came in around eleven "and then his mother and daddy took him back" to Fairfield (R. 113).

Accused admitted going absent without leave three times (R. 119).

By Specification 4, Charge V, accused was charged with intent to deceive Colonel Lake on July 31, 1941, by officially reporting that a certain debt owing by accused to the Safety Tire and Battery Company of Brownwood, Texas, had been paid in full when he knew it was not paid in full.

Colonel Lake testified that he received a letter in regard to a debt owed by accused and forwarded the letter to accused for indorsement. The accused in the indorsement to the letter stated he had paid the account in full (R. 20). When asked why he made such a statement, accused said he found out later he could not pay it all (R. 21) because he needed some money for other things (R. 29).

Mr. Done E. Smith, bookkeeper of the Safety Tire Company, testified that the ledger sheet of his books showed that Lieutenant William S. Foster, Company L, 144th Infantry, owes a balance of $10 on his account (R. 36).

Accused, on the witness stand, admitted replying to a letter from Colonel Lake about July 31, 1941, by indorsement that the "debt was paid in full", and stated that when the answer was made the debt had not been paid in full "because the money order probably hadn't gotten there" (R. 127).

By Specification 2, Charge VII, accused was charged with breaking his arrest at Fairfield, Texas, on or about August 8, 1941, after having been duly placed in arrest.

Colonel Lake placed accused under arrest at Fairfield, Texas (R. 26), August 8 (R. 31), and in confinement to his (Colonel Lake's) tent after he had broken arrest for the third time (R. 31). Breaking arrest was also shown by his company morning report of August 8, 1941 (R. 47), and by the statements of the wife of accused that he visited her in Dallas on this date (R. 112-113). Accused admitted going to Dallas without permission on three different occasions (R. 119-122), and on being questioned about the entry on the company morning report of August 8, 1941, of "from arrest to AWOL", accused stated this was the first time he had gone "AWOL" from the regiment (R. 126).

5. Forgery is making a false suable document with intent to defraud (2 Wharton's Criminal Evidence, p. 1164). Although denied by the accused, the proof was ample and the court was entitled to believe that accused wrote the first check in full, himself, without the consent of Private Carnes, and with the intent that it would be accepted as the obligation and promise of Private Carnes. The court also was entitled to disbelieve accused and from the evidence produced find that accused had written the other two checks in their entirety with the similar intent and purpose. From a consideration of the evidence the Board of Review is of the opinion that the accused did so write the three checks in their entirety with the intent to fraudulently obtain their purported value for his own use.

The facts relied upon by the prosecution in this case for proof of the forgeries charged are substantially the same as those supporting the conviction of conduct unbecoming an officer. However, they are considered from a wholly different aspect in deliberating upon guilt of violation of the 95th Article of War, which is a separate and distinct offense from forgery. The evidence required to convict of the latter does not necessarily include proof of facts which are essential to convict of the former. Forgery is an offense under the civil criminal law while conduct unbecoming an officer is exclusively a military offense. In CM 153372 (1922), where the one act of the accused constituted both a felonious assault under Article of War 93 as well as an assault upon his superior officer in the execution of his office under Article of War 64, it was held not to be a duplication

of charges to charge accused, under the respective articles, with both offenses, the first being an offense of a civil nature, and the second a purely military offense (see also CM 184816 and CM 185962 (1929)). Dismissal is mandatory upon conviction of a violation of the 95th Article of War and is authorized upon conviction of the 93rd Article of War.

The attitude of accused is quite fully shown in his letter to Colonel Lake (Exhibit C) and his conviction supported by his own admission under oath (R. 117,119,122,125,126,127,143).

While the better practice would have been for the court to return a finding of not guilty at the end of the trial and the action of the trial judge advocate and the court was irregular in striking from the charge sheet Specification 4 of Additional Charge I and the Specification under Additional Charge II, no rights of the accused were prejudiced thereby.

6. War Department records disclose that accused was born at Dallas, Texas, on April 15, 1917, and at the time of the commission of the offenses he was 24 years of age. He graduated from high school in Dallas, Texas, in 1935, and attended college for two and one-half years. He enlisted in Company H, 144th Infantry, Texas National Guard, on June 3, 1940, was inducted into Federal service on November 25, 1940. He was honorably discharged as sergeant on May 6, 1941, to accept commission as a temporary second lieutenant of Infantry, Army of the United States, which appointment was accepted by him on May 7, 1941.

7. The court was legally constituted. 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.

C. M. Smith, Judge Advocate.
William A. Founds, Judge Advocate.
Charles H. VanBenschoten, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218946

JAN 22 1942

UNITED STATES	)	SECOND CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Dix, New Jersey, October
Second Lieutenant CHARLES	)	15, 1941. Dismissal.
L. JOLY, Jr. (0-359874),	)	
Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

Specification 3: (Disapproved by reviewing authority.)

Specification 4: In that 2nd Lt. Charles L. Joly, Jr., Inf., Asst. Post Provost Marshal, Fort Dix, N. J., did, at Fort Dix, N. J., on or about June 16th, 1941, with intent to deceive, wrongfully and unlawfully make and utter to the Officers' Club, Fort Dix, N. J., a certain check, drawn on The Peoples National Bank & Trust Co. of Pemberton, Pemberton, N. J., in the sum of Thirty-five ($35.00) Dollars, and by means thereof, did fraudulently obtain from the Officers' Club Thirty-five($35.00) Dollars, he the said 2nd Lt. Charles L. Joly, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in The Peoples National Bank & Trust Co. of Pemberton, bank for the payment of said check.

Specification 5: In that 2nd Lt. Charles L. Joly, Jr., Inf., Asst. Post Provost Marshal, Fort Dix, N. J., did, at Fort Dix, N. J., on or about June 23rd, 1941, with intent to deceive, wrongfully and unlawfully make and utter to the Officers' Club, Fort Dix, N. J., a certain check, drawn on The Peoples National Bank & Trust Co. of Pemberton, Pemberton, N. J., in the sum of Five ($5.00) Dollars, and by means thereof, did fraudulently obtain from the Officers' Club Five ($5.00) Dollars, he the said 2nd Lt. Charles L. Joly, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in The Peoples National Bank & Trust Co. of Pemberton, bank for the payment of said check.

Specification 6: (Finding of not guilty.)

Specification 7: In that 2nd Lt. Charles L. Joly, Jr., Inf., Asst. Post Provost Marshal, Fort Dix, N. J., did, at Fort Dix, N. J., on or about July 7th, 1941, with intent to deceive, wrongfully and unlawfully make and utter to the Officers' Club, Fort Dix, N. J., a certain check, drawn on The Peoples National Bank & Trust Co. of Pemberton, Pemberton, N. J., in the sum of Five ($5.00) Dollars, and by means thereof, did fraudulently obtain from the Officers' Club Five ($5.00) Dollars, he the said 2nd Lt. Charles L. Joly, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in The Peoples National Bank & Trust Co. of Pemberton, bank for the payment of said check.

Specification 8: In that 2nd Lt. Charles L. Joly, Jr., Inf., Asst. Post Provost Marshal, Fort Dix, N. J., did, at Fort Dix, N. J., on or about July 7th, 1941, with intent to deceive, wrongfully and unlawfully make and utter to the Officers' Club, Fort Dix, N. J., a certain check, drawn on The Peoples National Bank & Trust Co. of Pemberton, Pemberton, N. J., in the sum of Ten ($10.00) Dollars, and by means thereof, did fraudulently obtain from the Officers' Club Ten ($10.00) Dollars, he the said

2nd Lt. Charles L. Joly, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in The Peoples National Bank & Trust Co. of Pemberton, bank for the payment of said check.

Specification 9: In that 2nd Lt. Charles L. Joly, Jr., Inf., Asst. Post Provost Marshal, Fort Dix, N. J., did, at Fort Dix, N. J., on or about July 10th, 1941, with intent to deceive, wrongfully and unlawfully make and utter to James Harvey, Pointville, N. J., a certain check, drawn on The Peoples National Bank & Trust Co. of Pemberton, Pemberton, N. J., in the sum of Seventy-two and 50/100 ($72.50) Dollars, and by means thereof, did fraudulently obtain from James Harvey merchandise of the value of about Twenty-two and 50/100 ($22.50) Dollars and the cancellation of a Fifty ($50.00) Dollar debt due from the said 2nd Lt. Charles L. Joly, Jr., he the said 2nd Lt. Charles L. Joly, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in The Peoples National Bank & Trust Co. of Pemberton, bank for the payment of said check.

Specification 10: In that 2nd Lt. Charles L. Joly, Jr., Inf., Asst. Post Provost Marshal, Fort Dix, N. J., did, at Fort Dix, N. J., on or about July 10th, 1941, with intent to deceive, wrongfully and unlawfully make and utter to the Officers' Club, Fort Dix, N. J., a certain check, drawn on The Peoples National Bank & Trust Co. of Pemberton, Pemberton, N. J., in the sum of Fifteen ($15.00) Dollars, and by means thereof, did fraudulently obtain from the Officers' Club Fifteen ($15.00) Dollars, he the said 2nd Lt. Charles L. Joly, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in The Peoples National Bank & Trust Co. of Pemberton, bank for the payment of said check.

Specification 11: (Deleted.)

Specification 12: In that 2nd Lt. Charles L. Joly, Jr., Inf., Asst. Post Provost Marshal, Fort Dix, N. J., did, at Fort Dix, N. J., on or about July 14th, 1941,

with intent to deceive, wrongfully and unlawfully make and utter to the Officers' Club, Fort Dix, N. J., a certain check drawn on The Peoples National Bank & Trust Co. of Pemberton, Pemberton, N. J., in the sum of Four ($4.00) Dollars, and by means thereof, did fraudulently obtain from the Officers' Club Four ($4.00) Dollars, he the said 2nd Lt. Charles L. Joly, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in The Peoples National Bank & Trust Co. of Pemberton, bank for the payment of said check.

Specification 13: In that 2nd Lt. Charles L. Joly, Jr., Inf., Asst. Post Provost Marshal, Fort Dix, N. J., did, at Fort Dix, N. J., on or about July 14th, 1941, with intent to deceive, wrongfully and unlawfully make and utter to the Officers' Club, Fort Dix, N. J., a certain check, drawn on The Peoples National Bank & Trust Co. of Pemberton, Pemberton, N. J., in the sum of Five ($5.00) Dollars, and by means thereof, did fraudulently obtain from the Officers' Club Five ($5.00) Dollars, he the said 2nd Lt. Charles L. Joly, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in The Peoples National Bank & Trust Co. of Pemberton, bank for the payment of check.

Specification 14: (Finding of not guilty.)

Specification 15: (Finding of not guilty.)

Specification 16: (Finding of not guilty.)

Specification 17: In that 2nd Lt. Charles L. Joly, Jr., Inf., Asst. Post Provost Marshal, Fort Dix, N.J., did, at Fort Dix, N.J., on or about July 9, 1941, with intent to deceive, wrongfully and unlawfully make and utter to the Empire Trust Company, 120 Wall St., N.Y.C., a certain check, drawn on The Peoples National Bank & Trust Co., of Pemberton, Pemberton, N.J., in the sum of Thirty ($30.00) Dollars, in payment of a debt, he the said 2nd Lt. Charles L. Joly, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in The Peoples National Bank & Trust Co. of Pemberton, bank for the payment of said check.

Specification 18: In that 2nd Lt. Charles L. Joly, Jr., Inf., Asst. Post Provost Marshal, Fort Dix, N.J., did, at Fort Dix, N.J., on or about July 21, 1941, with intent to deceive, wrongfully and unlawfully make and utter to "CASH", a certain check, drawn on The Peoples National Bank & Trust Company of Pemberton, Pemberton, N.J., in the sum of Fifteen ($15.00) Dollars, and by means thereof, did fraudulently obtain from Susie Johnson Fifteen ($15.00) Dollars, he the said 2nd Lt. Charles L. Joly, Jr., then well knowing that he did not have and not intending that he should have sufficient funds in The Peoples National Bank & Trust Co. of Pemberton, bank for the payment of said check.

He pleaded not guilty to the Charge and all Specifications thereunder. He was found guilty of Specifications 3, 4, 5, 7, 8, 9, 10, 12, 13, 17, and 18, and of the Charge; not guilty of Specifications 1, 2, 14, 15, and 16. He was sentenced to be dismissed the service. The reviewing authority disapproved the finding of guilty of Specification 3, approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution with respect to the Specifications of which accused stands convicted is substantially as follows:

a. The accused uttered to the Officers' Club, Fort Dix, New Jersey, within a period of less than one month, from about June 16 to about July 14, 1941, seven checks drawn upon the Peoples National Bank and Trust Company of Pemberton, New Jersey, which were dishonored by that bank and returned to the Officers' Club with a pink slip informing the club that the check had been charged to the club account and returned unpaid because of insufficient funds (R. 17-27, 33-46). The dishonored checks, except Exhibit 8 a, were later delivered to accused who destroyed them, but the pink slips were retained by the club. All of the checks were cashed by the Officers' Club and were subsequently redeemed by accused (R. 32, 104; Ex. 8 a).

(1) Specification 4 - A check for $35 was cashed (R. 17) and was dishonored on June 16, 1941 (R. 40; Ex. 4). The bank balance of accused on June 13, 1941, was $24.74, was successively reduced to $11.56 on June 16th, and to $3.64 on June 23rd, at which amount it remained to include June 29, 1941 (R. 39; Ex. 13).

(2) Specification 5 - A check for $5 was cashed (R. 19) and dishonored (R. 43; Ex. 5) on June 23, 1941. The bank balance of accused on June 18th was $4.14, was reduced to $3.64 on June 23rd, at which amount it remained to include June 29, 1941 (R. 40; Ex. 13).

(3) Specifications 7 and 8 - Two checks, respectively for $5 and $10, were cashed (R. 21) and dishonored (R. 44-45; Exs. 6, 7) on July 7, 1941. The bank balance of accused on July 7, 1941, was $2.61, was successively reduced to an overdraft of $.48 on July 22nd, and so remained to include July 31, 1941 (R. 44; Ex. 13).

(4) Specification 10 - A check dated July 10, 1941, for $15 was cashed (R. 23) and dishonored (R. 45; Exs. 8 a, b, 9) on the same date. The bank balance of accused on July 7, 1941, was $2.61, was successively reduced to $.11 on July 8th, and to an overdraft of $.48 on July 22nd, and so remained to include July 31, 1941 (R. 44; Ex. 13).

(5) Specifications 12 and 13 - Two checks for $4 and $5, respectively, were cashed (R. 25-26) and dishonored (R. 46; Exs. 10, 11) on July 14, 1941. The bank balance of accused on July 7, 1941, was $2.61, was successively reduced to an overdraft of $.39 on July 14th, to an overdraft of $.48 on July 22nd, and so remained to include July 31, 1941 (R. 44; Ex. 13).

b. Specification 9 - The accused on July 10, 1941, gave to James B. Harvey, Pointville, New Jersey, his check drawn on the Peoples National Bank and Trust Company, Pemberton, New Jersey, dated July 10, 1941, for $72.50 (Ex. 16 a) to cover a prior check for $50, which "bounced" and a balance of $22.50 owed for rent. The check was returned to Mr. Harvey by the bank on July 10th, because of insufficient funds. The check was subsequently made good (R. 45, 58-60; Ex. 16 b, 17). The bank balance of accused on July 3, 1941, was $12.61, was successively reduced to $.11 on June 10th, and to an overdraft of $.48 on July 22nd, at which amount it remained to include July 31, 1941 (R. 45; Ex. 13).

c. Specification 17 - The accused sent to the Empire Trust Company, 120 Wall Street, New York City, in part payment of a note (R. 75), his check dated July 9, 1941, for $30, which

check was dishonored because of insufficient funds (R. 71-72; Exs. 21, 22). The bank balance of accused on July 3, 1941, was $12.61, was successively reduced to $.11 on July 9th, and to an overdraft of $.48 on July 14th, at which amount it remained to include July 31, 1941 (R. 47; Ex. 13). This check was made good (R. 76).

d. Specification 18 - On July 21, 1941, Mrs. Susie Johnson, operator of a restaurant, Browns Mills, New Jersey, cashed for accused his check payable to cash, drawn on the Peoples National Bank and Trust Company of Pemberton, New Jersey, for $15, dated July 21, 1941 (Ex. 18 a). The check was returned by that bank because of insufficient funds (R. 47; Ex. 18 b; R. 61-62). The bank balance of accused on July 3, 1941, was $12.61, was successively reduced to an overdraft of $.39 on July 14th, and to an overdraft of $.48 on July 22nd, at which amount it remained to include July 31, 1941 (R. 47; Ex. 13). This check had not been paid at the date of trial (R. 62).

e. The account of accused with the Peoples National Bank and Trust Company of Pemberton, New Jersey, was opened on May 20, 1941, by the discount of a note, of which the proceeds were $147.70. On June 13, 1941, a new note was discounted for $225. The net increase in the amount credited to the accused's account was a little less than $100 (R. 54) as the balance of the old note was deducted. Accused, in addition, made deposits on June 3, 1941, of $194.80, on June 30, 1941, of $182.97, and on August 1, 1941, of $183.60 (Ex. 13). Twenty-six checks were drawn on the account during the period from June 6 to July 21, 1941 (R. 52). The account of accused was overdrawn on two occasions, once on June 11th in a substantial amount, and once on July 14th because of a charge of $.50 by the bank for each check dishonored and returned because of insufficient funds (R. 48; Ex. 13). In some instances the cashier of the bank honored the check of a depositor even though there were insufficient funds on deposit to pay it. An officer who regularly deposited in the bank would be permitted to overdraw his account on the last day of the month, but the bank did not make a practice of permitting a depositor to overdraw his account except at the end of the month. The only reason the cashier of the Peoples National Bank and Trust Company could give for permitting the accused to overdraw his account to the extent of $66.95 on June 11, 1941 (R. 49; Ex. 13), was because the ac-

cused had a note in the bank or an application for a loan at the time. That note for $225 was dated June 13, 1941.

4. At the conclusion of the case of the prosecution, the motion of defense for findings of not guilty of all Specifications was denied (R. 79).

5. Defense:

a. Captain Lewis R. Sussman, Military Police, stationed at Fort Dix, New Jersey, testified that accused had been assistant provost marshal since May 1941, that he had been efficient in his work, a willing and hard worker, and industrious at all times. He would classify him in efficiency as excellent (R. 80-81).

b. Captain Benjamin C. Edwards, Assistant Provost Marshal, Fort Dix, New Jersey, testified that accused was a hard-working officer and had observed him to be fair and impartial. On cross-examination by prosecution the witness admitted that he had known accused for only one month (R. 82-83).

c. Mr. Andre Ledoux, Cashier, Post Exchange, Fort Dix, New Jersey, had known accused since April 1941, and had found him to be cooperative at all times. He thought he was a good officer. On cross-examination by prosecution this witness admitted that he did not know the accused except in his official capacity as provost marshal. On one occasion he had cashed a check for accused which was returned for insufficient funds (R. 84-85).

d. The accused testified that he was married and had a wife and two children, one a little over two and one-half years, and the other a little over one and one-half years of age. He admitted having a checking account with the Peoples National Bank and Trust Company, Pemberton, New Jersey. He had never kept an accurate record of his account. He had never learned that it was overdrawn. He never intentionally gave checks knowing that he did not have funds in the bank to cover them. He made restitution for all of the checks returned because of insufficient funds, except the check for $15 given to Mrs. Johnson, who was unintentionally left out in redeeming these checks. The only explanation he could give for the dishonored checks issued by him was that he had given Mrs. Joly some checks signed in blank in June for household expenses, and that she had cashed some of them without his knowledge (R. 86-87). He admitted giving checks to the Officers' Club as follows: June 16, 1941, $35; June 23, 1941, $5; July 7, 1941, $5; July 7, 1941, $10; July 14, 1941, $4; July 14, 1941, $5; and that each and all of the checks were returned from the bank on which they were

drawn because of insufficient funds. When he redeemed these dishonored checks he destroyed them (R. 104).

On cross-examination and examination by the court the accused testified that he knew how much pay he was to receive at the end of each month; that he tried to determine what his expenditures would be for each month, but could not state whether he had ever limited himself to a budget (R. 106). He did not keep on his check stubs a record of the checks which he wrote. When he issued these various checks he did not know how much money he had in the bank but merely guessed at it. He thought he had given Mrs. Joly a half dozen or possibly ten checks signed in blank. He never consulted with her as to how many checks she had used (R. 107-108).

e. Lieutenant Colonel Curtis M. Noble had known the accused for about two years. He had been in almost daily contact with him at Fort Dix. He considered the accused as a sincere, enthusiastic, industrious, and very reliable officer. He considered him a good friend and a good soldier and would rate him on efficiency report as excellent. He would not hesitate to cash a ck for him (R. 109-111).

f. Mrs. Joly, wife of the accused testified that he had been a good husband and father. She had used blank checks which her husband gave her to pay household expenses and told him when they were used. During the months of September and October the accused had not given her any money for her support and that of the children. She thought she had used four or five of the checks which her husband had given her. She had drawn one check for the laundry bill of $6.45. This check was returned marked, "No Funds", and she redeemed it. She drew another check for $8.10 for the milk bill, which was returned marked, "Insufficient Funds". She thought she wrote these checks the latter part of June. She told her husband when she wrote them, but did not always tell him the exact amount of the check as sometimes it slipped her mind (R. 111, 116).

6. The evidence thus shows that each and all of the checks mentioned in the Specifications, of which accused stands convicted, were made and negotiated by him, and which, when presented for payment, to the bank on which they were drawn, were returned unpaid

because of insufficient funds. From the fact of dishonor and the testimony of the cashier of the Peoples National Bank and Trust Company of Pemberton, it is clear that accused had not made provision for the necessary funds or credit to pay the checks when presented. Although the testimony of the cashier is to the effect that regular depositors are sometimes permitted to overdraw their accounts at the end of the month, there is no proof that accused had been given such permission. Drawing checks in a few instances, when there were insufficient funds to pay them upon presentation, might be considered the result of mere carelessness on the part of the accused, or a mistake in computing his balance, but there is no justification for repeated instances in view of the generally depleted state of his account and the fact that he was on notice that his checks were being returned continually because of insufficient funds on deposit. The giving of the check (Ex. 8 a) in redemption of the dishonored checks (Exs. 6, 7), and the giving of the check (Ex. 16 a) in redemption of the dishonored check (Ex. 14 b), notwithstanding the fact that no deposit had been made in his account subsequent to the respective dates of the dishonored checks, is inconsistent with his denial of intent to deceive the persons to whom the checks were given.

Moreover, his testimony with respect to the checks signed in blank and given to his wife for the payment of household expenses, is directly in conflict with the testimony of Mrs. Joly. She testified that she told accused whenever she wrote a check, but did not always tell him the exact amount as it sometimes slipped her mind and might have varied a few cents. This reason advanced by accused for the condition of his bank account is further weakened by the fact that some of the checks written by Mrs. Joly were returned by the bank because of insufficient funds, and later redeemed by her.

Although the accused admitted that he had never kept an accurate record of his account, and that he gave the checks which were dishonored because of insufficient funds, he stated that it was his impression that he had sufficient funds in the bank to cover them, and denied any intent to deceive or defraud anyone. In view, however, of all the circumstances, of his testimony and that of his wife as to his gross carelessness in the issuance of the checks without keeping any record thereof, and his total indifference as to the balance to his credit in the bank, the Board of Review cannot escape the conclusion that the checks alleged in

the Specifications of which he stands convicted, were issued wrongfully and unlawfully and with intent to deceive.

7. At the time of trial the accused was thirty-three years of age. The records of the Office of The Adjutant General show his service as follows:

> Appointed Second Lieutenant of Infantry, Army of the United States, October 27, 1937. Ordered to extended active duty by paragraph 10, Special Orders No. 89, Headquarters Second Military Area, Second Corps Area, dated April 24, 1941, for a period of one year.

8. All members of the court recommended that accused, in view of his previous meritorious service as an enlisted man in the Army and the Navy of the United States, be permitted to enlist in the Army of the United States after the sentence imposed by the court is effected.

9. The court was legally constituted. 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 warrants confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Arthur S. Hall Jr, Judge Advocate.

Charles Lessson, Judge Advocate.

Thomas H. Taffoy, Judge Advocate.

1st Ind.

War Department, J.A.G.O., FEB 16 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Charles L. Joly, Jr. (0-359874), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence.

I invite attention to the recommendation of all the members of the court that, in view of the meritorious service of the accused for seven years as an enlisted man in the Army and in the Navy, he be permitted to enlist in the Army after execution of his sentence. His immediate commanding officer testified that accused was a willing, efficient, and industrious worker. A field officer testified that accused impressed him after almost daily official contact as a sincere, enthusiastic, very reliable, industrious, and excellent officer.

3. There is nothing in the record to indicate that the acts of the accused were anything more than the result of gross carelessness and reckless disregard of ordinary caution in the handling of his checking account. There is no suggestion of any intent to defraud. Restitution was made on the checks prior to trial, except in the case of one check in which the failure to redeem was unintentional.

In view of all the circumstances, I believe that this young officer may still render useful service as an officer. I recommend that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President.

4. Inclosed herewith are a draft of 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 above recommendation.

Myron C. Cramer.

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls -
Incl 1 - Record of trial.
Incl 2 - Drft. of let. for sig. Sec. of War.
Incl 3 - Form of Executive action.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 218970

JAN 19 1942

UNITED STATES	7TH DIVISION
v.	Trial by G. C. M., convened at Fort Ord, California, October 30 and November 14, 1941. Dismissal.
Second Lieutenant BYRON F. HENDRICKSON (0-340497), 53rd Infantry.	

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, Judge Advocates.

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.

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Byron F. Hendrickson, 2nd Lieutenant, 53rd Infantry, being indebted to The Emporium, San Francisco, California, in the sum of one hundred twenty-nine dollars and seventy seven cents ($129.77), which amount became due and payable on or about March 10, 1941, did, at Fort Ord, California, from March 10, 1941, to October 1, 1941, dishonorably fail and neglect to pay said debt.

Specification 2: In that Byron F. Hendrickson, 2nd Lieutenant, 53rd Infantry, having on or about August 10, 1941, become indebted to The Officers' Club, Fort Benning, Georgia, in the amount of one hundred twenty-two dollars and eighty-five cents ($122.85) for merchandise, and having failed without due cause to liquidate said indebtedness, and having on or about August 15, 1941 promised in writing to said Officers' Club, Fort Benning, Georgia, that he would on or about September 10, 1941, pay on such indebtedness the sum of sixty-

one dollars ($61.00), did, without due cause, at Fort Benning, Georgia, on or about September 10, 1941, dishonorably fail to keep said promise..

Specification 3: (Finding of not guilty)

Specification 4: In that Byron F. Hendrickson, 2nd Lieutenant, 53rd Infantry, being indebted to the Mess Fund, 3rd Battalion Training Unit, Fort Benning, Georgia, in the sum of sixteen dollars and forty-five cents ($16.45) for mess, and having failed without due cause to liquidate said indebtedness, and having on or about August 15, 1941, promised in writing to said Mess Fund, 3rd Battalion Training Unit, Fort Benning, Georgia, that he would on or about September 3, 1941, settle said indebtedness in full, did, without due cause, at Fort Benning, Georgia, on or about September 3, 1941, dishonorably fail to keep said promise.

Specification 5: In that Byron F. Hendrickson, 2nd Lieutenant, 53rd Infantry, being indebted to Student Officers' Tailor Shop, Fort Benning, Georgia, in the sum of twenty dollars and sixty-five cents ($20.65), which amount became due and payable on or about July 10, 1941, did, at Fort Benning, Georgia, from July 10, 1941, to October 1, 1941, dishonorably fail and neglect to pay said debt.

Specification 6: In that Byron F. Hendrickson, 2nd Lieutenant, 53rd Infantry, being indebted to Woods' Dolores Pharmacy, Carmel, California, in the sum of thirty-two dollars and sixty-three cents ($32.63), which amount became due and payable on or about July 10, 1941, did at Carmel, California, from July 10, 1941, to October 1, 1941, dishonorably fail and neglect to pay said debt.

Specification 7: In that Byron F. Hendrickson, 2nd Lieutenant, 53rd Infantry, being indebted to Roos

> Brothers, Palo Alto, California, in the sum of ten dollars and ninety cents ($10.90), which amount became due and payable on or about November 15, 1940, did at Fort Ord, California, from November 15, 1940, to October 1, 1941, dishonorably fail and neglect to pay said debt.

He pleaded not guilty to the Charge and all Specifications thereunder. He was found not guilty of Specification 3; guilty of Specifications 2 and 4; guilty of Specifications 1, 5, 6 and 7, excepting the word "dishonorably"; and of the Charge, not guilty of violation of the 95th Article of War, but guilty of violation of the 96th Article of War. No evidence of previous convictions was introduced. He was sentenced to be relieved from active duty, and to have his commission as a reserve officer terminated. By indorsement dated November 12, 1941, the reviewing authority returned the record of trial to the president of the trial court for proceedings in revision in accordance with paragraph 87b, page 75, Manual for Courts-Martial, 1928, for the reason that the sentence adjudged by the court was invalid. The court thereupon reconvened on November 14, 1941, and sentenced the accused to be dismissed the service. The findings and sentence were announced in open court. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. As to Specifications 1, 5, 6 and 7, the court found the accused guilty, excepting the word "dishonorably". Without the element of dishonor these Specifications do not allege offenses, and without a finding that the acts alleged were done "dishonorably" no offenses thereunder have been proved. The Board of Review has held:

> "Dishonorable neglect to pay debts is a violation of A.W. 95. Neglect on the part of an officer to pay his debts promptly is not of itself sufficient grounds for charges against him. Where the nonpayment amounts to dishonorable conduct, because accompanied by such circumstances as fraud, deceit, or specific promises of payment, it may properly be deemed to constitute an offense. Where the specification alleged that accused, as an officer, failed and neglected to pay debts, and the proof does not show such conduct with reference to the debts as would constitute an offense, although some of the debts had been due for more than seven months, a finding of guilty can not be sustained." (CM 121207 (1918); CM 202601; Dig. Ops. J.A.G., 1912-1930, par. 413, p. 198)

In listing instances of punishment for dishonorable neglect to discharge pecuniary obligations, Winthrop, in his Military Law and Precedents (Reprint, p. 715), states:

> "In these cases, in general, the debt was contracted under false representations, or the failure to pay characterized by deceit, evasion, false promises, denial of indebtedness, &c, and the neglect to discharge the obligation, at least in part, was continued for an unconscionable period. Some such culpable and dishonorable circumstances should characterize the transaction to make it a proper basis for a military charge. A mere failure to settle a private debt, (which may be more the result of misfortune than of fault,) cannot of course properly become the subject of trial and punishment at military law."

The discussion of facts is, therefore, limited herein to those concerned only with Specifications 2 and 4, of which Specifications accused was found guilty without qualification.

Accused left Fort Ord, California, to attend the Infantry Training School at Fort Benning, Georgia, on May 13, 1941, and left Fort Benning, Georgia, to return to Fort Ord, California, on August 15, 1941.

The testimony covering Specification 2 is furnished by the deposition (R. 20, Ex. 6) of First Lieutenant Henry L. Eskew, Infantry, Secretary of The Officers' Club, Fort Benning, Georgia, to the effect that the books of the club showed a running account charged to accused on the "chit" system covering the period from May 29, 1941, to the date of his departure, August 15, 1941, there being a total amount due of $122.85, at the time accused left Fort Benning, and remaining unpaid at the time of taking the deposition, October 20, 1941; that monthly statements were rendered accused who made no response other than a payment of $16.50 about June 15, 1941, and the giving of two notes on the date of his departure from Fort Benning, one for $61.45, due September 10, 1941, and one for $61.40, due October 10, 1941. Accused also made verbal promises of payment.

The testimony concerning Specification 4 is furnished by the deposition (R. 20, Ex. 4) of First Lieutenant Joseph X. O'Brien, Infantry, custodian of The Officers' Mess Fund, Third Student Training Battalion, The Infantry School, Fort Benning, Georgia, to the effect that his books showed a charge against accused for meals taken in the mess during

the first fifteen days of August 1941 in the amount of $16.45. On August 14, 1941, accused made a certificate acknowledging the indebtedness, stating that he did not have sufficient funds with which to pay, and promising to settle the account after his return to his permanent station and not later than September 3, 1941. Bills were sent to the accused but on the date of the deposition, October 20, 1941, the account remained unpaid.

Accused, having been duly advised of his rights, elected to be sworn as a witness in his own behalf, and stated that he had a wife and a girl "three or four years old" living at Carmel, California; that he had been employed for the nine months just before coming to active duty at $120 per month, but ran behind $20 or $25 per month during that time; that while his pay and allowances amounted to $183 per month and he had received $380 travel pay for the trip to Fort Benning, Georgia, and return to Fort Ord, California, he had owed $300 or $400 (R. 22) when called to active duty on December 15, 1940, and in trying to pay on this debt and support his family he became unable to meet his current obligations. He further stated that he had a car upon which he paid $15 per month (R. 23), with $35 monthly house rent and his other family living expenses. His pay check was sent to the Bank of America at Monterey, California, where a checking account was kept in his wife's name. Accused admitted the correctness of the Fort Benning mess bill and that he had promised to pay it on his return to Fort Ord, and stated that he intended to pay the account when he was financially able (R. 27). He also admitted that the expenditures at the Fort Benning Officers' Club were generally for luxuries (R. 32); that he at all times acknowledged the account and intended to pay it but on his return to Fort Ord was unable to borrow the money to do so.

4. The evidence with respect to these two Specifications shows the debts were due substantially as alleged and that the accused, although admitting their correctness and repeatedly promising verbally and in writing to pay them on definite dates, dishonorably failed to do so (CM 121152, Robertson; Winthrop, supra). The conduct of the accused in recklessly incurring unnecessary debts and so flagrantly disregarding his repeated written and verbal promises in connection therewith, falls far short of the minimum standard expected of an Army officer. The court's findings as to Specifications 2 and 4, and as to the Charge are supported by the weight of the evidence and are legally justified.

The original sentence of the court was, as has been stated above, "to be relieved from active duty, and to have your commission as a reserve officer terminated". This purported sentence was beyond the jurisdiction of the court to adjudge, did not constitute a legal sentence, and was therefore void and of no effect. As originally adjudged the sentence consists of two parts, which should be considered separately.

(a) The first part, "to be relieved from active duty", is a purely administrative function, to be accomplished only by appropriate administrative authority. Such action is not punitive and its enforcement would leave the accused in the status of a reserve officer not on active duty. He merely would be restored to his civilian status with no legal disability or limitation whatsoever. It might well be that some reserve officers would welcome such an adjudication so as to relieve them from sacrifices resultant upon separation from their normal social and business activities. In Winthrop's Military Law and Precedents (2nd Ed., 1920 Reprint), page 400, it is stated:

> "The Sentence Must Constitute a Criminal Judgment. This principle results from the very nature of courts-martial as tribunals invested only with a criminal jurisdiction and power of punishment.
>
> "In the first place, therefore, the requirement of the sentence must amount to a punishment; otherwise it is not only irregular <u>but of no effect</u>." (Underscoring supplied)

However, even assuming that relief from active duty could be considered as punitive action, this portion of the sentence would still be invalid, because no limitation is given as to time. It is not stated whether the accused shall be relieved from active duty for a day, a month, a year or permanently. This situation is similar to a sentence, "to be confined at hard labor", without any time being stated. It is true that when taken with the other portion of the sentence, "to have your commission as a reserve officer terminated", the effect would be relief permanently from active duty, but that result follows only inferentially, and an accused cannot be sentenced by inference or implication. The sentence must be definite, certain and unmistakable as to its terms. A pertinent statement appears in Winthrop's Military Law and Precedents, <u>supra</u>, page 403:

> "It (the sentence) Should (be) Definite and Unambiguous in Terms. *** Where the sentence is discretionary,

the punishment or punishments selected by the court, (subject to the law of maximum punishments, in cases of enlisted men,) should be stated in simple, clear and unmistakable terms, and with such precision in regard to details as to convey the exact particulars intended to be conveyed by the court." (Underscoring supplied)

(b) The second portion of the sentence, "to have your commission as a reserve officer terminated", is also a nullity. Termination of a reserve officer's appointment is governed by Sec. X, AR 140-5, July 1, 1941. An examination of this regulation and of the pertinent Articles of War indicates that the only manner in which a court-martial may separate a reserve officer from the service (terminate his appointment) is by "dismissal". "Discharge" of a reserve officer can be accomplished only in the manner indicated in the regulation referred to above. The phrase "termination of a reserve commission" might be considered as the equivalent of "discharge". However, nowhere is it provided that a court-martial may sentence a reserve officer to be "discharged". It may be said that an inference can be drawn from the phrase used that the court intended that this officer be "dismissed". As hereinbefore stated, however, no person may be sentenced by inference or implication. Furthermore, it is quite evident that the court intended the sentence to be something less than dismissal, although it did desire that the accused be separated from the service. The manner of such separation is not stated. This portion of the sentence is vague and ambiguous. It is not "stated in simple, clear, and unmistakable terms" (Winthrop, supra), and certainly a sentence should be construed strictly in favor of the accused.

The original sentence of the court can be construed as no more than a vague, ambiguous recommendation to higher authority, and does not constitute a criminal judgment. Therefore, this sentence is void and of no effect.

Under these circumstances a situation existed wherein the court had made findings of guilty but, in legal effect, had adjudged no sentence. Therefore, the work of the court was not complete and the case was returned to the court by the reviewing authority for proceedings in revision, in accordance with paragraph 87b, p. 75, Manual for Courts-Martial, 1928. That this action by the convening authority was proper is indicated by the following statement from Winthrop's Military Law and Precedents, page 454:

"Nature of the Authority. Incident to the discretion vested by the code in the Reviewing Officer, *** to approve or otherwise act upon the proceedings and sentence, is the authority, long recognized at military law, (and now affirmed in the Army Regulations,) to cause any error or errors appearing in the record, and capable of correction, to be corrected by the court before final action taken by him on the case. Where, in reviewing the record as transmitted to him, he believes that he has discovered a material omission or other defect, either in the findings or sentence or some interlocutory proceeding of the court, which may properly call for a disapproval, he may, instead of formally disapproving, return the record to the court for the purpose of having the requisite amendment made, with a view, if it be duly made, to a final approval ***." (Underscoring supplied)

On page 455 of the same treatise, in discussing the kind of errors which may be corrected by such action, the following applicable statement appears:

"*** Errors of law or fact, or of judgment or discretion. Such are, mainly, errors in the substance of the findings or sentence *** or that the sentence is not warranted by or consistent with the findings, or is not itself legally authorized for the offence or offences found ***.

"Whether the defect be occasioned by inadvertence, or arise from a misconception of law or military usage, or from an imperfect logic or a misuse of the judicial faculty, it is of course most desirable that it be removed, if practicable, from the proceedings, and the due and rational course of justice be relieved from obstruction and embarrassment. This is particularly to be desired where there has been a conviction, since, in the absence of the correction, the sentence may not legally be capable of execution or for other reason may properly have to be disapproved." (Underscoring supplied)

We are not called upon to pass upon a situation wherein a court finds an accused guilty but states affirmatively that he will serve no sentence. In the case at bar the court, in legal effect, took no action regarding a sentence. The situation is analogous to a case

wherein a court makes findings of guilty and adjourns without acting at all on the matter of sentence. In such case the reviewing authority properly could send the record back for the court to complete its work. Inasmuch as the purported sentence of the court in the instant case is a nullity, the same action was appropriate.

In the case of Rose ex rel. Carter v. Roberts (C.C.A.) 99 Fed. 948, cited in Schiller's Military Law and Defense Legislation, p. 392, it is stated (p. 393):

> "If the sentence was in excess of the authority conferred upon the court by the articles of war enacted by congress, it was to that extent void, as the court would have gone beyond its jurisdiction in imposing punishment ***." (Underscoring supplied).

And in Dig. Ops. J.A.G. (1912-1930), pars. 1257, 1345, 1350 and 1351, it is stated that trial by an improperly constituted court is void for all purposes, and is therefore not a bar to a subsequent trial by a court with proper jurisdiction. The instant case involves a similar principle. If an entire trial which is void and of no effect does not bar a subsequent trial (in which the sentence may be more severe than in the previous void trial), by the same reasoning a void sentence by a properly constituted court should not prevent the court from correctings its ineffective action by subsequently adjudging a proper sentence in revision proceedings.

In the proceedings in revision the court sentenced the accused "to be dismissed the service". The claim is made for the defendant that this sentence is invalid under the provisions of Articles of War 40 and 50½, in that it constitutes a greater punishment than was first imposed. This contention is not without merit and cannot be summarily dismissed. The answer to this claim, however, is that in the instant case as the first sentence was of no effect for the purpose of having it executed, it was also of no effect for the purpose of placing any limitation upon the power of the court in the proceedings in revision. In short, it was of no effect whatever. The court was, therefore, under no limitation in the revision proceedings by reason of its former purported sentence. The accused has not been twice placed in jeopardy. In Wharton's Criminal Law (12th Ed.), Vol. 1, p. 541, the footnote refers to the case of Grant v. State (1894), 33 Fla. 291, 14 So. 757, wherein an analogous question arose. In that case it was stated that a verdict of "manslaughter in the first degree", which the court refused

to receive because there was no such degree, was not a bar to the jury again retiring and bringing in a verdict of "murder in the first degree". It will be noted that the later (valid) verdict was much more severe than the first (void) verdict. Yet the later verdict was upheld. The first purported verdict was a nullity and therefore did not limit the jury in its subsequent deliberation upon a proper verdict.

The sentence of dismissal in the instant case is entirely valid.

5. Attached to the record of trial is a request for clemency signed by six of the seven members of the court, recommending that the sentence of dismissal be not invoked but that accused be discharged administratively as provided for in AR 140-5, because of

> "the age and rank of the accused; his lack of experience in both civil and military life; his financial condition prior to entering active service, and his evident lack of familiarity with the customs of the service."

(It may be observed that AR 140-5, par. 74c, has been held to be applicable only to cases wherein misconduct occurs while a reserve officer is not on active duty, and that the action contemplated by the court would properly be taken under (Tentative) AR 605-230, August 25, 1941.)

It is apparent that the members of the court felt that the accused should be separated from the service, but wished to spare him the stigma and dishonor of a dismissal and felt that an administrative discharge would be less severe. However, a disapproval of this sentence and the initiation of such administrative proceedings would not constitute a proper exercise of clemency on the part of the reviewing authority. The action of a board appointed under the appropriate regulations might or might not accomplish the result which the members of the court intend. Clemency should consist of some less severe action which the reviewing authority may take, but he cannot delegate such action to a board. Referring this matter to a board would, in a sense, place the matter outside the control of the reviewing authority. The court found the accused guilty of offenses in violation of Article of War 96. These findings are supported by the evidence. Action by an administrative board cannot be substituted for punitive action in a case properly cognizable by a court-martial.

6. War Department records disclose that accused was born in Chanute, Kansas, on December 19, 1909, and that he was 31 years of age at the

time of the commission of the offenses. He was appointed a second lieutenant, Infantry Reserve, on February 11, 1936, and was reappointed on February 11, 1941. He was on active duty for periods of two weeks during 1936, 1937 and 1938; and entered on extended active duty at Fort Ord, California, on December 15, 1940.

7. The court was legally constituted. 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 the Charge and of Specifications 2 and 4 thereunder; and legally insufficient to support the findings of guilty of Specifications 1, 5, 6 and 7; and legally sufficient to support the sentence and to warrant confirmation thereof.

The Board of Review concurs in the request of the trial court for clemency and, upon consideration of the entire record, is of the opinion that the sentence should not be changed but that the execution of the sentence to dismissal should be suspended during the pleasure of the President.

S. M. Smith, Judge Advocate.
William H. Rounds, Judge Advocate.
Charles M. VanDenburgh, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JAN 24 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Byron F. Hendrickson (0-340497), 53rd Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Charge and Specifications 2 and 4 thereunder; legally insufficient to support the findings of guilty of Specifications 1, 5, 6 and 7; and legally sufficient to support the sentence and to warrant confirmation thereof.

3. War Department records disclose that this officer was 31 years of age at the time of the commission of the offenses. He was appointed a second lieutenant, Infantry Reserve, on February 11, 1936, and was reappointed on February 11, 1941. He was on active duty for two-week periods during 1936, 1937 and 1938; and entered on extended active duty at Fort Ord, California, on December 15, 1940.

4. Attached to the record of trial is a request for clemency signed by six of the seven members of the court, recommending that the sentence of dismissal be not invoked but that accused be discharged administratively under the provisions of AR 140-5, July 1, 1941, because of his age and rank, his lack of experience in both civil and military life, his financial condition prior to entering active service, and his lack of familiarity with the customs of the service. I believe, upon consideration of the entire record, that the sentence to dismissal should be confirmed but that the execution thereof should be suspended during the pleasure of the President.

5. It is recommended that the findings of guilty of Specifications 1, 5, 6 and 7 of the Charge be disapproved, and that the sentence be confirmed but the execution thereof suspended during the pleasure of the President.

6. Inclosed are the draft of a letter for your signature transmitting the record to the President for his action, and a

form of Executive action designed to confirm the sentence but suspend the execution thereof during the pleasure of the President.

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl. 1 - Record of trial.
Incl. 2 - Draft of let. for Sig. Sec. War.
Incl. 3 - Form of Executive action.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 219114

JAN 8 1942

UNITED STATES	)	1st CAVALRY DIVISION
v.	)	Trial by G.C.M., convened at Fort Bliss, Texas, November 21, 1941. Each: Dishonorable discharge (suspended) and confinement for two (2) months. Fort Bliss, Texas.
Privates HARRY L. ROY (15043038) and WILLIAM BACKUS (7040093), both of Company B, 759th Tank Battalion (L), GHQ Reserve.	)	

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence as to accused Roy. The record has now been examined by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private William Backus, Company "B", 759th Tank Battalion (L) GHQ Reserve, and Private Harry L. Roy, Company "B", 759th Tank Battalion (L) GHQ Reserve, acting jointly and pursuant to a common intent, did, at Fort Bliss, Texas, on or about September 2, 1941, feloniously take, steal and carry away a camera, value about seven dollars ($7.00), the property of Private Edward J. Horan.

Each pleaded not guilty to, and was found guilty of, the Charge and its Specification. No evidence of previous convictions was introduced as to either accused. Each was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two months. The reviewing authority approved only so much of the finding in each case as involved a finding of guilty of larceny of the camera involved of some value less than $20, approved the sentence as to each and ordered it executed, but suspended that portion thereof adjudging dishonorable discharge until the soldiers' release from confinement, and designated Fort Bliss, Texas, as the place of confinement.

3. Private Horan testified that he was the owner of a camera identical in description with the camera alleged to have been stolen, which was introduced as Prosecution's Exhibit A. On September 2, 1941, the camera was missing from his foot locker (R. 5-7). He had given no one permission to take the camera and there had been no borrowing between him and either of the accused. Both of the accused were members of the same company to which Private Horan, the owner of the camera, belonged, and Private Backus slept in the upstairs part of the same building occupied by Private Horan, while Private Roy slept in a building nearby. The acquaintance between Private Horan and the accused was very slight and he knew them only as members of the same company (R. 8). Private Kesterson, a member of the same company as that to which the accused belonged, testified that he had never seen either of them with the camera (R. 14-15). The camera in question was sold or pawned for $3 and the signature on the slip which was procured from the pawn shop was that of Private Roy (R. 11; Ex. C). Neither of the accused testified and no evidence was offered by the defense.

The only question involved in this case is as to whether or not the evidence of record warranted the findings of guilty as to Private Harry L. Roy. He admitted to the investigating officer that he sold or pawned the camera in question to the Security Loan and Jewelry Company for three dollars ($3.00), and that he gave one dollar and fifty cents

to the other accused, Private William Backus, but that he did not steal it, and that it was given to him by Private Backus to carry. This statement was introduced in evidence as Exhibit D.

Private William Backus also made a statement to the investigating officer, which was introduced in evidence as Exhibit E, in which he corroborated Private Roy's statement that he, Private Backus, had given the camera to him; and that he and Private Roy went together to the Security Loan and Jewelry Company where Private Roy pawned or sold the camera for three dollars and gave him half of the proceeds. Private Backus explained his possession of the camera by saying that it was pawned to him at Washington Park and that he did not remember who pawned it to him.

The only evidence to connect Roy with the stolen camera was his possession of it. Such possession to be considered as evidence in a case of larceny must be personal, recent and unexplained. Mere possession of stolen goods, unaccompanied by other evidence of guilt, is not to be regarded as prima facie evidence of larceny (Wharton's Cr. Ev. 199). Neither the camera nor case had identifying marks to put one on notice that it was stolen property.

There is no competent evidence of record which is inconsistent with the statement of Private Roy, or with hypothesis of his innocence, nor is there any legal proof of record that he either stole the camera or that he knew it had been stolen at the time he pawned or sold it.

4. In view of the evidence adduced in this case, the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings and sentence as to accused Roy.

F. W. Smith, Judge Advocate.

William A. Rounds, Judge Advocate.

Charles H. Vandenbergh, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 219134

JAN 12 1942

UNITED STATES)	4TH MOTORIZED DIVISION
)	
v.)	Trial by G. C. M., convened at Fort Benning, Georgia, December 9, 1941. Dismissal.
)	
Second Lieutenant FRANCIS M. CRIST, JR. (0-383997), 42nd Field Artillery Battalion.)	

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, Judge Advocates.

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.

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

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

Specification 1: (Finding of not guilty)

Specification 2: In that 2nd Lieutenant Francis M. Crist, Jr., 42nd Field Artillery Battalion, did at Fort Benning, Georgia, on or about September 1, 1941, with intent to deceive Captain Jackson P. Serfas, 42nd Field Artillery Battalion, officially state to the said Captain Serfas in substance the following: that a Chevrolet automobile which had been subject to an indebtedness from the said Lieutenant Crist to Commercial Credit Company, Philadelphia, was still owned by the said Lieutenant Crist and that the said automobile was with relatives of the said Lieutenant Crist in Baltimore, Maryland, which statements were known by the said Lieutenant Crist to be untrue in that the said Chevrolet automobile had prior to September 1, 1941, been conveyed by said Lieutenant Crist to W. D. Patterson Company, Columbus, Georgia, in part pay-

ment for another automobile purchased by said Lieutenant Crist.

Specification 3: (Finding of not guilty)

CHARGE II: Violation of the 93rd Article of War. (Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification 1: In that 2nd Lieutenant Francis M. Crist, Jr., 42nd Field Artillery Battalion, did, at Fort Benning, Georgia, on or about July 30, 1941, wrongfully solicit and obtain a loan from Private First Class Dominico Cicco, Battery "C", 42nd Field Artillery Battalion, in the amount of about Forty Dollars ($40.00).

Specification 2: (Finding of not guilty)

Specification 3: (Finding of not guilty)

Specification 4: (Finding of not guilty)

Specification 5: In that 2nd Lieutenant Francis M. Crist, Jr., 42nd Field Artillery Battalion, did, at Columbus, Georgia, on July 1, 1941, and July 2, 1941, wrongfully and to the discredit of the military service, make and negotiate to one Bob Manning, three checks in the amounts of Ten Dollars ($10.00), Five Dollars ($5.00) and Ten Dollars ($10.00), respectively, drawn upon the Commercial and Savings Bank, Bel Air, Maryland, without having previously made provision for the necessary funds or credit with said bank to meet the same, by reason whereof said checks were dishonored by said bank.

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and Specification 2 thereunder, and of Charge III and Specifications 1 and 5 thereunder. He was found not guilty of Specifications 1 and 3, Charge I, of Charge II and its Specification, and of Specifications 2, 3 and 4, Charge III. No evidence of previous

convictions was introduced. He was sentenced to be dismissed the service. The findings and sentence were announced in open court. The reviewing authority approved only so much of the finding of guilty of Specification 5, Charge III, as involves a finding that accused did, at the time and place alleged, wrongfully and to the discredit of the military service, make and negotiate to one Robert Manning two checks, amounts unknown, drawn upon the Commercial and Savings Bank, Bel Air, Maryland, without having previously made provision for necessary funds or credit with said bank to meet the same, by reason whereof said checks were dishonored by said bank, and as thus modified the reviewing authority approved the findings and the sentence, and forwarded the record of trial for action under Article of War 48.

3. The evidence as to the Charges and Specifications of which accused was found guilty is substantially as follows:

The testimony with reference to Specification 2, Charge I, shows that on or about September 1, 1941, a letter was received from the Commercial Credit Company of Philadelphia by the commanding officer of accused's organization, inquiring about an indebtedness of accused in the amount of about $90 on a 1935 Chevrolet automobile, and asking the location of the car (R. 17-18). Captain Jackson P. Serfas, Adjutant, 42nd Field Artillery Battalion, was directed by this same commanding officer to interview accused concerning this letter for the purpose of answering it. The letter was shown to accused and he was told of the reason for the inquiry, and on that date, August 26, 1941, accused stated it would be taken care of at the end of the month. Accused was questioned again on the same subject during the first week of September. On this latter occasion he told Captain Serfas that the indebtedness had been taken care of and that the car was in the possession of his family in Maryland (R. 21).

Accused agreed to a stipulation to the effect that if the manager of the W. D. Patterson Company, Columbus, Georgia, were present he would testify that the Chevrolet automobile in question had been conveyed by accused to the Patterson Company prior to September 1, 1941, in part payment for another automobile purchased by accused (R. 22).

Accused, having been duly advised of his rights as a witness in his own behalf, elected to be sworn, but since he testified only as to the Specifications of which he was found not guilty it will not be necessary to summarize his testimony.

Private Dominico Cicco, Battery C, 42nd Field Artillery Battalion, testified with reference to Specification 1, Charge III, that on or about July 30, 1941, accused "come into the mess hall where I work and he asked me for some money. I let him have it and he paid me back." The amount was $40 (R. 42). The reason the money was given accused was because "he was an officer in my battery" (R. 43). This money was not to pay any bills of witness nor for the purpose of being deposited to the credit of witness (R. 44), the accused "just said he wanted some money" (R. 47).

The only evidence offered by the prosecution to prove the offense alleged in Specification 5, Charge III, is the testimony of Robert Manning, the proprietor of a restaurant in Columbus, Georgia, substantially to the effect that on or about July 1 or 2, 1941, someone of his employees received from accused, and cashed for him, two checks, the amounts of which he cannot recall, drawn on the Commercial and Savings Bank of Bel Air, Maryland (R. 31,34), which were deposited by his bookkeeper (R. 31) to Manning's account in the Columbus Bank and Trust Company, Columbus, Georgia (R. 33). This latter bank returned the checks and "if my memory serves me right" with the notation written thereon, "Insufficient Funds" (R. 30). Manning then redeemed the checks at the bank where he had deposited them with the necessary amount of cash (R. 31) and tried to locate accused, but failed because he "had gone on maneuvers or somewhere". He then had his bookkeeper write accused's commanding officer a letter "to get word to him about my wanting to get in touch with him" (R. 31). (Note: Testimony elsewhere in the record shows that accused had gone to Louisiana on maneuvers.) Later, during a conversation with accused's commanding officer on the telephone, Manning said that he would appreciate the accused coming down and taking care of the checks (R. 32). On Sunday afternoon, date not stated, the accused's father, Colonel Crist, redeemed the checks (R. 32). The fact must be emphasized that the checks in question were never introduced into the evidence, and the court never saw them, although apparently defense counsel had them in the courtroom during the trial because at the re-cross examination of Manning defense counsel asked him -

> "Q. Will you state what bank these checks were drawn on? (The accused was given an opportunity to see the check with no objections.)
>
> "A. Since/I have seen the checks I remember now that they are drawn on a bank in Bel-Air, Maryland" (R. 33).

(Note: Evidently the word "accused" in parenthesis above is a typographical error on the part of the court reporter. It obviously should read "witness".)

In criminal prosecutions it is an essential requisite that only the best evidence shall be received to prove the charge against the defendant, which means that no evidence is to be received that indicates that there is still better proof of the fact in the possession or under the power of the party producing it (1 Wharton's Criminal Evidence, p. 616).

No checks were produced in evidence nor was any showing made by the trial judge advocate that the alleged checks were not available as exhibits at the trial. The checks mentioned were not shown to be the checks of the accused, nor was there any evidence that accused had cashed them. In reply to a direct question to witness Manning, asking if he did any sort of business on or about July 1 or July 2, 1941, with the accused, he answered, "I didn't myself personally but I think the people that work for me did" in the cashing of a check (R. 29-30). (Underscoring supplied)

The gist of this offense stated in the allegation is that he made and negotiated these checks "without having previously made provision for the necessary funds or credit with said bank to meet the same". (Underscoring supplied) Defending against this allegation the defense offered witness Staff Sergeant Calhoun of the Finance Department at the 4th Division, Fort Benning, who testified in substance that the accused has been paid by his office since May 1941 down to, but not including November, and that none of his pay checks have been given to him personally. On examination of the records of the pay accounts of all officers on the post, this witness can state that each month accused's pay check is mailed directly to the Commercial and Savings Bank at Bel Air, Maryland, and that his pay check for June was mailed approximately on June 29 to that bank, and for July it would have been mailed about July 30.

In the face of this evidence grave doubt exists as to the legal sufficiency of the evidence of record offered by the prosecution to support this Specification. Even should it have been established that these were the checks of accused and that he had cashed them in the restaurant, there is no affirmative evidence that the checks were worthless when drawn, or that the accused had knowledge that these checks were not good, or that he had any reason to believe that they would not be paid. On the contrary, he may have had every

reason to suppose that his entire pay check, including commutation of quarters and rations, which would be approximately $183 for an officer of his rank and length of service, would be available for the payment of these three checks which, as alleged in the Specification, totaled only $25. It might still be possible for the accused's account to have been insufficient to meet these Manning checks when presented and still it could be true that he had previously made provisions for necessary funds or credit with the bank to meet them. The fact that these checks were dishonored is merely hearsay as to this record and is not established by competent evidence, as no witness from either bank involved was ever called to establish it. It does appear, of course, that Manning got the checks back from his Columbus bank unpaid and that accused's father subsequently redeemed them, but it is not believed that the only inference that can be drawn from this fact is that accused had not previously made provisions for their payment at the Maryland bank. It is also pointed out that the finding in this case cannot be used as a plea in bar to a subsequent charge for the same offense, because of its vague terms, namely, "two checks, amounts unknown, drawn on the Commercial and Savings Bank, Bel Air, Maryland", which failed to designate the dates or amounts of the checks or any other specific means of positive identification. For these reasons, the Board of Review is of the opinion that the evidence of record is insufficient to sustain the findings of the court as to this Specification.

4. The testimony clearly shows that the statement concerning the indebtedness on, and the whereabouts of, the Chevrolet automobile was made to Captain Serfas in his official capacity and that it was admitted, without explanation, to be untrue by accused in his stipulation. The evidence supporting the charge of borrowing money from an enlisted man is clear and uncontradicted.

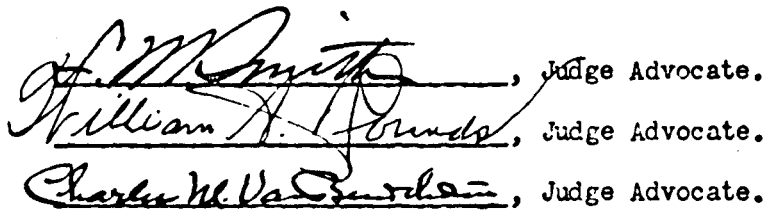
5. The charge sheet shows that accused was 23 years of age at the time of the commission of the offenses, with prior service as follows:

> "Enlisted June 29, 1936 13th FA Bn - Discharged
> Aug. 22, 1938, convenience of the Government.
> Enlisted January 28, 1939 310th FA Bn - Discharged
> St Sgt Aug. 17, 1939 conven of Government."

He was appointed a second lieutenant, Field Artillery Reserve, on August 18, 1939, and entered on active duty on July 5, 1940. On May 14, 1941, his active duty tour was extended to June 30, 1942.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and Specification 2 thereunder and of Charge III and Specification 1 thereunder; legally insufficient to support the finding of guilty of Specification 5, Charge III; and legally sufficient to support the sentence and to warrant confirmation thereof. A sentence to dismissal is mandatory upon conviction of violation of the 95th Article of War.

7. Attached to the record of trial is a recommendation for clemency signed by six of the eight members of the trial court, the other two members being on leave at the time of signing, asking that the sentence of dismissal of the accused from the service be not executed, but commuted to suspension from promotion for one year after his promotion would otherwise become due. The Board of Review concurs in the recommendation of the trial court for clemency and, upon consideration of the entire record, is of the opinion that the sentence should not be changed but that the execution of the sentence to dismissal be suspended during the pleasure of the President.


, Judge Advocate.
, Judge Advocate.
, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JAN 16 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Francis M. Crist, Jr. (0-383997), 42nd Field Artillery Battalion.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge I and Specification 2 thereunder and of Charge III and Specification 1 thereunder, legally insufficient to support the finding of guilty of Specification 5, Charge III, and legally sufficient to support the sentence.

3. There is attached to the record of trial a request for clemency signed by six of the eight members of the trial court, the other two members being on leave at the time of signing, recommending that the sentence of dismissal of the accused from the service be not executed, but commuted to suspension from promotion for one year after his promotion would otherwise become due. This recommendation was based on the "belief that the officer may be re-claimed and be of benefit to the Service in this emergency."

War Department records show that this officer was 23 years of age at the time of the commission of the offenses, with prior service as follows:

> "Enlisted June 29, 1936 13th FA Bn - Discharged Aug. 22, 1938, convenience of the Government. Enlisted January 28, 1939 310th FA Bn - Discharged St Sgt Aug. 17, 1939 convenience of Government."

He was appointed a second lieutenant, Field Artillery Reserve, on August 18, 1939, and entered on active duty on July 5, 1940. On May 14, 1941, his active duty tour was extended to June 30, 1942.

While it has not been the practice of this office to recommend the commutation of a sentence of dismissal imposed upon conviction of making a false official statement in violation of the 95th Article

of War, for which a sentence of dismissal is mandatory, there have been exceptions to this practice (CM 211931, Raymond, 1939). Upon consideration of the entire record, and in view of the inexperience of this officer, I believe that the suspension of the execution of the dismissal during the pleasure of the President would be consonant with the policy of the War Department and without injury to the Army. It is therefore recommended that the execution of the sentence to dismissal be suspended during the pleasure of the President.

4. Inclosed herewith are the draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to confirm the sentence but suspend the execution thereof during the pleasure of the President.

Myron C. Cramer.

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig.
Sec. of War.
Incl.3-Form of Executive action.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

Board of Review
CM 219135

MAR 26 1942

UNITED STATES)	41st INFANTRY DIVISION
)	
v.)	Tried by G.C.M., convened at
)	Fort Lewis, Washington, Novem-
Lieutenant Colonel GORDON)	ber 21, 22, 24 and 25, 1941.
D. STRYKER (0-232152),)	Dishonorable discharge and
Signal Corps, 41st Infantry)	confinement for two and one-
Division.)	half (2½) years. Penitentiary.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and McCLAIN, Judge Advocates.

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.

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

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

Specification 1: In that Lt. Col. Gordon D. Stryker, Signal Corps, 41st Infantry Division, did at Camp Murray, Washington, on or about October 15, 1940, feloniously take, steal, and carry away, subsistence stores of the value of about $7.72, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Lt. Col. Gordon D. Stryker, Signal Corps, 41st Infantry Division, did at Camp Murray, Washington, on or about October 18, 1940, feloniously take, steal, and carry away subsistence stores of the value of about $1.07, property of the United States, furnished and intended for the military service thereof.

Specification 3: In that Lt. Col. Gordon D. Stryker, Signal Corps, 41st Infantry Division, did at Camp Murray, Washington, on or about October 22, 1940, feloniously take, steal, and carry away subsistence stores of the

value of about $8.23, property of the United States, furnished and intended for the military service thereof.

Specification 4: In that Lt. Col. Gordon D. Stryker, Signal Corps, 41st Infantry Division, did at Camp Murray, Washington, on or about October 30, 1940, feloniously take, steal, and carry away subsistence stores of the value of about $4.76, property of the United States, furnished and intended for the military service thereof.

Specification 5: In that Lt. Col. Gordon D. Stryker, Signal Corps, 41st Infantry Division, did at Camp Murray, Washington, on or about November 1, 1940, feloniously take, steal, and carry away subsistence stores of the value of about $1.20, property of the United States, furnished and intended for the military service thereof.

Specification 6: In that Lt. Col. Gordon D. Stryker, Signal Corps, 41st Infantry Division, did at Camp Murray, Washington on or about November 8, 1940, feloniously take, steal, and carry away subsistence stores of the value of about $5.00, 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 Lt. Col. Gordon D. Stryker, Signal Corps, 41st Infantry Division, did first at Camp Murray, Washington, and thereafter at the 41st Infantry Division Cantonment, Fort Lewis, Washington on divers, many and sundry occasions between the dates of October 1, 1940, and May 1, 1941, more specific dates of which are to the accuser unknown, knowingly, willfully, and wrongfully take, carry away and convert to his own use certain Government subsistence stores and gasoline of the value of about $400.00, the same being the property of the United States intended for the military service thereof, all to the prejudice of good order and military discipline.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty under Charge I of Specifications 1, 2, 3, and of Charge I, of Specification 4, substituting $4.22 for $4.76, of Specification 5, substituting $.87 for $1.20, and of Specification

6, substituting $4.41 for $5; of the Specification, Charge II, substituting November 15 for October 1, and substituting for $400, $302.83 following "subsistence stores" and words "of some value" following word "gasoline"; and of Charge II. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years and six months. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½. The record has been acted upon by the Board of Review under the provisions of Article of War 48.

3. The six Specifications of Charge I allege the larceny, each on a specific date in October or November 1940, of subsistence stores, property of the United States, furnished and intended for the military service, in violation of Article of War 94.

a. The evidence for the prosecution shows that on October 15, 1940 (Spec. 1), Sergeant Edward C. Hage, 41st Signal Company, at the direction of accused, put up in a pasteboard box two gallons tomato juice, four cans pears, three pounds coffee, eighteen eggs, four heads lettuce, six cans of tuna fish, two loaves bread, two pounds butter, four pounds leg of pork, three pounds of bacon, and two gallons canned ham, and placed the box in the car of the accused which was pointed out to him by the accused (R. 25-32). All of those articles were Government property issued to Sergeant Hage at the "Fort" for the 41st Signal Company (R. 32-33). The value of the above items was $7.75 (R. 167; Ex. 7 A).

On October 18, 1940 (Spec. 2), the accused gave Sergeant Hage an order for sugar, four pounds of coffee, two pounds pork chops, one pound butter, jello, canned corn, string beans, and pears, and one quart of pickles, which Hage put up for, and placed in the car of, accused. These articles were taken from the storeroom of the 41st Signal Company and were Government property (R. 33-35; Ex. 1). The value of the above items was $1.46 (R. 167; Ex. 7 B).

On October 22, 1940 (Spec. 3), at the request of accused, Sergeant Hage put up in a box, apple butter, two loaves bread, two cans berries, catsup, four pounds jello, five cans peas, two cans jam, four cans pineapple, three pounds carrots, six pounds pork chops, eleven pounds ham, three pounds bacon, four pounds pork

links, and three pounds butter, and either Hage or the student cook carried them out and placed them in the car of accused. These items were Government property from the shelves and ice box of the 41st Signal Company (R. 36-37; Ex. 1) and were valued at $10.29 (R. 167; Ex. 7 C).

On October 30, 1940 (Spec. 4), the accused ordered Sergeant Hage to cut him a nice steak and himself took a large can of ham from an ice box. Sergeant Hage put in a box five pounds tenderloin steak, seven pounds canned ham, five half-pints mustard, olives, eggs, asparagus, two pounds flour, two quarts dill pickles, and one-half slab bacon. These articles were placed in the car of accused, a blue Chevrolet sedan, at the motor pool (R. 39-40; Ex. 1). These items were valued at $4.22 (R. 167; Ex. 7 D).

On November 1, 1940 (Spec. 5), accused came into the kitchen and wanted bread, coffee, butter, half a cured ham, and lettuce. Sergeant Hage wrapped up the articles, which were the property of the United States, pertaining to the 41st Signal Company, put them in pasteboard boxes, and placed them inside the car (R. 40-41; Ex. 1). These items were valued at $.87 (R. 167; Ex. 7 E).

On November 8, 1940 (Spec. 6), accused came in one of the kitchens and on his order, Sergeant Hage put up for him four pounds pork links, two chickens, two gallons tomato juice, four cans tomatoes, two dozen oranges, one-half dozen lemons, two celery stalks, three pounds cheese, six pounds roast beef, four pounds bacon, and teabone steak, and placed the articles in the car of accused. These articles were the property of the United States belonging to the 41st Signal Company, and were valued at $4.41 (R. 42-44, 167; Exs. 1, 7 F).

Sergeant Hage wrote the above items on a small slip each day as put up and copied each upon the day put up onto a piece of paper (Ex. 1) and added the date. All of the original small slips were lost (R. 45-49). Exhibit 1 is his personal writing of the orders which the accused gave him and which he filled (R. 28).

All articles listed on Exhibit 1 were issued to the Signal Company for use in its mess, and were taken from the storeroom where subsistence stores issued to the Company were ordinarily

stored. Sergeant Hage tried to put up the things when no one was around, usually between dinner and two o'clock, and mostly on a Saturday when a large volume of supplies came in for over Sunday. Accused told Sergeant Hage that he wanted the food because he was "batching" and cooking for himself. Sergeant Hage knew "the things" should not be done but gave the supplies because accused directed it (R. 55-63).

Private First Class Alvin W. Lozier, a cook in the 41st Signal Company, saw groceries from the kitchen put in the blue Chevrolet of accused around ten times from October to about April (R. 74-75, 78-79), but stated no specific dates. Sergeant Charles R. Marshall saw boxes of groceries taken out of the 41st Signal Company kitchen and put in the car of accused by Sergeant Hage and Private Lozier twice during the period October 1940, to May 1941 (R. 112-113). Vernon C. Coleman, formerly cook, 41st Signal Company, during the period October 1, 1940, to February 15, 1941, saw accused order Sergeant Hage to cut for accused meat which was carried to car of accused by Coleman or by accused (Ex. 10).

b. Defense:

The accused took the stand in his own behalf and testified that he had been in the National Guard in Oregon off and on since 1914 and a commissioned officer since 1926; had been commanding officer of the Headquarters Company, 186th Infantry, and of the 41st Signal Company; and was inducted into Federal service as Lieutenant Colonel, Signal Corps, 41st Division Signal Officer, on September 16, 1940. He had then no administrative supervision over the 41st Signal Company (R. 224-225).

He denied that he had gotten any subsistence stores from the 41st Signal Company between October 1, 1940, and January 1, 1941, and denied specifically that he had gotten any on October 15, 18, 22 or 30, 1940, November 1 or 8, 1940, the dates alleged in the six Specifications (R. 242-243). He stated that the first time Sergeant Hage put up supplies for him was in the middle of January 1941. He denied that the list which Sergeant Hage testified that he got on October 15, 1940, was correct, denied that he got anything in October, denied that Coleman ever carried out any articles to his car in November (R. 276), and denied that he told Sergeant Hage that he was "batching" or cooking for himself (R. 254).

c. It is the opinion of the Board of Review that, notwithstanding the specific denial by the accused that he received during that period no subsistence supplies from the 41st Signal Company, the testimony of Sergeant Hage as to the items of supplies issued to the 41st Signal Company which he furnished to the accused and which were placed either by Hage or his assistant in the car of accused under the specific directions of accused, is convincing and is supported by the memorandums of the supplies furnished upon the dates alleged, which memorandums were copied at the time together with the date of delivery upon Exhibit 1, and is further corroborated by the testimony of the cooks Lozier and Coleman and of Sergeant Marshall, who themselves either placed boxes in the car or saw others do so within the period covered by the dates alleged in the six Specifications, but without the stating of any specific date. The value of the articles so placed in the car of accused is proven substantially as found.

One, who by the use of an innocent agent, obtains possession of the property of another, is as guilty as though he had taken it with his own hands (sec. 58 (4), 36 C.J. 752).

The Board of Review, in the case of an officer who instructed his assistants to prepare packages of food, which were called for by the officer's orderly and placed in the car of accused and which articles were all obviously such as are usually and habitually carried among the food supplies of enlisted men's messes, has held that the record of trial was legally sufficient to support a finding of guilty of embezzlement of those articles of food (CM 204879, Fleischer).

4. The Specification, Charge II, alleges the wrongful taking, carrying away, and conversion to the use of accused on sundry occasions between October 1, 1940, and May 1, 1941, of certain subsistence stores and gasoline, property of the United States, intended for the military service, in violation of Article of War 96.

a. The evidence for the prosecution is substantially as follows:

(1) The accused made the following signed statement to the officer who investigated the charges:

"I admit that I received certain foodstuffs in the approximate amount of twenty (20) dollars during the early months of 1941 only, but disclaim any intent whatsoever to defraud the government.

"With reference to the gasoline, the appropriation of which I am charged, I admit the receipt of a few gallons on two occasions but state that it was used in the government service. There was an extreme shortage of government vehicles in the fall of 1940 which necessitated the use of my personal automobile to properly perform my official duties." (R. 209; Ex. 12.)

(2) Sergeant Hage identified Exhibit 2, five sheets of paper containing his tabulation of subsistence stores, groceries, and meats from the mess kitchen of the 41st Signal Company, which were put up by Hage, or which he had seen his cooks put up for and which went to the accused, from about October 1940, to about April 30, 1941. This was a master sheet made up from small slips on which were listed the supplies which accused got on different occasions. Sergeant Hage entered these small slips on Exhibit 2 as he found time within a day or two after the articles left the kitchen. Except for Exhibits 3, 4, 5 and 6, all small slips have been lost or had disappeared from a box in the storeroom when the organization returned from California in July (R. 124-129, 135, 141-142, 149). Exhibit 3 is in the handwriting of accused and was handed to Sergeant Hage by accused. Exhibits 4, 5 and 6 were written by Hage (R. 138). When the mess officer, Lieutenant Hirte, ordered Hage about January 1, 1941, to make a list of what went out of the kitchen, Hage told Lieutenant Hirte that he already had a record from about October, and continued to make a record (R. 143-145). The articles listed on Exhibits 1, 3, 4, 5 and 6 are all included on Exhibit 2 at various points and all of those exhibits contain the only written data Sergeant Hage had as to the articles taken from the kitchen (R. 137-138). Exhibit 2 contains no dates, but the items thereon from Exhibit 1 were obtained by accused in October, those on Exhibit 3 in January, and those on Exhibit 4 on January 24, 1941 (R. 146-148).

Master Sergeant Samuel H. Fogg, using the Fort Lewis Commissary price lists and applying to each item the lowest price during the period November 1, 1940, to March 31, 1941, computed

the total value of the staple items listed on Exhibit 2 - not including fresh fruits and vegetables - as $331.83 (R. 168, 185-187). Deducting from that figure $29, the value found by Sergeant Fogg of the items thereon alleged in Charge I and listed on Exhibit 1 (R. 167), leaves a value of $302.83 for the other items of Exhibit 2, the value of the subsistence stores, which the court found by exception and substitution (R. 447).

(3) Private Merrill T. Young, a cook in the 41st Signal Company, between September 1940 and April, saw accused come in, have boxes fixed up, and taken out of the kitchen. Young himself before April, fixed for accused one box of meat and canned fruits and put it in the blue Chevrolet sedan car of accused. He saw Sergeant Hage make a record on slips of paper after the things were taken out to the car (R. 64-69).

(4) Private First Class Alvin W. Lozier, a cook in the 41st Signal Company, saw accused go from the kitchen to the pantry and look over the stock of supplies. He had seen accused take from the shelves supplies which were put in a box and the box put in the car of accused, sometimes by Lozier, sometimes by others. During the period from October to about April, he saw groceries taken out and put in the car of accused about ten times. The first box Lozier carried out to the car of accused contained canned goods, vegetables and a ten or twelve pound can of ham. He had seen Sergeant Hage make, on slips of paper, a list of supplies which left the mess hall (R. 70-75, 77).

(5) Private First Class Francis L. Fitzsimonds, a cook in the 41st Signal Company, more than ten times from the last of November 1940 until April, put up in boxes or bags the groceries which the accused stated he wanted, and each time the accused took them out of the kitchen. He saw Cook Coleman occasionally put up boxes of groceries for accused before the latter part of November, carry them out, and place them in the car of accused, (R. 92-99).

(6) Private First Class Richard L. Butler, company clerk, 41st Signal Company, on one occasion between October 1940, and April 1941, saw accused go into the pantry, get things, bring them to the kitchen, and carry the articles of food out of the kitchen (R. 108). One evening in the kitchen Butler tried unsuccessfully to get a turkey sandwich from a turkey just taken

out of the oven. Shortly thereafter the accused came into the kitchen and got the whole turkey, which was taken out of the building, either by accused or by one of the men on duty (R. 110-111).

(7) Private Walter A. Crosby, cook, 41st Signal Company, often saw accused get supplies out of the company kitchen during the period from October to May. Crosby gave accused supplies approximately twenty-five or thirty-five times from November to May. The accused would go into the pantry with Crosby, accused would point out what he wanted, and Crosby would give it to accused, usually one of a kind, like a person going into a store and buying a week's supply. A K.P. would usually carry the things out to the car of accused. Crosby was not certain that the groceries carried out went into the car of accused each time, but occasionally did actually see them go into the car (R. 115-124).

(8) Sergeant Charles R. Marshall, 41st Signal Company, twice in the period October 1940 to May 1, 1941, saw boxes containing groceries carried out of the rear door of the company kitchen by Sergeant Hage or Private Lozier into the 1940 blue Chevrolet sedan of accused (R. 112-113).

(9) Vernon C. Coleman in his deposition, stated accused would come into the kitchen and order Coleman to give him food which he stated he was taking for use in the Officers' Mess. During the period October 1, 1940, to February 15, 1941, Coleman furnished to accused, upon his order, subsistence stores from the mess of the 41st Signal Company, including butter, coffee, cereal, canned goods, chickens, steaks, chops, olives and bread, of a total money value of about $284. Coleman or accused (carried) carried the items out to the car of accused. Coleman saw accused order Sergeant Hage to cut for him meat, which accused carried away with him. Accused usually came in and took foodstuffs every other day. On the day before the Christmas furloughs started, a Friday, accused came in and took a good deal, a ham, some canned goods, some chickens, butter and several items, such as peaches and pineapple (R. 183; Ex. 10).

When recalled as a witness for the court, Vernon C. Coleman testified in great detail as to the supplies which he furnished accused from the stores of the 41st Signal Company from October 1, 1940, to January 1, 1941, of a value of about $200, and after January 1, 1941, of a value of about $80 (R. 279-337). He

recalled but one definite date, the day before the Christmas furlough began, because accused then gave him a bottle of whiskey (R. 292). Accused never gave him a slip with a list, but always told him personally what supplies he wanted (R. 297).

(10) First Sergeant Lloyd P. Hirte, 41st Signal Company, visited the kitchen on morning inspections. He once saw accused come out of the pantry with a box containing canned goods in his hand, and walk out of the kitchen and on to the street carrying the box. He reported that fact to Captain Burns in February. He saw the cooks - one of whom was Coleman - carry out boxes from the kitchen for accused at least six times in the months of February and March 1941. The company never, to his knowledge, bought groceries from any source other than the Quartermaster (R. 100-104).

(11) First Lieutenant Ralph L. Hirte, Signal Corps, had been in the 41st Signal Company since it was organized and since February 1941, had been second in command and mess officer. Irregularities in the mess were brought to his attention. He reported to his commanding officer in the latter part of February that accused was taking boxes of foodstuffs out of the kitchen. He himself saw accused take boxes out of the kitchen five times during the latter part of February and March. He was sure that the boxes contained subsistence stores because they contained cans and other material exactly the same as were kept in the kitchen, and because accused brought them out of the kitchen. The accused, when removing the stores, gave him an explanation that he was not well off financially and that the use of the supplies was lessening the burden on him. He talked to the accused several times objecting to the removal of the stores. An inventory disclosed that there was a shortage. When Sergeant Hage first reported the shortage, Lieutenant Hirte directed him to continue keeping his list. Lieutenant Hirte never took any part in the delivery of any groceries to the accused, nor did he ever receive any money in payment for food taken from the mess hall (R. 85-92). In his first conversation with accused objecting to the removal of supplies, Lieutenant Hirte told accused that he was no longer in the National Guard and could not get away with taking them, and tried to put it over in a diplomatic manner. The accused replied that he was a member of the Division staff, that they could handle the regulations the way they wanted to, and as accused was the senior, it was his responsibility. The substance of another statement by accused had to do with being embarrassed about his bills and that when he got caught up, everything would work out all right (R. 196-205).

When recalled as a witness for the court, Lieutenant Hirte identified his indorsement on the $10 check (court's Ex. 1). That check was not in payment of subsistence supplies furnished accused from the mess of the 41st Signal Company. He did not remember receiving a check while in Miss Hart's apartment. He believes check was probably in repayment of a loan of $10 made to accused prior to the death of his mother so that accused could go to Portland. The accused never offered to make any settlement for groceries, and had never, to Lieutenant Hirte's knowledge, paid anything into the mess fund for the articles received from the mess. Lieutenant Hirte never paid any sum into the company fund in settlement of any account resulting from food furnished the accused, never indicated to accused that the account for groceries would be taken care of, nor did he tell accused not to worry about the account. The accused was under obligation to Lieutenant Hirte as a cosigner on a note of accused at the Fort Lewis Bank, originally for $500 (R. 375-381).

(12) Captain Lawrence J. Burns had been with the 41st Signal Company since 1936 and in command since August 1940. In the spring of 1941, he spoke to accused about a report that accused was taking groceries and subsistence from the company kitchen, and told accused that such action was not proper, with the hope that accused would cease that practice. He took no other action except to talk to the mess officer. Captain Burns had no personal knowledge that accused took anything from the mess hall (R. 79-85).

When recalled as a witness for the court, Captain Burns denied that he had at any time received any money from accused in payment for foodstuffs issued for use of the 41st Signal Company (R. 382).

(13) With respect to gasoline:

(a) The signed statement of accused admitted the receipt "of a few gallons on two occasions", but stated that it was used in the Government service, and that the extreme shortage of Government vehicles in the fall of 1940 necessitated the use of his private car properly to perform his official duties (R. 209; Ex. 12).

(b) Private First Class Paul M. Maxam, a truck driver in the 41st Signal Company, twice in November saw gasoline poured into the gas tank of the blue Chevrolet sedan of accused at the company motor pool, from a ten gallon "bidon" can which came from the same spot where Maxam secured the Government gasoline to fill the tank of his truck. He identified the contents of the cans poured into gas tank of car of accused as gasoline because it was placed in the gas tank (R. 169-174).

(c) Private William F. West, a driver of the 41st Signal Company, saw, during the period from September 15, 1940, to May 1941, gasoline poured from the ten gallon "bidons" of gasoline into gas tank of the private car of accused at least five or ten times. He knew the "bidons" were full from the manner they were carried, and that it was Government gasoline because it was drawn from the gasoline dump, the fifty gallon barrels filled from a gas truck (R. 174-181).

(d) Private Ralph Svehaug, in charge of gasoline dump of the 41st Signal Company in October, November, and part of December 1940, twice put ten gallons of Government gasoline in tank of car of accused upon the order of some person in military uniform. On each occasion, the accused drove his car into the area and, after the gasoline was put in, the accused drove the car away from the area (R. 181-185).

(e) Harry S. McNair, on one occasion between October 1, 1940, and April 1, 1941, at the motor pool of the Signal Company at Camp Murray, upon the order of accused, put five or six gallons of Government gasoline into the car of the accused (R. 193; Ex. 9).

b. Defense:

(1) The accused testified at great length and in great detail upon this specification. He identified his signature upon prosecution Exhibit 12 - his statement to the investigating officer. In the first paragraph thereof, he admitted receipt of certain foodstuffs in an approximate amount of $20 during early months of 1941, but disclaimed any intent whatsoever to defraud the Government.

About January 5 or 10, 1941, accused asked Captain Burns if he objected to the accused getting a few things from the kitchen, if accused paid for them. Captain Burns motioned toward Lieutenant Hirte, stated that he had no objection and that Lieutenant Hirte would take care of it. From that time accused secured supplies from the kitchen not over ten or twelve times, and except for the first time, only a few items each time. He customarily prepared a list and gave it to Lieutenant Hirte, Sergeant Hage, or Private Coleman. This practice continued during part of January, all of February, and a part of March. It was his intention to pay for what he secured. It was never his intention to steal the groceries nor to defraud the Government in the procurement of them. It was his impression that he could legally procure these subsistence stores from the company and pay for them (R. 240-244). He desired the groceries from the company purely as a matter of convenience, and was under the impression that he could not buy supplies at the Fort Lewis Commissary (R. 251-252). None of the stores he obtained were taken to Portland (R. 253) where he had his home (R. 278), but he took all of them to the apartment of Miss Hart in Olympia, who was not a dependent, as gifts to her for her own use (R. 278-279).

His first conversation with Lieutenant Hirte as to payment for supplies was about the middle of February at the apartment of Miss Hart. When accused asked Lieutenant Hirte how much he owed the company, Hirte did not know but finally said between $5 and $10. Accused said he would be getting a few things more and gave Hirte a check for $10. In another conversation, after they came back from California, accused asked how much he owed and Hirte replied that it was all taken care of. As Hirte was under considerable obligations to accused who had assisted financially and secured jobs for Hirte during his National Guard service, accused assumed that the supplies had been paid for by Hirte (R. 261-263). Accused then, in March, stopped getting food from the company kitchen because he could not see Hirte paying for this food (R. 279).

With respect to gasoline the accused testified that he obtained, upon the authorization of Captain Burns, Government gasoline twice when he arrived at the 41st Signal Company and found that he was out of gasoline. He does not know how much

gasoline was put in his car each time, but he asked only for enough to get to a pump. He used that gas in his car in performing official duties. He had no intention of stealing or wrongfully taking any gasoline, or of defrauding the Government. Because of a shortage of official transportation, he drove his car hundreds of miles on official duties, paying for his gasoline (R. 244-247).

Except for the admissions stated above, the accused denied generally and specifically, substantially all of the testimony of the witnesses for the prosecution relating to wrongful conversion to his own use of the Government subsistence stores and gasoline (R. 224-285, 354-361, 382, 391).

(2) Sergeant Hage (recalled by defense) stated that between October 1, 1940, and April 1, 1941, he cut steaks from beef furnished to the 41st Signal Company for accused so many times that he could not count them, sometimes twice a week (R. 363-364). He counted "somewhere around thirty" steaks listed on Exhibit 2 (R. 365).

(3) In rebuttal, Miss Aileen Hart testified that she saw accused write the check for $10 (court's Ex. No. 1), sign it and deliver it to R. L. Hirte in her apartment in Olympia. Hirte was evasive when accused inquired how much was due for the groceries up to that time, but thought it was between $5 and $10. Accused stated that he would make it out for $10 as he would be getting a few more things. At the Moose Club in Tacoma shortly after maneuvers, the accused in her presence asked Lieutenant Hirte if there was a balance due for groceries and how much, because he wanted to take care of it. Lieutenant Hirte replied that there was no balance; that he had taken care of it. The $10 check was written sometime in February. She knew this was the only $10 check accused gave Hirte because she took care of the checking account of accused and saw all of his returned checks (R. 392-399).

When recalled as a witness for the court, Miss Hart stated that she had known accused about five years. Her brother had been a member of the company while accused commanded it. She had never received any groceries from accused until about the middle of January 1941, after she moved from Portland to Olympia. After that, he brought food to her apartment about once a week on

an average. The quantities were small and did not amount to more than six or eight articles at a time. The accused was at her apartment once or twice a week and sometimes on Sunday, and partook of the supplies he brought (R. 399-402).

c. The finding of guilty of this Specification alleging the wrongful conversion by the accused of subsistence supplies, property of the United States intended for the military service thereof, of the approximate value of $300, and of gasoline of some value, within the dates alleged, is, as to the subsistence supplies, established by the testimony of Sergeant Hage and his records, and is supported by the testimony of Captain Burns, Lieutenant Hirte, and two sergeants, and six enlisted men, each, except Captain Burns, furnishing proof of varying items of the aggregate amount found. Lieutenant Hirte, the three sergeants and six enlisted men either put up from the stores issued to the 41st Signal Company and in its storerooms, boxes of foodstuffs at the express direction of accused and placed the boxes in the car of the accused, or saw others put up the boxes and the boxes placed in the car of accused. The accused himself carried some of the boxes from the kitchen.

The accused admitted the receipt during the early months of 1941 of certain foodstuffs in the approximate amount of $20 but insisted that he had by check paid Lieutenant Hirte $10, the amount due on the date in February on which he gave the check, and that Lieutenant Hirte had later told him that the balance had been taken care of, from which accused assumed that Lieutenant Hirte had paid the balance due for the supplies. Notwithstanding the fact that Miss Hart, the young woman to whom accused stated he had given the foodstuffs, corroborated his statement as to his giving the $10 check in payment on account, and that Lieutenant Hirte stated that the account had been cared for, Lieutenant Hirte testified that the $10 check was in repayment of a loan, and denied that he had ever received any payment from accused for any subsistence stores or had ever told accused that any account for them had been taken care of or paid by Lieutenant Hirte.

With respect to the gasoline, one witness stated that he had twice put ten gallons of gasoline in the car of accused, another that he had once put in five or six gallons, one that he had twice, and another that he had five or ten times seen gasoline put in the car of accused within the period alleged, all Government property from the gasoline dump of the 41st Signal Company.

The accused likewise admitted the receipt of a few gallons of Government gasoline on two occasions, upon the authorization of Captain Burns, when his tank was low, enough to get him to a service station, but stated that it was used in the Government service.

In the opinion of the Board of Review, the wrongful conversion by accused of subsistence stores, of an approximate value of $300, and gasoline of some value, property of the United States intended for the military service, is convincingly established by the record. His denials of receipt of stores in excess of a value of $20 and his assertion that such stores were paid in part by himself and the balance taken care of by Lieutenant Hirte, lacks any substantiation, except from Miss Hart, who admittedly was an interested party with respect to the transaction.

5. a. The motion of the defense to strike Charge II and its Specification because (1) it failed to state any crime or offense; (2) any offense charged did not constitute a violation of Article of War 96; and (3) the Specification was so vague, indefinite and ambiguous that it did not fairly apprise accused of the offense intended to be charged was overruled by the law member upon each ground. Upon objection by a member, the court was closed, and upon being opened, the president announced that the objection was not sustained and the motion to strike was denied (R. 11-20).

The motion was properly denied. The Specification alleges that accused did at Camp Murray and Fort Lewis, Washington, on sundry occasions between October 1, 1940, and May 1, 1941, wrongfully take, carry, and convert to his own use, certain Government subsistence stores and gasoline, of the value of about $400, property of the United States intended for the military service thereof, to the prejudice of good order and military discipline.

In the Fleischer case (CM 204879), in which objection was made by the defense to the form of a specification alleging embezzlement of a gross amount over a period of about fifteen months, the Board of Review held -

"* * * The practice of charging embezzlement in the manner followed in the specification objected to has been approved by the Federal courts as well as by the Board of Review on the ground that so long as the commission of the offense is laid within the statute of limitations the time of the same is immaterial, and it would be futile to require the pleader to allege a specific, definite time. Sec. 1564 (3), Dig. Ops. JAG, 1912-30, and authorities therein cited, including Moore v. United States, 160 U. S. 258. The objection was properly overruled."

The Judge Advocate General has held -

"* * * The embezzlement of different amounts over a period of time may be charged as the embezzlement of an aggregate sum (9 R. C. L. 1290; Brown v. State, 18 Ohio State 497; Moore v. United States, 160 U. S. 268, 274). C. M. 130989 (1919)."

The Specification clearly alleges an offense cognizable under Article of War 96. The accused was fully acquainted with the gist of the offense charged, and was fully able to, and did in fact, address his defense to the offense intended to be charged.

b. The defense during the presentation of its case read into the record a portion of the report of investigation consisting of a statement signed by Lieutenant Colonel Ward W. Roney, J.A.G.D., Judge Advocate, 41st Division, reciting in part that after conference with the Chief of Staff, Inspector, Captain Johnson, Colonel Roney and Colonel Laughlin (the law member of the court), it was decided to lay the general charge under Article of War 96 for wrongful conversion (R. 339).

The law member then made a statement that he did not consider that his conference with Colonel Roney as one which gave him any information concerning the case; that he was not a party to a conference with the Chief of Staff, the Inspector, and Captain Johnson; that Colonel Roney came to his office and consulted him as to technical features, and whether a specification could be drawn, setting out a

continuous offense over a period of perhaps a year; the discussion covered larceny, embezzlement and misappropriation of property under the 94th Article of War, and wrongful conversion under the 96th Article of War; after the conference Colonel Roney mentioned the name of accused; that he formed no opinion and reached no conclusion as to the guilt or innocence of accused; that he subsequently informed a Captain Henning, the individual defense counsel, that he had conferred on the specifications, that he expected to be made available to sit as law member in the case and believed he would be subject to challenge as he was junior in rank to accused; his only part was in generally deciding the manner in which the specification should be prepared, but did not draft them, was not present when they were drafted, and had not seen them until he arrived in the court room.

Counsel for defense then stated that it had no intention of challenging the law member but had brought the matter to the attention of the court in order to keep the record perfectly clear and to have Colonel Laughlin explain his prior connection with the case (R. 339-341).

c. Later during the presentation of its case, the defense challenged Colonel Laughlin on the ground that Colonel Laughlin participated in deciding what form of charge should be made in the case, that he had prejudged the sufficiency of the specification upon which he was, upon the motion of defense to strike the Specification, Charge II, called upon to rule, and should not have ruled or discussed the matter with the court after the matter was taken under advisement by the court (R. 383-384).

The law member replied that ruling upon the sufficiency of the specification was made upon citations which were given to the court, and that he had no facts upon which to base the particulars of Specification, Charge II (R. 384).

The court was closed and the challenged member withdrew. Upon opening the president announced that the challenged member would take the stand (R. 384).

Lieutenant Colonel Robert L. Laughlin, J.A.G.D., Staff Judge Advocate, IX Army Corps, was sworn and testified, in substance, that he knew of no legal reason why he should not sit as

a member of the court and that he had formed no opinion or conclusion respecting the guilt or innocence of the accused on any charge; he knew of no facts, so far as the expected evidence was concerned; the only facts stated were hypothetical and of a general nature upon which to base some kind of a charge; after the technical conference Colonel Roney told him the name and duty of the officer, and the company in which he was accused of taking things, but never got down to the point of discussing them as subsistence stores or groceries; and that he did not go into the facts of the investigation but had learned in open court what he knew about the case; that he advised Colonel Roney that a charge based upon the hypothetical facts would constitute wrongful conversion and fall under the 96th Article of War (R. 385-390).

The law member withdrew, the court was closed, and upon being reopened, the president announced that the challenge was not sustained (R. 391).

d. While the practice of permitting a judge advocate to be consulted upon and to offer advice as to the form of proposed specifications and, thereafter, to be named and sit as law member for the trial of an accused upon those specifications is not to be commended, the Board of Review believes that the substantial rights of accused were not injuriously affected thereby in view of the fact that the ruling as made by the law member and upon the objection, sustained by the court, was legally sound and in accordance with the established precedents (CM 204879, Fleischer; sec. 1564 (3), Dig. Ops. JAG 1912-30, CM 130989).

6. The accused is forty-five years of age. The records of the Office of The Adjutant General show his service as follows:

> Federally recognized as Second Lieutenant, Infantry, Oregon National Guard, February 9, 1926; appointed Second Lieutenant, Infantry Reserve, June 7, 1926; Federally recognized as Captain, Infantry, Oregon National Guard, February 4, 1927; appointed Captain, Infantry Reserve, March 31, 1927; Federally recognized as Captain, Signal Corps, Oregon National Guard, November 20, 1936; appointed Captain, Signal Corps, National Guard of the United States, January 26, 1937; Federally recognized as Major, Signal Corps,

Oregon National Guard, February 1, 1939; appointed Major, Signal Corps, National Guard of the United States, March 15, 1939; Federally recognized as Lieutenant Colonel, National Guard of the United States, July 18, 1939; appointed Lieutenant Colonel, National Guard of the United States, November 1, 1939; active duty, September 16, 1940, pursuant to the call of the President dated August 31, 1940.

7. The court was legally constituted. 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 warrants confirmation of the sentence. A sentence of dismissal is authorized upon conviction of a violation of the 94th or of the 96th Article of War. Confinement in a penitentiary is not authorized for any offense of which accused was found guilty (A.W. 42; par. 90, M.C.M., 1928).

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 219209

JAN 7 1942

UNITED STATES	43rd INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp Blanding, Florida, December 16, 1941. Dismissal and total forfeitures.
Second Lieutenant RODNEY E. ROSS, Jr., ASN Unknown, Infantry (118th QM Regt.).	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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.

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

CHARGE: Violation of the 61st Article of War.

Specification: In that 2nd Lieutenant Rodney E. Ross, Jr., ASN Unknown, 118th QM Regiment, did without proper leave absent himself from his regiment at Camp Blanding, Florida, from about October 25, 1941 to about November 22, 1941.

Accused pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous conviction 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 three months. The reviewing authority approved the sentence, but remitted the confinement imposed, and forwarded the record of trial for action under the provisions of Article of War 48.

3. The prosecution did not introduce any testimony.

4. Defense:

a. The accused testified that he is twenty-four years old. He voluntarily enlisted December 20, 1940, as a private in the Maine National Guard. When he came to Camp Blanding with his regiment he was in the Antitank Company. While on maneuvers in Louisiana he was commissioned. As he was more familiar with infantry than with quartermaster duties, his transfer to a new regiment (Quartermaster) gave him such a frame of mind that he had to get away. He intended to go absent without leave for a short time, had no intention of deserting, but did intend to come back later to face the punishment. He went to Miami Beach with an enlisted man of the Antitank Company where he got in contact with his father and told his father that he was returning. When he left for Camp Blanding on November 20, the Miami police had the number of his car, picked him up, and put him in jail. On the morning of the 22nd, the police turned him loose, told him to go back to Morrison Field. The Military Police returned him to Camp Blanding on November 29th, where he has been in the stockade. He had no prior service but his name had been drawn. He had completed high school, preparatory school, and three and one-half years of college. He had had more money at his disposal than the average man. Before this absence his conduct had been good. His return was of his own free will prior to the declaration of war (R. 6-10).

b. Captain Arthur B. Scott (R. 10) and Second Lieutenant Alason H. Butler (R. 11) stated that the accused, whom they knew in the Antitank Company, was a good soldier. Captain Scott, the commanding officer of the Antitank Company, recommended accused for a commission on his ability, although he had not known accused before he was in the Army. Lieutenant Butler stated that accused was very much concerned about his transfer to the Quartermaster regiment, was very much broken up about it, did not sleep at night, and thought that he was being eased out of the Army.

5. At the time of the trial accused was twenty-four years of age. The Office of The Adjutant General has no record of his service. The record of trial indicates that he was commissioned Second Lieutenant, Infantry, Army of the United States, in September 1941, from the grade of private in the National Guard in Federal service.

6. The court was legally constituted. No errors in-

juriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record is legally sufficient to support the findings of guilty and the sentence, and warrants confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st Article of War.

_____, Judge Advocate.

Chas. L. Bresson, Judge Advocate.

Thomas N. Jaffe, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JAN 10 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Rodney E. Ross, Jr., ASN Unknown, Infantry (118th QM Regt.).

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence.

3. I recommend that the sentence be confirmed but, in view of all of the circumstances of the absence, his short military experience, and the confidence of his former company commander in his ability to become a useful officer, that the forfeiture of pay be reduced to $25 per month for six months and carried into execution, and that the execution of that portion adjudging dismissal be suspended during the pleasure of the President.

4. Inclosed herewith are a draft of 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 above recommendation.

Myron C. Cramer.

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls -
Incl 1 - Record of trial.
Incl 2 - Drft. of let. for sig. Sec. of War.
Incl 3 - Form of Executive action.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 219428

FEB 28 1942

UNITED STATES	27th INFANTRY DIVISION
v.	Trial by G.C.M., convened at Fort McClellan, Alabama, December 4, 11, 12, and 13, 1941. Dismissal.
First Lieutenant LAWRENCE A. WILLIAMS (0-410872); (erroneously stated in record as 0-41872), Air Corps, 102nd Observation Squadron.	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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.

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 1st Lt. Lawrence A. Williams, Air Corps, did at Chattanooga, Tennessee, on or about July 8, 1941, with intent to defraud, wrongfully and unlawfully make and utter to Hotel Patten, Incorporated, a corporation of Chattanooga, Tennessee, which said corporation was at said time and place operating the Patten Hotel, a check in words and figures as follows: "Hotel Patten, Chattanooga, Tenn., July 8, 1941. Pay to the order of The Patten Hotel $25.00. Twenty Five and no/100——Dollars. The Commercial National Bank of Anniston, Alabama. Lawrence A. Williams, 1st Lieut., 102nd Obsn. Sqdn., Fort McClellan, Alabama.", and by means

thereof did fraudulently obtain from the said Hotel Patten Incorporated, a corporation, the sum of Twenty Five ($25.00) Dollars, the said 1st Lt. Lawrence A. Williams then well knowing that he did not have and not intending that he should have sufficient funds in the Commercial National Bank in Anniston, Alabama, for the payment of said check.

Specification 2: In that 1st Lt. Lawrence A. Williams, Air Corps, did at Chattanooga, Tennessee, on or about June 27, 1941, with intent to defraud, wrongfully and unlawfully make and utter to Read House Company, a corporation of Chattanooga, Tennessee, which said corporation was at said time and place operating the Read House, a check in words and figures as follows: "Chattanooga, Tenn. June 27th, 1941. (Chattanooga's Finest Hotel) Pay to THE READ HOUSE $25.00. Twenty Five and no/100—Dollars. For value received I claim that the amount is on deposit in said bank in my name subject to this check and is hereby assigned to payee or holder hereof. To the Commercial National Bank, City and State of Anniston, Alabama. Lt. Lawrence A. Williams, 102nd Observation, Squadron, Address Lovell Field, Chattanooga, Tenn.", and by means thereof did fraudulently obtain from the said Read House Company, a corporation, the sum of Twenty Five ($25.00) Dollars, the said 1st Lt. Lawrence A. Williams then well knowing that he did not have and not intending that he should have sufficient funds in the Commercial National Bank in Anniston, Alabama, for the payment of said check.

Specification 3: In that 1st Lt. Lawrence A. Williams, Air Corps, did at Chattanooga, Tennessee, on or about June 27, 1941, with intent to defraud, wrongfully and unlawfully make and utter to Read House Company, a corporation of Chattanooga, Tennessee, which said corporation was at said time and place

operating the Read House, a check in words and figures as follows: "Chattanooga, Tenn. June 27th, 1941. (Chattanooga's Finest Hotel) Pay to THE READ HOUSE $25.00. Twenty Five and no/100--Dollars For value received I claim that the amount is on deposit in said bank in my name subject to this check and is hereby assigned to payee or holder hereof. To the Commercial National Bank, City and State Anniston, Alabama. Lawrence A. Williams, 1st Lieut. 102nd Obsn. Squadron, Address Lovell Field, Chattanooga, Tenn. Room #850", and by means thereof did fraudulently obtain from the said Read House Company, a corporation, the sum of Twenty Five ($25.00) Dollars, the said 1st Lt. Lawrence A. Williams then well knowing that he did not have and not intending that he should have sufficient funds in the Commercial National Bank in Anniston, Alabama, for the payment of said check.

Specification 4: In that 1st Lt. Lawrence A. Williams, Air Corps, did at Chattanooga, Tennessee, on or about June 30, 1941, with intent to defraud, wrongfully and unlawfully make and utter to Read House Company, a corporation of Chattanooga, Tennessee, which said corporation was at said time and place operating the Read House, a check in words and figures as follows: "Chattanooga, Tenn. June 30th, 1941. (Chattanooga's Finest Hotel) Pay to THE READ HOUSE $35.00. Thirty Five and no/100--Dollars For value received I claim that the amount is on deposit in said bank in my name subject to this check and is hereby assigned to payee or holder hereof. To the Commercial National Bank. City and State Anniston, Alabama. Lawrence A. Williams, 1st Lieut., 102nd Observation Squadron, Address Fort McClellan, Alabama", and by means thereof did fraudulently obtain from the said Read House Company, a corporation, the sum of Thirty Five ($35.00) Dollars, the said 1st Lt. Lawrence A. Williams then well knowing that he did not have and not intending that he should have sufficient funds in the Commercial National Bank in Anniston, Alabama, for the payment of said check.

Specification 5: In that 1st Lt. Lawrence A. Williams, Air Corps, did at Chattanooga, Tennessee, on or about July 23, 1941, with intent to defraud, wrongfully and unlawfully make and utter to Park Hotel Conpany, a corporation of Chattanooga, Tennessee, which said corporation was at said time and place operating the Park Hotel, a check in words and figures as follows: "Chattanooga Tenn., July 23rd, 1941. Commercial National Bank of Anniston Alabama. Pay to the order of The Park Hotel---$15.00. Fifteen and no/100---Dollars. Phone No. 1045. Address Fort McClellan, Ala. Lawrence A. Williams, 1st Lieut., 102nd Observation Squadron", and by means thereof did fraudulently obtain from the said Park Hotel Company, a corporation, the sum of Fifteen ($15.00) Dollars, the said 1st Lt. Lawrence A. Williams then well knowing that he did not have and not intending that he should have sufficient funds in the Commercial National Bank in Anniston, Alabama, for the payment of said check.

Specification 6: In that 1st Lt. Lawrence A. Williams, Air Corps, did at Chattanooga, Tennessee, on or about July 26, 1941, with intent to defraud, wrongfully and unlawfully make and utter to Park Hotel Company, a corporation of Chattanooga, Tennessee, which said corporation was at said time and place operating the Park Hotel, a check in words and figures as follows: "$20.00 The Park Hotel. Chattanooga, Tenn. July 26th, 1941. Name of Bank Commercial National Bank, City of Anniston, Alabama. Pay to The Park Hotel---Twenty and no/100---Dollars. For value Received, I assert that the above amount is on deposit in said Bank in my name subject to this check. Lawrence A. Williams, 1st Lieut. 102nd Observation Squadron, Fort McClellan, Ala.", and by means thereof did fraudulently obtain from the said Park Hotel Company, a corporation, the sum of Twenty ($20.00) Dollars, the said 1st Lt. Lawrence A. Williams then well knowing that

he did not have and not intending that he should have sufficient funds in the Commercial National Bank in Anniston, Alabama, for the payment of said check.

Specification 7: In that 1st Lt. Lawrence A. Williams, Air Corps, did at Chattanooga, Tennessee, on or about July 28, 1941, with intent to defraud, wrongfully and unlawfully make and utter to the Park Hotel Company, a corporation of Chattanooga, Tennessee, which said corporation was at said time and place operating the Park Hotel, a check in words and figures as follows: "The Commercial National Bank Anniston, Alabama. July 28th, 1941. No.___Pay to the order of The Park Hotel $10.00. Ten and no/100 Dollars. Lawrence A. Williams, 1st Lieut., 102nd Observation Sqdn., Fort McClellan, Ala.", and by means thereof did fraudulently obtain from the said Park Hotel Company, a corporation, the sum of Ten ($10.00) Dollars, the said 1st Lt. Lawrence A. Williams then well knowing that he did not have and not intending that he should have sufficient funds in the Commercial National Bank in Anniston, Alabama, for the payment of said check.

Specification 8: In that 1st Lt. Lawrence A. Williams, Air Corps, did at Chattanooga, Tennessee, on or about July 2, 1941, with intent to defraud, wrongfully and unlawfully make and utter to Stanley H. McCullough, doing business under the firm name and style of Mac's Dry Cleaning, a check in words and figures as follows: "Commercial National Bank Anniston, Ala. July 2nd, 1941. No.___ Pay to the order of Cash---$15.00. Fifteen and no/100 Dollars For___. Lawrence A. Williams, 1st Lt., 102nd Obsn. Sqdn., Fort McClellan, Ala.", and by means thereof did fraudulently obtain from the said Stanley H. McCullough, doing business under the firm name and style of Mac's Dry Cleaning, the sum of Fifteen ($15.00) Dollars, the said 1st Lt. Lawrence A. Williams then well knowing that he did not have and not intending

that he should have sufficient funds in the Commercial National Bank in Anniston, Alabama for the payment of said check.

Specification 9: In that 1st Lt. Lawrence A. Williams, Air Corps, did at Chattanooga, Tennessee, on or about August 11, 1941, with intent to defraud, wrongfully and unlawfully make and utter to R. W. Bethea, doing business under the firm name and style of Eddy's Restaurant and Drive In, a check in words and figures as follows: "The Commercial National Bank, Anniston, Ala. Anniston, Ala. August 11th, 1941. No.___. Pay to the order of Cash---$10.00. Ten and no/100---Dollars. Lawrence A. Williams, 1st Lieut., 102nd Observation Squadron, Fort McClellan, Alabama", and by means thereof did fraudulently obtain from the said R. W. Bethea, doing business under the firm name and style of Eddy's Restaurant and Drive In, the sum of approximately Eight and 50/100 ($8.50) Dollars in cash and food and drinks to the value of approximately One and 50/100 ($1.50) Dollars, the said 1st Lt. Lawrence A. Williams then well knowing that he did not have and not intending that he should have sufficient funds in the Commercial National Bank in Anniston, Alabama for the payment of said check.

Specification 10: In that 1st Lt. Lawrence A. Williams, Air Corps, did at Chattanooga, Tennessee, on or about July 25, 1941, with intent to defraud, wrongfully and unlawfully make and utter to J. W. Bowen and Ellis Goodloe Jr., doing business under the firm name and style of the Flamingo Club, a check in words and figures as follows: "Chattanooga, Tenn., July 25th, 1941, Commercial National Bank of Anniston, Alabama. Pay to the Order of Cash---$10.00. Ten and no/100---Dollars. Phone No. 1045. Address 102nd Observation Squadron, Fort McClellan, Ala. Lawrence A. Williams, 1st Lieut., Air Corps.", and by means thereof did fraudulently obtain from

> the said J. W. Bowen and Ellis Goodloe Jr., doing business under the firm name and style of the Flamingo Club, the sum of approximately Seven ($7.00) Dollars in cash, and food and drinks to the value of approximately Three ($3.00) Dollars, the said 1st Lt. Lawrence A. Williams then well knowing that he did not have and not intending that he should have sufficient funds in the Commercial National Bank in Anniston, Alabama for the payment of said check.

Specification 11: (Finding of not guilty.)

He pleaded not guilty to the Charge and all Specifications thereunder, and was found guilty of Specifications 1 to 10 inclusive, and of the Charge, but not guilty of Specification 11. No evidence of previous conviction was introduced. He was sentenced to be "dishonorably" dismissed the service. The findings and sentence were not announced. The reviewing authority approved the sentence, but, in his action, improvidently stated "Under the provisions of Articles of War 48 and 50½, the record of trial is forwarded for action and the order directing execution is withheld". The record was forwarded to the Board of Review where it has been acted upon under the provisions of Article of War 48.

3. The evidence for the prosecution with respect to the Specifications of which accused stands convicted is substantially as follows:

a. Specification 1 - The accused on July 8, 1941, gave to Hotel Patten, Incorporated, Chattanooga, Tennessee, his check drawn on the Commercial National Bank, Anniston, Alabama, dated July 8, 1941, for $25 (R. 44-45; Ex. 30). The check was presented to the bank for payment and returned dishonored three times because of insufficient funds (R. 45). This check was redeemed by accused on December 4, 1941 (R. 49; Ex. 39). The bank account of accused on June 10, 1941, was overdrawn $2.96, was later overdrawn $4.46, and remained in that condition to August 6, 1941, on which date the overdraft was paid and the account closed (R. 86-87, 110,111).

b.(1) Specifications 2 and 3 - The accused on June 27, 1941, gave to Read House Company, Chattanooga, Tennessee, his two

checks drawn on the Commercial National Bank, Anniston, Alabama, dated June 27, 1941, for $25 each (R. 28, 40, 43; Exs. 27, 28). These two checks were presented to the bank for payment and returned dishonored because of insufficient funds (R. 41). The bank account of accused on June 10, 1941, was overdrawn $2.96, was later overdrawn $4.46, and remained in that condition to August 6, 1941, on which date the overdraft was paid and the account closed (R. 86-87, 110, 111).

(2) Specification 4 - On June 30, 1941, accused gave to Read House Company, Chattanooga, Tennessee, his check drawn on the Commercial National Bank, Anniston, Alabama, dated June 30, 1941, for $35 (R. 26, 28; Ex. 6). The check was presented to the bank for payment and returned dishonored because of insufficient funds (R. 26-27). The bank account of accused on June 10, 1941, was overdrawn $2.96, was later overdrawn $4.46, and remained in that condition to August 6, 1941, on which date the overdraft was paid and the account closed (R. 86-87, 110,111).

c. Specifications 5, 6 and 7 - The accused between July 23 and 28, 1941, gave to Park Hotel Company, Chattanooga, Tennessee, three of his checks drawn on the Commercial National Bank, Anniston, Alabama, one dated July 23, 1941, for $15, one dated July 26, 1941, for $20, and one dated July 28, 1941, for $10 (R. 65-66, 69-70). These checks were presented to the bank for payment and returned dishonored because of insufficient funds (R. 65). The bank account of accused on June 10, 1941, was overdrawn $2.96, was later overdrawn $4.46, and remained in that condition to August 6, 1941, on which date the overdraft was paid and the account closed (R. 86-87, 110, 111). On December 3, 1941, accused made the last payment of $22.50 by Post Office money order in redemption of these three checks (R. 36, 38; Exs. 22, 24).

d. Specification 8 - The accused on July 2, 1941, gave to Stanley H. McCullough, trading and doing business as Mac's Dry Cleaning, Chattanooga, Tennessee, his check drawn on the Commercial National Bank, Anniston, Alabama, dated July 2, 1941, for $15 (R. 43).

The check was deposited in the Hamilton National Bank, Chattanooga, Tennessee, in the usual course of business, later presented to the bank on which it was drawn for payment, and returned dis-

honored because of insufficient funds (R. 53). The bank account of accused on June 10, 1941, was overdrawn $2.96, was later overdrawn $4.46, and remained in that condition to August 6, 1941, on which date the overdraft was paid and the account closed (R. 86-87, 110,111). This check was redeemed December 5, 1941 (R. 54).

e. Specification 9 - The accused on August 11, 1941, gave to R. W. Bethea, trading and doing business as Eddy's Restaurant and Drive In, Chattanooga, Tennessee, his check drawn on the Commercial National Bank, Anniston, Alabama, dated August 11, 1941, for $10 (R. 56). The check was presented to the bank for payment, dishonored, and returned with a notation on the check, account closed (R. 57). The account of accused was closed August 6, 1941 (R. 86-87). The check was redeemed by accused December 4, 1941 (R. 58, 59-60; Exs. 46, A).

f. Specification 10 - The accused on July 25, 1941, gave to David Overton Fleming, manager of the Flamingo Club, located ten miles north of Chattanooga, Tennessee, on Lee Highway, his check drawn on the Commercial National Bank, Anniston, Alabama, dated July 25, 1941, for $10 (R. 61-63). The check was presented to the bank for payment, dishonored, and returned with a notation on the check, account closed (R. 62; Ex. 47). The bank account of accused on June 10, 1941, was overdrawn $2.96, was later overdrawn $4.46, and remained in that condition to August 6, 1941, on which date the overdraft was paid and the account closed (R. 86-87, 110, 111). Accused redeemed this check December 5, 1941 (R. 62).

4. Major A. E. Nelson, Commanding Officer, 102nd Observation Squadron, had a conversation with accused on or about August 27, 1941, following the receipt by him of letters from various creditors of accused. In this conversation, Major Nelson suggested a plan to accused which, in substance, provided for the redemption of the worthless checks which these creditors held, by withholding $225 of accused's monthly pay check and applying from this sum to the payment of these checks 25 percent of the amount of the respective checks, which would result in full payment to all of them over a period of four months beginning with his check for the month of August 1941 (R. 71-72). The accused agreed to such a plan and countersigned a letter mailed by Major Nelson to the holders of these checks disclosing the method by which it was proposed to redeem the checks in question (R. 76-77). In compliance with this proposed method

of payment accused turned over his pay check to the Adjutant for the months of August and September (R. 79-80, 105). His pay checks for the months of October and November were held up and not paid until December (R. 79-80). On September 2nd $217.68 was paid, October 8th $217.68 was paid, and December 3rd $401.96 was paid, making a total of $837.32 (R. 107).

Mr. Arthur Wellborn, Vice President of the Commercial National Bank, Anniston, Alabama, testified that accused opened an account with the Commercial National Bank, Anniston, Alabama, on November 14, 1940 (R. 85), and identified the signature of accused from the bank signature card signed at the time the account was opened. Using a true copy of the ledger sheet relating to accused's account covering the period from November 14, 1940, through August 6, 1941, he testified that on June 4, 1941, accused deposited $263.87; at the close of business on June 4th his balance was $169.76; at the close of business on June 5th his balance was $81.04; at the close of business on June 6th his balance was $76.04; at the close of business on June 9th his balance was $47.04; and at the close of business on June 10th his account was overdrawn $2.96. This overdraft was increased to $4.46 and continued up to and including the time when the account was closed, August 6, 1941. Accused made no deposits between June 4, 1941, and August 6, 1941, except a deposit sufficient only to pay the overdraft (R. 84-87).

It was shown by stipulation between prosecution and defense counsel, as well as by the testimony of Arthur Wellborn, that the checks described in Specifications 1 to 10, inclusive, of the Charge, were each presented to the bank for payment, dishonored, and returned unpaid because of insufficient funds or because the account was closed (R. 88-89).

5. At the conclusion of the case of the prosecution, defense counsel moved for a finding of not guilty as to all Specifications and the Charge on the ground that sufficient proof had not been submitted to warrant a finding of guilty. The motion was granted as to Specification 11 and denied as to all others.

Defense:

6. a. The accused testified that he had been in the armed forces of the United States approximately seven and one-half years and had served in the Infantry, Air Corps, and Quartermaster Corps, receiving honorable discharges from these branches

on three different occasions. His discharge certificates were offered and received in evidence except for one which had been destroyed by fire (R. 100-101). He admitted having an account with the Commercial National Bank, Anniston, Alabama, and that he made and uttered the checks described in Specifications 1 to 10, inclusive (R. 102). He thought he had sufficient funds on deposit during the months of June and July to cover the checks he had written. He never carried a check book but used counter checks or checks of establishments wherever he cashed one. He usually wrote down the amount of the checks he cashed on a stub he had in his pocket book and kept his bank balance mentally (R. 102-103). Normally he deposited his salary check. He deposited his salary check of $262.67 on May 3, 1941, and his salary check of $263.87 on June 4, 1941. His salary check for June was cashed on a week end while he was drinking heavily. He did not realize until the middle of August that he had cashed the check and spent the money (R. 103-104). The worthless checks in question were usually written on week ends while attending parties with his friends, and as he ran out of money he would cash a check. Usually Lieutenant Johansen and a Mr. Langley were with him on these parties. Lieutenant Johansen was a pilot and owned his own plane, as did Mr. Langley. These two men were comparatively wealthy (R. 104). Prior to his trial accused had submitted his application for resignation for the good of the service, but since war has been declared he preferred to withdraw it, as he felt that he could be of some value to the service. He delivered his pay check for the months of August and September to the Adjutant for the purpose of having the sum of $225 deducted to pay his creditors as provided in the plan agreed upon by him with Major Nelson. His salary checks for the months of October and November were held up and not received until December. These were also turned over to the Adjutant early in December (R. 105-106). To the best of his ability he fulfilled the agreement he made with Major Nelson in making restitution for the worthless checks. He realized during the month of August that he did not have sufficient money to meet his obligations and that he had an overdraft at the bank (R. 109). He sent the money to the bank in August to pay the overdraft and thought that he had sufficient money in the bank to meet his bills after August 6th. He thought he had the sum of $40 on deposit at that time but after his conversation with Major Nelson on August 27th

he realized that he was in error (R. 110). He did not know what his balance was and made no deposits in the bank after August 1941, except the sum of $4.46 to pay an overdraft (R. 111). He did not know his bank account had been closed. It was his understanding that a depositor closed his own account.

He remembered vaguely of having cashed the checks in question, stopping at the Read House and cashing checks there and paying his bill of $58.30. He thought Lieutenant Johansen paid him his share of the bill but could not recall whether it was by check or cash (R. 112-113). He remembered registering at the Patten Hotel on or about July 6th and remained there two nights (R. 117). He remembered going to the Flamingo Club in Chattanooga and cashing a check there on July 25, 1941 (R. 121). He went back to the Flamingo Club a couple days later and asked Mr. Fleming if the check had been returned. He told Mr. Fleming that his wife had drawn checks on his account, but this statement was untrue. It was an effort on his part to extricate himself if the check had been returned.

The accused is married and supports his wife. He does not give her any stipulated monthly sum but the amount contributed varies (R. 132-133). He was drinking steadily during the months of June and July (R. 103, 124-126, 137).

First Lieutenant William J. Kilker, Adjutant (R. 138-139), and Captain Thomas R.Davis, second in command of 102nd Observation Squadron (R. 140-141) testified that accused's reputation and character were excellent.

7. The undisputed evidence, including the testimony of accused, fully sustains the allegation in each of the Specifications 1 to 10, inclusive, that accused, at the time and place alleged, made and uttered the checks in question, and that each was dishonored by the bank on which it was drawn because of insufficient funds, or account closed.

There is some discrepancy in the testimony as to the amount of the overdraft of his account. One witness (R. 86) stated the amount was $4.46, and again (R. 87) he stated it was $2.96. The accused testified (R. 110) the amount was $6.40, and again (R. 111) that it was $4.46. The amount, however, is immaterial, since it was affirmatively shown that the account was

in fact overdrawn on June 10, 1941, and that it remained in an overdraft status until closed on August 6, 1941. All of the checks involved were made and uttered by accused between these two dates, except the one described in Specification 9. As to this check, accused was surely charged with notice that there were not sufficient funds to his credit at the time it was uttered because he had only four days prior to the issuance of this check deposited a sum in the bank sufficient only to pay the overdraft which then existed. This conclusion must be reached, notwithstanding his testimony to the effect that he thought he had sufficient money on deposit to pay this and all of the other checks until he learned to the contrary on or about the middle of August 1941.

With respect to Specification 10, there is a variance between the allegation and proof as to the person to whom the check was given. The Specification alleges that the check was given to J. W. Bowen and Ellis Goodloe, Jr., doing business under the firm name and style of the Flamingo Club, while the proof shows the check was given to one David Overton Fleming, manager of the Flamingo Club. This slight variance is not material as the evidence shows that Fleming was a person in charge of the Flamingo Club, had authority to cash the check, and later gave it to Jack Bowen (although not shown to be one and the same person as J. W. Bowen, one of the co-owners), who required Fleming to make it good after it was dishonored (R. 60-61).

8. The only question requiring consideration is, whether the checks were issued knowingly and with intent to defraud, as alleged, and constituted an offense such as is denounced by the 95th Article of War.

> "* * * when the act is conceded, and the state of mind is in issue, the ordinary doctrine of chances is apt to assist us materially in coming to a decision. For example, if A while hunting in a party with B finds a shot from B's gun whistling past his head, A is willing to accept a bad aim or an accidental stumble as the explanation; but the same thing happens again, and if on the third occasion A receives B's bullet in his body, the natural inference of probability is that it was done deliberately. For the basis of this inference we have merely the doctrine of chances, i.e. that the chances of three successive

accidental and innocent shots of the sort are very small, or (to put it in another way) that inadvertence or accident is abnormal or occasional, and thus the recurrence of the same harmful result indicates a normal, i.e. deliberate, origin; in short, similar results do not usually recur through abnormal causes. Such seems to be the principle upon which, when the doing of a wrongful act is conceded and the innocent intent is in issue, the doing of the same or a similar act upon other occasions is admitted in evidence to negative the innocence of intent. * * *." (Sec. 14 q, chap. 5, vol. 1, Greenleaf on Evidence, 16th ed.)

9. Accused testified that all of the checks were negotiated in and around Chattanooga, Tennessee, while accused was attending week end parties or was in company with a Lieutenant Johansen and a Mr. Langley, both of whom were comparatively wealthy and owned their own planes. As he ran out of money on these occasions he wrote the checks in question. This explanation of the circumstances under which they were issued, might, if limited to one wrongful act, tend to show that the immediate need of the money at the time, prompted the making of the check, rather than any then existing intent on the part of accused to defraud the person to whom it was given, but the course of conduct of accused in writing a large number of checks within a comparatively short period of time, and his failure to exercise ordinary care with respect to the condition of his bank account at the time these checks were negotiated, reflects more than inadvertance, indifference or carelessness. Such repeated wrongful and unlawful acts lead to but one conclusion, viz., that accused made and uttered the checks specified, with knowledge and intent as alleged. In arriving at such a conclusion all direct and circumstantial evidence may be considered, including the successive frequency of the acts committed, and such evidence tends to negative innocence of intent on the part of accused.

10. Under all the circumstances, the Board of Review is of the opinion that it was established beyond a reasonable doubt that accused made and uttered the checks specified with knowledge and intent, as alleged, and that such conduct was in violation of the 95th Article of War (CM 200248, Briggs; CM 201134, Sullivan; CM 204927, Parsons; CM 207588, Lizotte; CM 210678, Sharp; and CM 213993, Casseday).

11. At the time of trial accused was thirty-three years of age. The records of The Adjutant General show his service as follows:

> Federally recognized as First Lieutenant, Infantry, New York National Guard, October 14, 1940; appointed First Lieutenant, Infantry, National Guard of the United States, October 15, 1940; accepted October 15, 1940; assigned serial number 0-410872; and is now a First Lieutenant, Infantry, National Guard of the United States. He entered on active duty October 15, 1940, pursuant to the order of the President dated September 25, 1940.

The serial number of accused as shown on the charge sheet, in the action of the Commanding General, and throughout the record (0-41872) is erroneous. His correct serial number as shown in the Army Directory of Reserve and National Guard Officers On Active Duty, dated July 31, 1941, and verified by The Adjutant General, Officers' Record Section, is 0-410872.

12. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial.

13. For the reasons above stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. A sentence of dismissal is mandatory upon conviction of violation of Article of War 95.

_____, Judge Advocate.

_____, Judge Advocate.

_____ Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAR 21 1942 To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Lawrence A. Williams (0-410872), Air Corps, 102nd Observation Squadron.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation of the sentence. Prior to his present difficulties, this officer had a good record. He had served honorably for approximately seven and one-half years in the Infantry, Air Corps, and Quartermaster Corps. The Adjutant and one other officer of his organization testified at his trial that his reputation and character were excellent. In view of the fact that he redeemed all of the checks prior to trial, and his apparent capability of rendering useful service in the future, I recommend that the sentence be confirmed, but that the execution thereof be suspended during the pleasure of the President.

3. Inclosed herewith are a draft of 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 above recommendation.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls. -
Incl 1 - Record of trial.
Incl 2 - Drft. of let. for sig. Sec. of War.
Incl 3 - Form of Executive action.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

Board of Review
CM 219438

JAN 20 1942

UNITED STATES	)	GULF COAST AIR CORPS TRAINING CENTER
	)	
v.	)	Trial by G.C.M., convened at Ellington Field, Texas, January 5, 1942. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
	)	
Private HOWARD E. TATE (18055336), 460th Ordnance Company, Aviation (Comp.).	)	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support the sentence.

2. The only question requiring consideration is whether the evidence is legally sufficient as to a necessary element of the offense of larceny, the intent of accused to deprive permanently the owner of his property.

3. The evidence sufficiently shows that the accused took and drove away the automobile described, at the time and place, of the ownership, and of the approximate value, as alleged.

The owner of a 1939 Pontiac car, Texas license No. 576333, left the car parked outside of his barracks at Ellington Field, Texas, at about eight o'clock on the evening of November 17, 1941. The next morning he found it missing, and his automobile keys missing from his room. The accused started drinking whiskey in his room on the night of November 17, 1941, then at about midnight woke a soldier in another barracks and both took a drink from a quart bottle of whiskey. The accused then went to the boiler room, where he drank by himself and talked to the attendant for half an hour. He remembered getting ready to leave the boiler room and then nothing more until he woke in a hospital where a doctor was putting stitches in his knee.

4. At about 3:15 on the morning of November 18, 1941, an ambulance driver found a man, who gave his name as that of the accused, sitting on an automobile cushion near a wrecked automobile at a railroad crossing in the vicinity of the home of accused. At about 3:20 a Houston police officer investigating the accident found accused in the ambulance. He found the 1939 Pontiac car, Texas license No. 576333, badly damaged along the car tracks, the rear wheels of a tank car knocked off the tracks, and a broken quart whiskey bottle was in the Pontiac car. At a civilian hospital the accused told the police officer that he had been drinking, that he was going east on Lyons Street at about thirty miles an hour and did not see the train because it was foggy. About an hour after the accident, a surgeon at a civilian hospital found an odor of some intoxicant on the breath of accused but found him able to cooperate. At about nine o'clock on the morning of November 18, 1941, at the station hospital, an officer of the Medical Corps found accused still drunk, entirely unable to cooperate, due, he believed, to the amount of whiskey the accused had consumed. The officer stated that the general appearance of the accused at that time was "that he was trying to get over a pretty heavy jag".

5. The facts sufficiently show that the accused in an intoxicated condition was driving the car when it collided with the car of a freight train at a railroad crossing in the vicinity of the home of accused. There is nothing in the evidence to form an adequate basis of a reasonable inference of intent on his part permanently to deprive the owner thereof of his property, a necessary element of the offense of larceny, and the testimony as to his drunken condition, particularly that of the officer of the Medical Corps who found accused still very drunk some six hours after the accident, negatives any such intent (CM 193315, Rosborough; CM 194359, Sadler; CM 197795, Hathaway; CM 205811, Fagan; CM 206350, McAdams & Tedder). The offense proved, the wrongful taking and carrying away of the automobile by accused, without the consent of the owner, violative of the 96th Article of War, was less than and included in the offense charged (CM 193315, Rosborough, and CM 194359, Sadler).

6. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of

the findings of guilty as involves findings of guilty of wrongfully taking and carrying away the automobile described, at the time and place alleged, without the consent of the owner, in violation of the 96th Article of War, and legally sufficient to support the sentence.

Curtis S. Hall, Jr., Judge Advocate.

Charles L. Bressons, Judge Advocate.

(On leave), Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 219511

MAR 5 1942

UNITED STATES	)	AIR CORPS TECHNICAL TRAINING COMMAND
	)	
v.	)	Tried by G.C.M., convened at Lowry Field, Colorado, December 12, 1941. Dishonorable discharge and confinement for one (1) year and one (1) day. Disciplinary Barracks.
	)	
Technical Sergeant THOMAS F. O'NEAL (6495561), Detachment Quartermaster Corps, Camp Barkeley, Texas.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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

Specification 1: In that Technical Sergeant Thomas F. O'Neal, Detachment QMC, Camp Barkeley, Texas, attached 9th School Squadron, Air Corps, Fort Logan, Colorado, did, at Littleton, Colorado, on or about February 15, 1941, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to wit:

LITTLETON, COLO., Feb 15 19 40 No. 461

THE LITTLETON NATIONAL BANK
82-120

PAY TO THE
ORDER OF Sgt. T. F. O'Neal $ 36.50

Thirty six and 50/100- - - - - - - -DOLLARS

John W. Hassett
Army Motion Picture Fund
Fort Logan, Colorado

which said check was a writing of a private nature which might operate to the prejudice of another.

Specification 2: In that Technical Sergeant Thomas F. O'Neal, Detachment QMC, Camp Barkeley, Texas, attached 9th School Squadron, Air Corps, Fort Logan, Colorado, did, at Littleton, Colorado, on or about May 17, 1941, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to wit:

LITTLETON, COLO., May 17 1941 No. 483

THE LITTLETON NATIONAL BANK
82-120

PAY TO THE
ORDER OF Sgt. O'Neal $ 42.50

Forty - two and 50/100 - - - - - -DOLLARS

John W Hassett
Army Motion Picture Fund
Fort Logan, Colorado

which said check was a writing of a private nature which might operate to the prejudice of another.

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

Specification 1: In that Technical Sergeant Thomas F. O'Neal, Detachment QMC, Camp Barkeley, Texas, at-

tached 9th School Squadron, Air Corps, Fort Logan, Colorado, did, at Littleton, Colorado, on or about February 15, 1941, with intent to defraud willfully, unlawfully, and feloniously pass as true and genuine a certain check in words and figures as follows:

LITTLETON, COLO., Feb 15 1941 NO. 461

THE LITTLETON NATIONAL BANK
82-120

PAY TO THE
ORDER OF Sgt. T. F. O'Neal $ 36.50

Thirty six and 50/100 - - - - - - - - - - DOLLARS

John W. Hassett
Army Motion Picture Fund
Fort Logan, Colorado

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a writing of a private nature which might operate to the prejudice of another, which said check was, as he, the said Technical Sergeant Thomas F. O'Neal, then well knew, falsely made and forged.

Specification 2: In that Technical Sergeant Thomas F. O'Neal, Detachment QMC, Camp Barkeley, Texas, attached 9th School Squadron, Air Corps, Fort Logan, Colorado, did, at Littleton, Colorado, on or about May 17, 1941 with intent to defraud willfully, unlawfully, and feloniously pass as true and genuine a certain check in words and figures as follows:

LITTLETON, COLO., May 17 19 41 No. 483

THE LITTLETON NATIONAL BANK
82-120

PAY TO THE
ORDER OF Sgt O'Neal $ 42.50

Forty - two and 50/100 - - - - - - - - -DOLLARS

John W. Hassett
Army Motion Picture Fund
Fort Logan, Colorado

a writing of a private nature which might operate to the prejudice of another, which said check was, as he, the said Technical Sergeant Thomas F. O'Neal, then well knew, falsely made and forged.

The accused pleaded not guilty to, and was found guilty of, all Charges and Specifications. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year and one day. The reviewing authority approved and directed the execution of the sentence, but suspended the execution of the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement (G.C.M.O. No. 12, Hdq. Air Corps Technical Training Command, Jan. 14, 1942).

3. In support of the allegation of forgery of the two checks by accused, the prosecution introduced Mr. R. K. Goddard of the Secret Service Division of the Treasury Department, who testified that he examined the photostatic copies, marked B and C, of two checks - the checks alleged in the Specifications of Charge I, to have been forged by accused - and compared them with specimens given him by the trial judge advocate as standards and concluded that accused wrote the originals of checks, Exhibits B and C (R. 53-54). Upon cross-examination as to his qualifications as a handwriting expert, Mr. Goddard stated:

> "No, I can't say I am a handwriting expert; I make what would be termed a competent witness. * * *." (R. 56.)

Mr. Goddard further testified that after his own examination he submitted the matter to Mr. George H. King whom he stated was "a very well nationally known handwriting expert", whose opinion agreed with his own (R. 57). Mr. Goddard stated that he had twelve samples of writing of accused, six copies on blank checks

of the $42 check, and six copies of the $36 check. At that point the following appears in the record:

> "PROSECUTION: If the court please, at my request, Sergeant O'Neal and Lieutenant Hassett submitted signatures for examination." (R. 59.)

Even if it be assumed that Mr. Goddard was a qualified handwriting expert, there is no competent proof of the authenticity of the purported handwriting of accused used by Mr. Goddard as a basis of his comparison with Exhibits B and C.

There is no other proof in the record tending to show that the check for $42.50, alleged in Specification 2 of Charge I and Charge II, was forged by accused.

In the absence of any competent proof that accused forged the check for $42.50, alleged in Specification 2 of Charge I, or knew that it was forged, it is the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 2 of Charge I and of Specification 2, Charge II.

4. a. With respect to the check for $36.50, alleged in Specification 1 of Charge I and Specification 1, Charge II, the evidence shows that accused was, on February 15, 1941, the assistant to Lieutenant John W. Hassett, manager of the Post Theatre, Fort Logan, Colorado. The bank account of the theatre fund was kept in the First National Bank, Littleton, Colorado, and the authorized signature to draw on that account at that time was John W. Hassett, followed by a stamp "Theatre Officer" (R. 9-10).

On February 15, 1941, accused came into the Post Exchange Store and was, upon his request, given a blank check on the Littleton National Bank by Mr. Tremaine, and went across the hall in the direction of the soda fountain (R. 80). The accused stated that he approached Lieutenant Hassett at the soda fountain and told Hassett that the cash fund at the theatre was low; that he told Hassett that he did not have the check book; went over on the other side of the Post Exchange and got a blank check from Mr. Tremaine; could not remember whether he wrote the check out or had one of the clerks write it out for $36.50;

took it over to the other side where Lieutenant Hassett in his presence signed two or three daily reports and the check (R. 98-99). Mr. Tremaine stated that the check was all written out with the exception of Lieutenant Hassett's signature when accused took it across the hall (R. 83). Accused returned with the check - a Motion Picture check for $36.50 - to Mr. Tremaine, asked Mr. Tremaine to cash it, but Mr. Tremaine did not have sufficient funds to do so (R. 80-81, 83, 106). Accused stated that he then took the check to Englewood and cashed it in the Safeway Stores (R. 106).

Mr. Fred W. Keene, manager of the Safeway Store, Englewood, identified by his initials and an O.K. in the left-hand top corner, photostat of a check marked Exhibit B, number 461, on the Army Motion Picture Fund, Fort Logan, in the sum of $36.50, which original check he O.K'd. on February 15, 1941, for cashing by accused who brought the check in (R. 39-41).

Lieutenant John W. Hassett testified that he did not sign a check number 461, dated February 15, 1941, for $36.50, in favor of Sergeant T. F. O'Neal, on his account as Theatre Officer, that the photostat copy of that check, looked like his writing, he believed it a tracing as he did not write quite that carefully, that the stamp was not his official stamp, that he did not write it, that he did not know where the original check was, that he first learned about it a week after its date, never saw it, and never authorized anyone to issue the check for him (R. 10-12). There existed another check on the Motion Picture Fund account bearing the number "461", which was issued in the amount of some $200 before he took over the accounts (R. 16).

The President and the Assistant Cashier of the Littleton National Bank were each familiar with the handwriting of Lieutenant John W. Hassett, and expressed the opinion that the photostat, Exhibit B, was not in the handwriting of Lieutenant Hassett (R. 30, 36-37).

The Assistant Cashier, Littleton National Bank, definitely identified the photostat copy, Exhibit B, which she obtained from the Colorado National Bank, as a true copy of original check which she saw and which went through her bank, and was returned to Fort Logan in the bank statement rendered at the end of February (R. 26-28). She stated that the title of the account was changed on

October 6, 1939, from "Army Motion Picture Fund", on which fund Exhibit B was drawn, to "Theatre Officer" (R. 31), that the check for $36.50, of February 15, 1940, signed "Army Motion Picture Fund" was passed by the bookkeeper without her knowledge, the payment was an error on their part for which the bank has since reimbursed that account in the amount of $36.50 after Lieutenant Hassett complained his bank statement was off $36.50, and she discovered a $36.50 check had been paid on February 19 (R. 27, 32-34).

The Chief Clerk, Colorado National Bank, testified that the photostat, Exhibit B, was made under his supervision from a master roll film of a check which came to his bank from the First National Bank at Englewood, though he could not say that he ever saw the original check. Upon the offer of Exhibits B and C in evidence, the defense stated, "The defense will admit the photostat copies" (R. 60-62).

b. The admission of the testimony with respect to a comparison of the checks alleged to have been forged with the purported specimens of the handwriting of accused when there was no proof of the authenticity of such specimens, of the testimony of Mr. Goddard as a purported expert without qualifying him as an expert, and of the hearsay repetition by Mr. Goddard of the opinion of a "nationally known handwriting expert", whose opinion, Mr. Goddard stated, agreed with his own, was clearly erroneous (CM 186415, Lewis; CM 186196, Meyer).

c. With respect to the admission of incompetent testimony:

> "The rule is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved. C. M. 130415 (1919)."

> "It is not necessarily to be implied that the substantial rights of the accused have been injuriously af-

fected by the admission of incompetent testimony; nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony had been excluded enough legal evidence remains to support a conviction. The reviewer must, in justice to the accused, reach the conclusion that the legal evidence of itself substantially compelled a conviction. Then indeed, and not until then, can he say that the substantial rights of the accused were not prejudiced by testimony which under the law should have been excluded. C. M. 127490 (1919)."

d. The proof that accused had possession of the forged check for $36.50 and obtained money on it, under the holding of the Board of Review in CM 120113, Dutton (Dig. Ops. JAG 1912-30, sec. 1569 (1)), would, in the absence of the evidence illegally received, have warranted the presumption that the accused forged it and supported the finding of guilty.

It is, however, the opinion of the Board of Review that the competent evidence is not of such a quantity and quality as practically to compel in the minds of conscientious and reasonable men a finding of guilty of forgery of the check for $36.50. It follows that the record of trial is legally insufficient to support the findings of guilty of Specification 1, Charge I, and of Specification 1, Charge II.

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of all Specifications and Charges, and legally insufficient to support the sentence.

[illegible], Judge Advocate.

Chas. B. Bresson, Judge Advocate.

Thomas H. Taffe, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D.C.

Board of Review
CM 219574

FEB 11 1942

UNITED STATES	)	NINTH CORPS AREA
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp Haan, California, December
Captain SALVATORE M. R.	)	8, 1941. Dismissal and total
SALVAGGIO (0-285888),	)	forfeitures.
Medical Corps.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and TAPPY, Judge Advocates.

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.

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Captain Salvatore M.R. Salvaggio, Medical Corps, Corps Area Service Command, Service Unit 1967, did, at the Station Hospital, Camp Haan, Riverside County, California, on or about September 15, 1941, desert the service of the United States and did remain in desertion until he surrendered himself at the Station Hospital, Camp Haan, Riverside County, California, on or about November 11, 1941.

The accused pleaded not guilty. He was, by exception and substitution, found not guilty of desertion, in violation of Article of War 58, but guilty of absence without leave for the period alleged, in violation of Article of War 61. He was

sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. There is no substantial disagreement between the evidence for the prosecution and for the defense.

a. Accused, Captain, Medical Corps, was a member of the Medical Section, Corps Area Service Command, Service Unit 1967, Camp Haan, California. About September 1, 1941, accused asked Lieutenant Colonel Clarke Blance, M.C., Commanding Officer of the Medical Section, for a twenty-five day leave, effective about October 1, 1941, to see a sick sister, who was stated to be ill with cancer. Colonel Blance informed accused that all leaves had been restricted to ten days, that higher authority would disapprove a request for leave for twenty-five days, and suggested that accused apply for leave about ten days before the expected date of departure, and that he would do what he could for accused at that time. Accused never again asked for a leave (R. 27-33). He was given a week-end pass over September 13 and 14, which expired at 8 a.m., September 15, 1941 (R. 13). Accused was not present at his assigned place of duty, the Receiving Office, Station Hospital, on September 15, 1941, and was not present for duty at any time between that date and November 11, 1941. He had no authorized leave of absence covering any part of that period (R. 19-20, 29; Ex. 1).

About October 16, 1941, Colonel Blance received the following telegram from accused from Boston, Massachusetts:

> "A MESSAGE FROM SISTER - URGENT. MY SUDDEN TRIP EAST. THIS, I REGRET ILLNESS AND URGENT BUSINESS HAVE KEPT ME SO BUSY THAT I POSTPONED WRITING. I WILL CONCLUDE MY AFFAIR AND WILL BE BACK NOVEMBER THE ELEVENTH OR BEFORE KINDLY USE YOU IMPARTIAL INFLUENCE ON MY BEHALF RESPECTFULLY - CAPTAIN SALVAGGIO." (Ex. 2.)

The accused returned to duty on November 11, 1941 (R. 12; Ex. 1). He then told Colonel Blance, in substance, that he had been on Government duty for six years, that he had been unable to get practically any leave during that time, that he was due Government leave, and he should have it (R. 32).

b. The accused testified that he had been on active duty as a First Lieutenant, Medical Reserve, with the Civilian Conservation Corps from July 5, 1935, until September 30, 1939, when his status changed to that of a civilian and he lost fifty days accumulated leave (R. 48-49), and had forty-four more days leave when he was again called to active duty on July 20, 1941, and assigned to Camp Haan. He asked the Adjutant and Executive Officer for some of the leave due him, but was told that his accumulated leave on his active duty tour and also while in a civilian capacity with the Civilian Conservation Corps was not available to him. He asked the Surgeon for leave to go see his sister who was ill with cancer in Boston, but was told that leave was a privilege, not a right, and that he would have to stay if they could not give him leave (R. 49-51).

Accused purchased on September 13, 1941, at March Field Station of the Santa Fe Railway Company, a round-trip ticket to Boston. He called Headquarters, Camp Haan, by telephone and told some soldier to get in touch with Captain Mantell or Major Henning and tell them that he was going on a "mercy leave" without permission and was leaving at ten o'clock from San Bernardino. He went to Boston and concluded after examination of his sister that she was ill from a fibroid tumor, not a cancer. He was then waiting for the expected arrival from Italy of his seventy-three year old father (R. 46-49). The telegram to Colonel Blance was sent October 15th (R. 52).

Upon cross-examination and upon examination by the court, accused testified that he left San Bernardino on Saturday, September 14, 1941, at 10:10 p.m.; stopped overnight in Chicago and arrived in Boston about September 19th. He made several trips to New York to see his attorney about his father, to Chicago to get his father-in-law to go to Riverside and stay with the wife of accused, and returned to Boston. He left Boston on November 7, and reached Camp Haan on November 11, 1941. He traveled in civilian clothes but had his uniform with him (R. 53-58).

The wife of accused corroborated his testimony generally. After accused telephoned Headquarters, Camp Haan, asking someone to sign him off because he was going absent without leave because his sister was ill, he asked her to see and explain the situation to Colonel Blance. She did explain the next day to an investigator from Camp Haan who called on her. The accused was very nervous at the time because he was about forty-eight pounds overweight

and had to reduce in order to meet his physical examination (R. 37-41).

c. The proof of absence without leave for the period alleged is clear, conclusive, and admitted by the accused in his own testimony.

4. The accused is thirty-nine years old. The records of the Office of The Adjutant General show his service as follows:

> Appointed First Lieutenant, Medical Corps Reserve, April 21, 1931; reappointed April 21, 1936; appointed Captain, Medical Corps Reserve, September 21, 1940. On active duty (C.C.C.) from July 5, 1935, to August 31, 1939. Ordered to extended active duty for one year, effective July 20, 1941.

5. The court was legally constituted. 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. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Bis-

Lester J. Fitzgerald, Judge Advocate.

Chas. B. Bresso, Judge Advocate.

Thomas M. Jaffy, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 219575

MAR 10 1942

UNITED STATES	)	SOUTHEAST AIR CORPS TRAINING CENTER
	)	
v.	)	Trial by G.C.M., convened at Maxwell Field, Alabama, December 15, 16, 22 and 23, 1941. Dismissal and confinement for three (3) years. Disciplinary Barracks.
	)	
Second Lieutenant ALEX E. MATHIS, JR. (0-420619), Air Corps.	)	

OPINION of the BOARD OF REVIEW
SMITH, VAN BENSCHOTEN and KOTRICH, Judge Advocates.

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.

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that 2nd Lieutenant Alex E. Mathis, Jr., Air Corps Reserve, Maxwell Field, did, at Maxwell Field, Alabama, on or about November 18, 1941, feloniously take, steal, and carry away: one wallet, value about $1.00, and $6.00 in United States currency, the property of Aviation Cadet James S. Hamer, Jr.; one wallet, value about $1.00, and $2.00 in United States currency, the property of Aviation Cadet William D. Workman; one wallet, value about $ .50, the property of Aviation Cadet John W. Curtis; and one wallet, value about $ .50, the property of Aviation Cadet Marvin A. Zahn.

Specification 2: In that 2nd Lieutenant Alex E. Mathis, Jr., Air Corps Reserve, Maxwell Field,

did at Maxwell Field, Alabama, on or about November 18, 1941, feloniously take, steal, and carry away: one wallet, value about $1.00, and $1.00 in United States currency, the property of Aviation Cadet Samuel V. Holch.

Specification 3: In that 2nd Lieutenant Alex E. Mathis, Jr., Air Corps Reserve, Maxwell Field, did at Maxwell Field, Alabama, on or about November 18, 1941, feloniously take, steal and carry away: one wallet, value about $1.00, and $23.00 in United States currency, the property of Aviation Cadet Robert N. Wesley; and one wallet, value about $ .50, and $8.00 in United States currency, the property of Aviation Cadet Robert L. Gayle.

Specification 4: In that 2nd Lieutenant Alex E. Mathis, Jr., Air Corps Reserve, Maxwell Field, did at Maxwell Field, Alabama, on or about November 18, 1941, feloniously take, steal, and carry away: one wallet, value about $ .50, and $4.00 in United States currency, the property of Aviation Cadet William Herbert Smith.

Specification 5: In that 2nd Lieutenant Alex E. Mathis, Jr., Air Corps Reserve, Maxwell Field, did at Maxwell Field, Alabama, on or about November 18, 1941, feloniously take, steal, and carry away: one wallet, value about $ .50, and $27.00 in United States currency, the property of Aviation Cadet Fred M. Kimbrough.

Specification 6: In that 2nd Lieutenant Alex E. Mathis, Jr., Air Corps Reserve, Maxwell Field, did at Maxwell Field, Alabama, on or about November 25, 1941, feloniously take, steal, and carry away: one wallet, value about $1.00, and $10.00 in United States currency, the property of Aviation Cadet Dawson O. George; one wallet, value about $1.00, the property of Aviation Cadet Howard A. Kelly; and one wallet, value about $ .50, and $2.00 in United

States currency, the property of Aviation Cadet Harry P. VanLear, Jr.

Specification 7: In that 2nd Lieutenant Alex E. Mathis, Jr., Air Corps Reserve, Maxwell Field, did at Maxwell Field, Alabama, on or about November 25, 1941, feloniously take, steal, and carry away: one wallet, value about $ .25, and $5.00 in United States currency, the property of Aviation Cadet Clarence C. Wall.

Specification 8: In that 2nd Lieutenant Alex E. Mathis, Jr., Air Corps Reserve, Maxwell Field, did at Maxwell Field, Alabama, on or about November 25, 1941, feloniously take, steal, and carry away: one wallet, value about $ .50, the property of Aviation Cadet James C. Stephens; and one wallet, value about $1.00, and $1.00 in United States Army Motion Picture Service coupons, the property of Aviation Cadet Morton H. Selub.

Specification 9: In that 2nd Lieutenant Alex E. Mathis, Jr., Air Corps Reserve, Maxwell Field, did at Maxwell Field, Alabama, on or about November 25, 1941, feloniously take, steal, and carry away: one wallet, value about $ .50, and $3.00 in United States currency, the property of Aviation Cadet Donald R. Clark.

Specification 10: In that 2nd Lieutenant Alex E. Mathis, Jr., Air Corps Reserve, Maxwell Field, did at Maxwell Field, Alabama, on or about November 25, 1941, feloniously take, steal, and carry away: one wallet, value about $1.00, and $30.00 in United States currency, the property of Aviation Cadet William H. Masters; and one wallet, value about $ .50, and $10.00 in United States currency, the property of Aviation Cadet Frank W. Roberts.

Specification 11: In that 2nd Lieutenant Alex E. Mathis, Jr., Air Corps Reserve, Maxwell Field, did at Maxwell Field, Alabama, on or about

November 25, 1941, feloniously take, steal, and carry away: one wallet, value about $1.00, and $6.00 in United States currency, the property of Aviation Cadet John M. Kirtley; and one wallet, value about $ .10, and $25.00 in United States currency, the property of Aviation Cadet Fred H. Alexander.

Specification 12: In that 2nd Lieutenant Alex E. Mathis, Jr., Air Corps Reserve, Maxwell Field, did at Maxwell Field, Alabama, on or about November 25, 1941, feloniously take, steal, and carry away: one wallet, value about $1.00, and $1.00 in United States currency, the property of Aviation Cadet Arthur E. Wenige.

Specification 13: In that 2nd Lieutenant Alex E. Mathis, Jr., Air Corps Reserve, Maxwell Field, did at Maxwell Field, Alabama, on or about November 25, 1941, feloniously take, steal, and carry away: one wallet, value about $1.00, and $6.00 in United States currency, the property of Aviation Cadet V. Allen Shouse; and one wallet, value about $1.00, and $12.00 in United States currency, the property of Aviation Cadet James H. Hargis.

The accused introduced as his individual counsel, a civilian attorney, and the designated defense and assistant defense counsel as associate counsel. He pleaded not guilty to all Specifications and the Charge "by reason of Insanity in that he was not at the time of the commission of the acts as alleged, and of each of said acts so far free from mental defect, disease or derangement as to be able concerning the particular acts charged to adhere to the right and refrain from the wrong." He was found guilty of all Specifications and the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to be confined at hard labor for five years. The findings and sentence were announced in open court. The reviewing authority approved the sentence, reduced the period of confinement to three years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place

of confinement and forwarded the record of trial for action under "Articles of War 48 and 50½". The record of trial should have been forwarded for action only under Article of War 48.

3. The court announced that by the explanation of his plea of not guilty it considered that the accused intended to raise the question of insanity as a defense, but ruled that the presumption that accused was sane would stand until evidence to the contrary was shown sufficient to place the sanity of accused in reasonable doubt (R. 7). On this question, the defense called Doctor Fred Reynolds, a graduate of Johns Hopkins University, who had done "neo-psychiatric" work for the Veterans Bureau and had, as county physician, examined all insane patients of Montgomery County, Alabama. Doctor Reynolds had not known the accused before he made the examination preparatory to testifying. From that examination, Doctor Reynolds testified that he was of the opinion that accused was a kleptomaniac, and based his opinion on the story told him by accused that as a child he had taken bright colored pencils and such things as appealed to him; that he took a meal ticket while in college, as well as a pair of shoes which he could not use; that after he left college he went to work in a store where he continued to take money; and that at the time he took these pocketbooks he did not need the money. The trial judge advocate objected to this history on the ground that it contained self-serving statements of accused, but the court overruled the objection. The doctor further stated that kleptomania is a recognized disease which could be treated by keeping the patient busy working and away from temptation (R. 10). He further stated that accused knew right from wrong "except when it comes to taking things" (R. 12). The defense then presented and the court accepted as evidence a stipulation covering the testimony that would have been expected from Major Frederick A. Pillet, Air Corps, if he were present and sworn as a witness, which stipulation relates the action taken by this officer in the apprehension of the accused and the finding of certain exhibits which were later introduced in evidence by the prosecution. The defense stated that the purpose of this stipulation was to show "the history on which the basis of his mental condition is founded" (R. 15).

Second Lieutenant H. C. Smith, Air Corps, 83rd School Squadron, testified that he borrowed $15 from accused on November 23, 1941 (R. 16).

Mr. Irving Merritt, a resident of Panama City, Florida, testified that he had known accused all his life and that the habits of accused were good except that he took things which did not belong to him; that "he and I were real good friends and he used to confide in me, and on several instances he told me of taking things"; that when they were in high school he had seen accused take money and cigarettes and give them to other boys; that they attended the same college and things turned up missing but that he did not know that accused was ever caught stealing in college or apprehended while taking things (R. 19).

The court, after having ascertained that accused's rights as a witness had been explained to him and that he understood them, permitted the defense to present in evidence his unsworn statement. An objection by the trial judge advocate that the statement was a self-serving declaration was overruled. In this statement, the accused recited in substance that all of his life he has been unable to control himself from taking things that did not belong to him; that as a small boy he took toys, baseball bats, skates, and many other things that took his fancy; that while in high school he worked Friday afternoons and Saturdays at a grocery store from which he took cash, cigarettes, and other novelties; that he did not smoke and gave the cigarettes away; that he is sure he took many things from his high school classmates but cannot remember the items; that he took numerous books from the high school library; that he believes that his parents never caught up with any of his stealing throughout those periods; that at college he took money, books, sweat shirts, a meal ticket, a pair of shoes that did not fit him, a purse which he later returned through the mail, and other things that he can't remember; that while in college he lived at a fraternity house and took ties, tie pins, books, a basket ball, money, a sport jacket which he did not use, and other small articles from his fraternity brothers; that during the summer following his freshman year at college he worked in a grocery store from which he took cash, cigarettes, and other small things; that after his junior year at college he worked during the summer on a railroad and did not take anything while working there; that the only time that he was ever caught at college was for the taking of the meal ticket for which he was required by the dean to reimburse the owner; that after graduation in June 1940 and until he joined the Army in October he took nothing; that for about more than one year prior to obtaining his commission as a second lieutenant he committed no thefts whatsoever; that finally, just prior to the taking of the wallets involved in

the charge herein, he had taken some other wallets and also flying equipment such as goggles and caps and other things belonging to his fellow cadets; that he had been appointed as tactical officer of the unit and, as part of his duties, was required to see that cadets were at all formations and that he entered the barracks for that reason and not for the purpose of stealing the wallets but that, when he was in the barracks and saw the trousers lying on the bunks, he could not resist the impulse to steal and took the wallets out of the trousers, and put them in his overcoat pocket, and did not open them until later; that he was in no financial difficulties and did not need the cash but just could not resist the impulse to take the wallets; that he loaned out part of the cash taken and does not know what he did with all the rest except that he kept it with his own money and spent it as his own; that he did tell Major Pillet that he threw some of the wallets away but the fact is that he cannot remember what he did with them and cannot explain why he kept the personal papers from the wallets; that he had told Lieutenant Marder that he could have resisted the taking of the wallets because he did not want to disclose his weakness for stealing but since he conferred with his defense counsel he now believes that he was not morally responsible and that the reflection on his family will be less if he is found mentally irresponsible instead of guilty of larceny and that with some help in the future and, if possible, some medical treatment, he believes he will be able to overcome the weakness (R. 20-23).

The defense offered a stipulation, which was received in evidence, that Lieutenant Charles E. Harton, Air Corps, would testify that he had borrowed seven dollars from accused on or about November 15, 1941.

The prosecution, in rebuttal of the evidence adduced by the defense on the sanity of accused, called First Lieutenant Louis Kaplan, Medical Corps, who testified that he had examined accused psychiatrically on December 2 and 13, 1941, and was of the opinion that accused was not insane and was not suffering from any psychosis; that in his opinion accused knows right from wrong and was able to resist taking things when the circumstances of the taking were unfavorable to him; that accused has evidenced a decided impulse to steal and if the circumstances were favorable to him he would not be able to resist; that accused may be classified as a kleptomaniac and as having a psychopathic personality; and that kleptomania is not recognized as a disease but as a condition (R. 24-27).

First Lieutenant Samuel H. Marder, Medical Corps, a witness for the prosecution, testified in substance that he was a practicing physician with about four years experience; that after internship he worked in the Massachusetts State Medical Department until he went into the Army; that he had given the accused a psychiatric examination and was of the opinion that he could determine between right and wrong, had no irresistible impulse to steal and is sane; that during the first examination accused did become somewhat confused and appeared depressed as was evidenced by tears but that during the later examination he was neither confused nor depressed; and that accused related the history of his early takings prior to the time witness formed his conclusions. Witness further stated that kleptomania is not recognized as a disease by medical authorities, but only as a symptom, being an uncontrollable desire to take things and extending over a long period of time; and that in his opinion accused was wholly normal (R. 28-30).

The court after hearing arguments was closed and on opening announced that by majority vote they ruled that the insanity of accused was an issue in the trial and directed the trial judge advocate to request the convening authority to appoint a board of officers as provided by paragraph 35c, Manual for Courts-Martial, 1928, and then adjourned to meet at the call of the president (R. 30-37). Pursuant to this request a board of officers was appointed, consisting of Major William F. DeWitt, Major Norman W. White and First Lieutenant Samuel H. Marder, all of the Medical Corps. The defense objected to the report of this board of officers for the reasons:

> "1. The said Board was not lawfully appointed or convened. 2. One of the members of said Board before his appointment thereon, had a fixed opinion on the sanity or mental responsibility of the accused. 3. First Lieutenant Samuel H. Marder, Medical Corps, the psychiatrist member of said board, whose opinion and advice would naturally have great weight with the other members of said Board, before his appointment to said Board, had testified before this Court to the sanity and mental responsibility of the accused at the time of the commission of the alleged offenses and had a fixed opinion thereon, and the said Lieutenant Samuel H. Marder was ineligible for appointment to said board. 4. The said Board was not an impartial and unbiased body, but one of its

members had a preconceived opinion on the sanity and mental responsibility of the accused. 5. The accused was not given an opportunity to be represented by counsel before the Board, but the accused himself did object to Lieutenant Samuel H. Marder as a member of the Board, and was told by Major William F. DeWitt, Medical Corps, that under Army Regulations, one of the members of the Board should be a psychiatrist and that Lieutenant Samuel H. Marder was the psychiatrist at this post. 6. The findings of the Board that the accused was mentally responsible for his actions on November 18, 1941, and on November 25, 1941, are conclusions of law which the Board was not authorized to make. 7. The findings of the Board do not include any findings as to whether at the time of the commission of the alleged acts the accused was so far free from mental defect, disease or derangement as to be able concerning the particular acts charged, to adhere to the right." (R. 107.)

The court was closed and on opening announced that by majority vote the objections of the defense were overruled and invited attention to the fact that the board proceedings were simply additional evidence and were admissible before the court as an aid to the court in determining the sanity or insanity of the accused. The order appointing the board and its findings were incorporated into the record in full. The board found that the accused -

"1. Is now mentally responsible for his actions.

"2. Was mentally responsible for his actions on November 18, 1941.

"3. Was mentally responsible for his actions on November 25, 1941.

"4. Is capable of distinguishing between right and wrong." (R. 117-118.)

At the request of the court, Major Norman W. White, Medical Corps, a member of the board, was sworn and testified in substance that he knew the accused; that the accused said to the board that he did not like the presence of Lieutenant Marder thereon due to the fact that the Lieutenant had already examined him and had expressed an opinion; that the provisions of Army Regulations 600-500 were read to him and he was told that Lieutenant Marder was the psychiatrist member of the board

and the Lieutenant stayed on the board; that the board made an examination of the accused, consisting of a series of questions, and later made a physical examination; that the witness did not recognize in the accused any evidence of a mental disease or condition of mind known as kleptomania; that a person addicted to kleptomania would not likely go a year without having an impulse to steal; that the history related by the accused might show some signs of a condition of kleptomania but, to establish such a condition, the fact that the accused took things is not of itself sufficient and that it would have to be shown also that he took other things which had no value or use; that a kleptomaniac does not consider the chances of getting caught; that during the examination the accused stated that he could have prevented the taking; that the only dealings the witness had had in psychiatry resulted from his duties as flight surgeon; that kleptomania is not a mental disease and, in his opinion, a man addicted to kleptomania would not go into a room, take some pocketbooks out of the pockets of some pants and not take anything else from the room; that such action would indicate premeditation (R. 119-124).

The defense offered an affidavit of one Carl Johnson, dean of men at John B. Stetson University, DeLand Florida, stating in substance that affiant knew accused, who was a student of keen ingenuity, good character, a high sense of honor and a gentleman, but that his being under-financed as a student necessitated hard work and long hours, from which he sustained at times a mental and nervous fatigue; and that accused had taken property not belonging to him. The affidavit was accepted in evidence as Exhibit A over the objection of the prosecution (R. 125).

After hearing arguments the court was cleared and closed at the request of the law member. When opened the president announced that -

> "The Court, by a majority vote of the members present at the time the vote was taken concurring, finds that the accused, on November 18th and 25th, 1941, was sane and 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 and refrain from the wrong. The Court further finds that the accused, at the present time, is sane and so far free from mental defect, disease, or derangement as to be able to cooperate intelligently with the conduct of his defense."

The defense immediately objected to the simple majority vote of the court on the ground that the issue of sanity goes along with the question of guilt and can be decided only by a two-thirds vote. The court overruled the objection of the defense counsel stating, in substance, that this was an interlocutory question and could be decided by a simple majority vote (R. 128-138).

The evidence for the prosecution shows in substance that Captain Roy Jones, Air Corps, post adjutant, Maxwell Field, had in his possession for safekeeping a paper sack containing bits of paper, a box containing two pocketbooks and miscellaneous cards and papers, and a box containing fifteen pocketbooks and miscellaneous cards and papers, which were offered in evidence by the prosecution and received by the court subject to future objection by the defense in the event they were not properly identified (R. 38-40).

The prosecution then reread, without objection, the stipulation previously introduced by the defense (R. 13-15) of the testimony of Major Frederick A. Pillet, Air Corps, in substance to the effect that on the morning of November 25, 1941, at about 9 o'clock, he saw accused in the bar of the Officers' Club, Maxwell Field, Alabama, and requested him to come along with the Major, Captain O. H. Thompson and Lieutenant Charles B. Rawson, to answer some questions; that on the way to the room of accused the Major asked accused what he was doing in the cadet barracks that morning and accused replied that he was making an official inspection of quarters; that when asked why he inspected the pockets of cadet clothing, accused denied that he had done so; that when they reached his room they requested accused to unlock his closet door, and on a shelf in the closet was a paper bag containing a considerable quantity of torn bits of identification cards, pictures, etc., which the Major marked "Exhibit One" and signed his name and wrote on the back "Mathis Case, 9:30 a.m., 11-25-41" in the presence of the other two officers; that all original contents were returned to the sack; that in the closet was also found a box containing two pocketbooks, the pilot log of the accused and other papers which the Major marked for identification purposes "Exhibit Two, Mathis Case, 11-25-41" with his name; that a third box was also found in this closet containing fourteen pocketbooks, as well as some articles of clothing; the fourteen pocketbooks were replaced in the box, which was marked "Exhibit Three, Mathis Case, 11-25-41" and the Major's name signed. The Major then asked accused where

he kept his money and accused stated that he had no money on him; that when asked where the pocketbooks came from, accused said "The cadet barracks", and when accused was again asked where the money was he went to the closet and removed his personal pocketbook bearing flying cadet identification card with his name on it, and removed some money from this pocket book, stating "Two dollars of this is mine"; that the money remaining was counted in the presence of the other two officers and found to amount to $98; that the Major wrote on the flying cadet membership card of accused "Exhibit #4, Mathis Case, 11-25-41", signed his name, replaced the card and the $98, and put the pocketbook with the other previously mentioned exhibits. The accused was then warned of his rights by the Major, permitted to lock up his room, and with the exhibits and witness proceeded to post headquarters (R. 40-43).

Captain Oscar H. Thompson, Air Corps, testified in substance that he was present at the time Exhibits 1, 2 and 3 were marked and taken to post headquarters and locked in a safe by Major Pillet, and at the time the Major told the accused to come to his quarters. He then related how accused went to the closet, brought out a pocketbook and told Major Pillet "Two dollars of this is mine", and that there was $98 in the pocketbook (R. 44).

First Lieutenant Charles B. Rawson, Air Corps, testified substantially the same as the stipulation of Major Pillet and the testimony of Captain Thompson (R. 46).

Aviation Cadet James S. Hamer, Jr., testified, in substance, that on the morning of November 18, 1941, at about 6:25 o'clock, he changed clothes to go on the athletic field and left his billfold in the left pocket of his pants on a chair; that when he returned at 7:20 it was missing without his permission; that at the time it disappeared it contained a St. Christopher medal, some pass cards and $16; that the pocketbook was given to him by his father and was worth about $3. The witness identified a pocketbook in possession of the prosecution, which had been taken from the box Exhibit 3, as his pocketbook, lost on the date in question. This pocketbook was accepted in evidence without objection by the defense and marked Exhibit 4 (R. 49).

Eight other aviation cadets then took the witness stand and testified substantially the same as Cadet Hamer as to the alleged taking on the date in question, and identified certain

property taken from the exhibits already before the court as being their respective property, and that they lost at least the amounts of money and personal effects alleged in the Specifications relating to the taking of their property (R. 49-65). Fourteen additional cadets testified in substance that on the morning of November 25, 1941, they went to the drill field for exercise and left certain personal effects and money in their billfolds in their clothing; that when they returned their billfolds and personal effects were missing from their clothing. These witnesses identified their billfolds in the possession of the prosecution among the exhibits before the court and testified that their individual billfolds had contained money and other things of value as alleged in the Specifications in which their names appeared and had been taken from their pockets without their permission (R. 65-86). Since the accused, in effect, admitted the taking of all of the property alleged in the various Specifications and as it was found in his possession, it is not considered necessary to summarize the testimony of each cadet as to all of the circumstances attendant upon the taking.

Aviation Cadet John H. Dillinger, Squadron G, Aviation Cadet Replacement Center, Maxwell Field, Alabama, testified in substance that he was charge of quarters of Squadron G on the morning of November 18, 1941, between 6 and 7 o'clock; that the men had reveille at 6 o'clock on that date, and athletic call between 6:15 and 6:30; that he made a room to room inspection and was back in the orderly room at 6:40; that the orderly room is the center room of Barracks 815 and there are six rooms on each side of the orderly room; that Squadron G consisted of two barracks, 815 and 819; that he was in Barracks 815 when the accused came up to him and asked him a question; that the accused departed and returned in fifteen or twenty minutes; and that he did not see anyone else in Barracks 815 during the hour in question, but that there were two negroes in Barracks 819 when he made his inspection (R. 86-87).

Aviation Cadet Ray C. Clinkscales testified in substance that he was acting charge of quarters on November 25, 1941, stationed in the orderly room of Barracks 815, and that accused came to the orderly room between 6:30 and 7:30 a.m., on that date; that there was one man stationed in Room 1, in charge of barracks, while the men in the organization had gone out for athletics (R. 89).

Aviation Cadet John H. Jarrel testified in substance

that Squadron G occupies Barracks 815 and 819; that he was on duty as acting first sergeant in the orderly room between Rooms 6 and 7 in Barracks 815 on the morning of November 25, 1941; that accused was tactical officer of that squadron and came into the orderly room on that morning (R. 90).

Second Lieutenant Walter L. Sanford, 91st School Squadron, Maxwell Field, testified in substance that on the morning of November 25, 1941, he was on duty as a sentinel detailed to watch Barracks 815; that about 6:50 a.m., he saw someone light a cigarette and as it was quite light he noticed that the person wore light trousers and was talking to a cadet; that the cadet went into the orderly room and the officer turned to his left and started back towards the end of the barracks and turned into a room; that he, the witness, went down the barracks porch, checking each room to find which room the officer had entered, and he saw someone in Room 8 going through some articles of clothing; that he meant by that that the officer had his hand in the pockets; that he recognized the accused as the person who was rifling the clothing; that the witness walked to the end of the barracks and as he returned the accused came out of the room, saluted, said "Good morning", immediately left the barracks, got in his automobile and drove towards the Bachelor Officers' Quarters; that it was already daylight and he could not be mistaken as to the identity of the accused; and that on November 25, 1941, witness was Private Walter L. Sanford, having since been commissioned as a second lieutenant (R. 91-93).

First Lieutenant Charles B. Rawson, Air Corps, was recalled as a witness for the prosecution, and related how the accused was apprehended on the morning of November 25, 1941, and voluntarily turned over certain money to Major Pillet, saying that two dollars of the money was his and the money came from the "cadet barracks"; that witness had placed Private (now lieutenant) Sanford on guard on November 25, 1941. The witness identified the accused's wallet, which was received in evidence as Exhibit 42 (R. 95).

Captain Oscar H. Thompson, Air Corps, was recalled as a witness for the prosecution, and testified in substance as to the warning given the accused; that after warning the accused of his rights he (the accused) was interviewed by F.B.I. men the next day; that the witness was present when the F.B.I. men advised accused that the case might be tried in Federal court and if he made a statement now the Federal judge might be inclined

to be more lenient. The defense then stated that it did not feel the rights of the accused had been jeopardized by the testimony of Captain Thompson and Lieutenant Rawson. The witness testified further in substance that he believed the interview with the F.B.I. men was conducted in such a manner as to encourage the accused to make a statement, and related again the evidence leading up to the apprehension of accused, stating that when asked by Major Pillet what he was doing going through the pockets of the pants accused said "I just was".

Upon request of the law member the court was closed and on being opened the president stated:

> "The Court was not satisfied that the statement made by the defendant to Major Pillet was made freely and without fear of punishment or hope of reward and by a majority vote rules that all reference to the statement made by the defendant to Major Pillet at the Bachelor Officer's Quarters be stricken from the records." (R. 96-101)

Captain Graham Kirkpatrick, Air Corps, Maxwell Field, the investigating officer, testified in substance that he knows the accused; that at the time of the investigation he informed the accused of his rights as a witness; that no reward was offered him in order to obtain a statement; that the accused made a statement to him after he had made the one to Major Pillet; that he showed the accused a paper containing his statement and he then warned him of his rights all over again, and accused stated that he wanted his confession to stand (R. 101-102).

The prosecution then introduced a stipulation agreed to by accused, his counsel and the trial judge advocate, to the effect that -

> "In the case of 2nd Lieutenant Alex E. Mathis, Jr.,* * * upon the trial before the General Court Martial any or all of the statements shown by the inclosures hereinafter listed may be introduced in evidence with the same effect as if the witness were present and personally testified under oath before the General Court Martial to the matters contained in such statements."

After listing some thirty statements the agreement concludes by specifically permitting the documentary evidence listed in inclosure #2 to be introduced in evidence upon proper identifica-

tion by any qualified witness. From among the statements mentioned, the prosecution introduced a signed confession of the accused sworn to before Major F. A. Pillet, without objection and in agreement with the defense, stating in effect that accused obtained the wallets and money from the Aviation Cadet Barracks, Squadron G, on November 18, 1941, and from Squadron G Barracks on November 25, 1941, and that the wallets found in his closet on the morning of November 25, 1941, were the ones that he had removed from the cadet barracks.

The rights of the accused were explained to him and he stated that he did not desire to take the stand or make a statement, either sworn or unsworn (R. 139).

The defense placed on the witness stand two character witnesses, namely, Mr. E. D. McDaniel, a Methodist minister, and Mr. W. J. Cook, a Ford dealer, both of Panama City, Florida (R. 126-128), and introduced in evidence stipulations of Mr. C. S. Rush and Mr. William W. Morriss, also of Panama City, Florida (R. 139; Exs. B, C). The substance of this testimony was that they knew the accused and had known him for many years and that his reputation was good in Panama City, and that they did not know of any disposition of the accused to take things which did not belong to him.

The prosecution and the defense made closing arguments and quoted provisions from the Manual for Courts-Martial, which arguments are recorded in the record, whereupon the court closed and made its findings (R. 139-145).

4. Although this record is long and somewhat involved, the issues are few. The accused is charged in thirteen specifications under one charge of having committed numerous thefts, from Squadron G Barracks on November 18, 1941, and from Squadron G Barracks and the barracks behind Squadron G Barracks on November 25, 1941. The specific defense relied upon throughout the trial was that as to the particular acts charged the accused was unable to adhere to the right and refrain from the wrong - more particularly, that the accused was a kleptomaniac.

The question of insanity having been raised by plea of accused and some medical testimony thereon, the court, as has been stated, requested the appointment of a board of officers as authorized by paragraph 35c, Manual for Courts-Martial, 1928. The board was accordingly appointed by the reviewing authority

under the provisions of AR 600-500, dated November 20, 1939. These regulations require an examination by a board consisting of at least two medical officers, one of whom will, if practicable, be a specialist in nervous and mental diseases. The board appointed consisted of two officers who are flight surgeons and a third officer who qualified as a psychiatrist. The board made the findings which have been quoted hereinbefore, and returned the record to the appointing authority by whom it was referred to the court for their information. The defense made strenuous objection to the admission of that report, principally because Lieutenant Samuel H. Marder, Medical Corps, who had testified before the court that in his opinion accused was capable of knowing right from wrong and was not subject to any irresistible impulse to steal, was later designated as one of the members of the medical board to inquire into the legal responsibility of accused. This contention is without merit for it has been held that the court is not bound by the findings of a medical board as to the sanity of an accused, the function of which is entirely advisory. In the case of Hayes, CM 204790, where a medical board found that the accused was insane at the time he committed the act for which he was being tried, the Board of Review held:

> "* * * the Board is of the opinion that in this case the evidence for the prosecution not only negatived several of the major premises upon which the report of the medical board was based, but affirmatively proved beyond a reasonable doubt that accused was so far free from mental defect, disease, or derangement as to be able, concerning the particular act charged, both to distinguish right from wrong and to adhere to the right."

The board was appointed in substantial compliance with the Army Regulations in question, and the appointment of the third member, who had, as a witness, expressed an opinion as to the sanity of the accused in this case prior to his appointment on said board, did not constitute error (par. 76c, M.C.M., 1921). His was an expert impersonal opinion (par. 76a 9, M.C.M., 1921), and there is little doubt that if the board of officers had been appointed prior to the time the court was convened that the presence of Lieutenant Marder would have been required thereon, due to the fact that he was the only officer at Maxwell Field having made special study in nervous and mental diseases. If this procedure had been followed, the objection of the defense would not have occurred. The record does not bear out the objection of the defense that this officer was prejudiced. The proceedings of

the board of officers were received by the court as evidence in addition to the testimony previously taken. From all of the evidence adduced, the court made its finding of mental responsibility above quoted. The evidence amply sustains the court's finding on that issue. The accused admitted taking the property as charged, and based his defense upon the ground that he is and since early childhood has been a kleptomaniac. The defense contended that although he recognized the moral turpitude involved in the thefts he was nevertheless at times irresistibly impelled to commit what some authorities call "pathological stealing". However, according to the testimony of Major White, Medical Corps, he admitted to the medical board, "that he could have prevented it". (R. 122). One of the outstanding earmarks of true kleptomania is the indiscriminate taking of the property of others regardless of its value or usefulness to the person taking it; another is spontaneity. The kleptomaniac sees the article before him and is seized by an overpowering impulse to take it even at the risk of immediate detection. Kleptomania is defined as "a persistent neurotic impulse to steal, especially without economic motive." Let us apply this definition to accused's own story of his malady. In his case it is not "persistent", for in his unsworn statement he told the court that for a period of a year or more he took nothing belonging to others. The circumstances incident to the taking of the billfolds belonging to the aviation cadets negative the theory that he acted upon "impulse". He went to the barracks at a time when he had reason to believe that there would be no one present, and it is also noteworthy that the billfolds were not lying around loose or in plain view on tables, chairs or bunks where they might tempt the cupidity of anyone entering the barracks but were in the trousers pockets of their respective owners. Doubtless thinking that there was no eye to see, accused went from place to place, thrusting his hands into the pockets, and garnered not one but twenty-three billfolds containing money of the cadets. This, according to the testimony of Major White, indicated premeditation and not an uncontrollable impulse (R. 124). Nor can it be said that he acted "without economic motive", for almost all of the billfolds contained money and some of them apparently had such intrinsic value that he did not throw them away but kept them. There is no evidence of record that upon these occasions he took anything that did not give promise of value. Accused stated that since he has been in the Army he has also taken flying equipment, such as goggles and a flying cap. These articles certainly possess a peculiar value to a person engaged in the business of flying. Going back to his childhood, he states

that he took such articles as baseball gloves and bats. It is well recognized that these articles are held in high esteem by all normal boys. When he was in college he took books, ties and a meal ticket, all of which articles are of value to a student. He does say that upon one occasion he took a pair of shoes and a sweater which did not fit him, but in the main it seems clear that he took nothing that would have been without value to him at the time it was taken. The court could, and undoubtedly did, take all these matters into consideration in arriving at its decision which is well sustained by the record.

The record reveals that the vote of the court on the question of the sanity of the accused was by a majority of the members present at the time the vote was taken. As has been stated, the defense objected to the making of such finding by a simple majority vote, claiming that, as the question of insanity had been raised in the plea of not guilty, it went along with the question of guilt and could be decided only by a two-thirds vote. This objection was overruled and the president of the court stated:

> "I invite the Defense Counsel's attention to the fact that this question is an interlocutory question and can be decided by a majority vote."

The ruling of the court is supported by the provisions of the 31st Article of War and by part of the fourth paragraph of paragraph 75, Manual for Courts-Martial, 1928, reading in part as follows:

> "* * * The court may, in its discretion, give priority to evidence on such issue [mental responsibility] and may determine as an interlocutory question whether or not the accused was mentally responsible at the time of the commission of the alleged offense * * *." (Underscoring supplied)

The objection by the defense was not well taken and the ruling of the court was not in error.

The question of insanity being disposed of, the only remaining question is what offenses has the accused committed. He is charged with several larcenies. Larceny is the fraudulent taking and carrying away of a thing without claim of right, with the intention of converting it to a use other than that of the owner, without his consent (2 Wharton's Criminal Law, 1405). Where

the larceny of several articles is substantially one transaction, it is a single larceny even though the articles belong to different persons. So, where a thief steals a suitcase containing the property of several persons, or goes into a room and takes property belonging to various individuals, it is but one larceny, which should be alleged in one specification (par. 149g, M.C.M., 1928). In this case there was no dispute that the accused did in fact take and carry away the wallets and money described in the various Specifications, securing about $85 from nine wallets on November 18, 1941, and $96 from fourteen wallets on November 25, 1941, each in the separate possession of different individuals. When the trial judge advocate in his argument attempted to explain that each Specification referred to a different room, the court sustained the objection of the defense that there had been no evidence offered to show that the men lived in different rooms and (the court by a two-thirds vote) refused the request of the trial judge advocate to be permitted to reopen the case and produce a witness to show the different rooms in which the offenses occurred. This leaves the record as showing admitted thefts occurring November 18, 1941, from one building, and admitted thefts occurring November 25, 1941, from two separate buildings. The defense herein claimed that but two offenses were committed by accused, that is, one on November 18, 1941, and one on November 25, 1941, and that after the court had made a finding on one specification of each date, to then vote on a second specification of another billfold alleged to have been also taken on the same date, constituted placing the accused in double jeopardy for the reason that one offense should not be the subject of more than one specification. This contention is based on the theory that all the evidence in this case indicates one taking on each of two occasions. For the acts of the accused to have constituted only one offense on each date, the evidence should clearly and conclusively show that the acts were committed at the same time and place, as substantially one transaction, and as the result of one impulse and one intent. The inference arising from alleging the offenses in separate specifications is that the offenses themselves were separate and distinct. The evidence reveals that Squadron G occupied two barracks, numbered 815 and 819, and that barracks 815 consisted of twelve rooms and an orderly room. The confession of accused admits that the property taken on November 18th was from the barracks of Squadron G, and on November 25th from the barracks of Squadron G and the barracks behind Squadron G barracks. The court is not bound to assume, in the face of this evidence, that these offenses occurred in one and the same place and are one and the same offense. From the evidence,

the fact appears that two buildings are involved and that the offenses were not all committed at the same place and, therefore, could not have occurred at the same time.

> "If, however, articles belonging to different owners are taken at different times or from different places, it is usually held that each taking is a distinct and independent larceny. A short space of time and distance will have this effect." (36 Corpus Juris, sec. 223.)

The finding of the court that the accused committed thirteen different larcenies of various amounts from different persons on two different days is supported by the evidence and by the confession made by the accused. The contention of double jeopardy in this case by the defense is not based upon the right of an accused not to be tried at a later time for the same offense after having once been tried therefor, but instead, is predicated upon an alleged error on the part of the prosecution in breaking down the charge into more than two separate specifications, claiming that but two offenses were committed by accused, one on November 18, 1941, and one on November 25, 1941. The claim of double jeopardy is therefore not so much one of error affecting the substantial rights of the accused as it is one of error in pleading and prodecure. Under the provisions of Article of War 37, the proceedings of a court-martial should not be held invalid, nor the findings or sentence disapproved, on the ground of improper admission or rejection of evidence, or for any error as to any matter of pleading or procedure unless it shall appear that the error complained of has injuriously affected the substantial rights of the accused. Certainly, the accused here was put on ample notice as to what offenses he was charged with, and he was represented by competent counsel who entered a plea to the general issue at the beginning of the trial. If, for any reason, the accused was not properly advised of what he was called upon to defend, he had his opportunity to have the specifications amended during trial. By waiting until final argument to advance this contention, the accused appears to be relying upon a technicality, in the hope of reducing the punishment which might be imposed. Assuming this to be so, however, and that the evidence actually supports only two offenses, the sentence imposed is well within the legal discretion of the court, since the table of maximum punishments is applied only to enlisted men. The court in closed session ruled that all statements made by accused to Major Pillet at the Bachelor Officers' Quarters be stricken from the record because not shown to have been freely

made without fear of punishment or hope of reward. These statements were presented in part by the defense and admitted in part by accused in his unsworn statement, and might well have been permitted in the record, but the court's action certainly could not prejudice any rights of the accused.

5. The Board in considering the record of trial has given careful consideration to the brief submitted on behalf of the accused by Mr. Richard T. Rives of Montgomery, Alabama, and also to the oral argument made before the Board, on March 4, 1942, by Mr. Francis P. Whitehair, DeLand, Florida, both attorneys for the accused.

6. War Department records disclose that accused was born at Dothan, Alabama, on February 3, 1919, and that at the time of the commission of the offenses he was 22 years of age. He graduated from high school in Panama City, Florida, in 1936, and from Stetson University, DeLand, Florida, in 1940. He received elementary training as a flying cadet at Jackson, Mississippi, from November 27, 1940, to February 9, 1941; basic training at Gunter Field, Alabama, from February 15 to April 27, 1941; and advanced training at the Air Corps Advanced Flying School, Maxwell Field, Alabama, from April 28 to July 11, 1941. He was appointed a second lieutenant, Air Corps Reserve, on July 11, 1941, and entered on his present active duty at Maxwell Field, Alabama, on July 12, 1941.

7. The court was legally constituted. 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 and the sentence and to warrant confirmation of the sentence. However, it is believed that the ends of justice will be met if the sentence is confirmed, the portion thereof relating to confinement remitted, and the sentence, as thus modified, carried into execution.

S. W. Smith, Judge Advocate.

Charles M. VanBuskirk, Judge Advocate.

E. J. Kotrich, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAR 25 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Alex E. Mathis, Jr. (0-420619), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation of the sentence. I do not concur in the recommendation by the Board of Review that all of the confinement be remitted. Accused was found guilty of a series of petty larcenies (thirteen specifications covering two or three distinct transactions), each of which was the deliberate work of a common thief. The fact that accused is an officer should not relieve him from the penalty commonly adjudged in the cases of enlisted men for such offenses. Accordingly, I recommend that the sentence be confirmed, that the term of confinement be reduced to one year, and that the sentence as thus mofified be carried into execution.

3. 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 recommendations hereinabove made should they meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of Executive action.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 219582

FEB 26 1942

U N I T E D S T A T E S	)	2ND ARMORED DIVISION
v.	)	Trial by G. C. M., convened at Fort Benning, Georgia, January 12, 1942. Confinement for six (6) months and forfeiture of twenty dollars ($20) per month for like period. 2nd Armored Division Stockade.
Private DAVIE BRADEN (14047389), Company F, 67th Armored Regiment.	)	

OPINION of the BOARD OF REVIEW
SMITH, VAN BENSCHOTEN and KOTRICH, Judge Advocates.

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

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

CHARGE I: Violation of the 86th Article of War.

Specification: In that Pvt. Braden, Davie, being on guard and posted as a sentinel, at Fort Benning, Georgia, on or about December 8, 1941, did leave his post before he was regularly relieved.

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

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

He pleaded not guilty to all Specifications and Charges. He was found guilty of Charge I and its Specification, and not guilty of Charge II

and both Specifications thereunder. No evidence of previous convictions was introduced. He was sentenced to be confined at hard labor for six months and to forfeit twenty dollars per month for a like period. The reviewing authority approved the sentence, ordered it executed, and designated the 2nd Armored Division Stockade as the place of confinement.

3. The record of trial discloses that about 6:30 p.m., on December 8, 1941 (R. 6), Lieutenant James H. Dyson, Battery C, 14th Field Artillery, officer of the guard at Fort Benning, Georgia (R. 8), discovered that accused, who had been posted about 1 p.m., as a sentinel (R. 17) in charge of two prisoners, Burgess and Davis, was missing (R. 9,11). The provost sergeant had sent the prisoners out under the accused as their sentry to police up the Cusseta Highway (R. 17,20). Sergeant Richard E. Weeks, Company D, 41st Infantry, who was assistant provost sergeant at the stockade (R. 11), located and arrested accused and the two prisoners on the Bull Creek Bridge, walking toward town and just beyond the intersection of the Cusseta Highway and Fort Benning Boulevard (R. 12). This point is about three-fourths of a mile from the reservation boundary (R. 13). Staff Sergeant Davis L. Temple, 702nd Tank Destroyer Battalion (Heavy), the provost sergeant at the 2nd Armored Division Stockade, was present when accused was posted as a sentry over the prisoners, and at some time during the afternoon, not specified, inspected this detail and found them "about half way between third street and reservation range between Columbus" (R. 17). They were walking toward Columbus and the place at which he picked them up on Bull Creek Bridge was not included in the police area (R. 17). There is no fence, sign or mark of any kind indicating the boundary of the reservation (R. 13). When accused was picked up he was in uniform, armed with a pistol which he carried in his jacket (R. 13,14,15), and was walking from six to eight paces back of his prisoners (R. 14). He was somewhat disheveled in appearance, did not have his pistol belt on (R. 15), but there was nothing otherwise unusual about his appearance (R. 16). At the time of the arrest both prisoners were in fatigue clothes (R. 17) and accused was in uniform (R. 12). One of the prisoners, Burgess, testified that when they were picked up they were walking back toward, and trying to find their way back to, the stockade; that they did not know the way back and were trying to get a taxi (R. 22). The other prisoner, Davis, testified that he does not know where the reservation ends; that when they were picked up by the sergeants "it was getting dusky dark" and the prisoners and the sentry were "heading back this way to the stockade" (R. 24). He does not know whether or not the place where he was picked up was outside the reservation.

There is no competent evidence to show that the accused was instructed as to when his tour of guard duty ended or when he should return to the stockade. Although his prisoners testified that they were supposed to turn in at 4:20 p.m., it is not shown that accused understood or was instructed as to that hour. The evidence does show, however, that the accused was posted as a guard over the two prisoners; was assigned to a certain area, that is, the Cusseta Highway and its bordering area within the Fort Benning Reservation; that he voluntarily left that area with his prisoners before he was relieved and that he and his prisoners were brought back to the post after they were apprehended, several hours after the usual hour for returning prisoners to the stockade. Though somewhat conflicting, the competent evidence adduced before the court sustains the findings and sentence.

The record discloses that Lieutenant Colonel Eustis L. Hubbard, 67th Armored Regiment (M), president and law member of the court, was the officer who forwarded the charges to the convening authority, concurring in the investigating officer's recommendation that the case be tried by general court-martial. However, the court and the accused were put on notice as to his connection with the case prior to the trial, when the trial judge advocate announced in open court, "the commanding officer who forwarded the charges to the convening authority is Lt. Col. Eustis L. Hubbard" (R. 2). Thereafter the defense announced in open court that "The accused has no challenges for cause", did not wish to exercise his right to one peremptory challenge, and did not "object to being tried by the Court as it now sits".

It sufficiently appears that the defense was made aware of the above circumstances and, knowing them, refrained from challenging Lieutenant Colonel Hubbard. Furthermore, the indorsement forwarding the charges may be considered as a routine expression of an opinion that the charges were of a character proper for trial by a general court-martial, and did not amount to an opinion as to the guilt of the accused. It may also be assumed that Lieutenant Colonel Hubbard conscientiously remained silent when asked if he was aware of any facts which he believed to be a ground for challenge against any member of the court (CM 167584, Sullivan). It must therefore be inferred that the defense was aware of these reasons for challenging Lieutenant Colonel Hubbard and, knowing them, voluntarily waived its right to exercise that privilege.

4. In view of the foregoing, the Board of Review is of the opinion that the record is legally sufficient to support the findings and sentence.

L. M. Smith, Judge Advocate.
Charles M. VanBenschoten, Judge Advocate.
E. J. Kotcich, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 219725

FEB 19 1942

U N I T E D S T A T E S	)	PANAMA COAST ARTILLERY COMMAND
v.	)	Trial by G. C. M., convened at Fort Amador, Canal Zone, October 9, 1941. Confinement for six (6) months and forfeiture of twenty dollars ($20) per month for like period. Fort Amador, Canal Zone.
Private MONTGOMERY C. LOWRY (6152144), Battery I, 4th Coast Artillery.	)	

OPINION of the BOARD OF REVIEW
SMITH, ROUNDS and VAN BENSCHOTEN, Judge Advocates.

1. The record of trial in the case of the soldier named above, having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence in part, has been examined by the Board of Review and the board submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that Private Montgomery C. Lowry, Battery "I", 4th Coast Artillery, while a prisoner, did, at Fort Amador, Canal Zone, on or about September 11, 1941, desert the service of the United States, and did remain absent in desertion until he surrendered himself at Fort Amador, Canal Zone, on or about September 15, 1941.

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

Specification: In that Private Montgomery C. Lowry, Battery "I", 4th Coast Artillery, having been duly placed in confinement in the Station Hospital, Fort Amador, Canal Zone, on or about September 2, 1941, did, at Station Hospital, Fort Amador, Canal Zone, on or about September 11, 1941, escape from said

> confinement before he was set at liberty by proper authority.

He pleaded not guilty to both Charges and the Specifications thereunder. He was found guilty of the Specification, Charge I, except the words "desert" and "in desertion", substituting therefor the words "absent himself without leave from" and "without leave", of the excepted words, not guilty, of the substituted words, guilty; of Charge I, not guilty, but guilty of violation of the 61st Article of War; and guilty of Charge II and its Specification. 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 for six months. The reviewing authority approved only so much of the sentence as provided for confinement at hard labor for six months and forfeiture of $20 per month for a like period, and as thus modified ordered the sentence executed. Fort Amador, Canal Zone, was designated as the place of confinement. The sentence was published in General Court-Martial Orders No. 5, Headquarters Panama Coast Artillery Command, January 20, 1942.

3. The evidence shows that in September, 1941, the accused was confined in the guardhouse at Fort Amador, Canal Zone, under sentence of court-martial to serve for six months. On or about September 2, 1941, he reported for sick call (R. 20), and at 2 o'clock p.m., the commander of the guard took him to the hospital, where he was admitted as a patient for observation and treatment (R. 20-23). There were other prisoners in the hospital "without sentry" and no guard or sentry for the accused was thought necessary by the sergeant of the guard. No receipt was taken for the accused (R. 22). There were no written instructions posted in the hospital with reference to the restriction of prisoners, and Private George McCarthy, Medical Department, who was wardman on the upper floor of the hospital, testified that he did not think that prisoners were warned not to leave the upper floor (R. 14). Captain Harold E. Upsahl, Medical Corps, who was in charge of the hospital ward to which accused was assigned, when asked, "Under what restraint was the accused", replied,

> "No restraint. We don't use restraint of any kind — it's an open ward. *** There was no sentry on prisoner Lowry. *** It's a common understanding that a patient in the hospital is not supposed to leave the ward — that's a very common understanding." (R. 25-26)

On September 11, 1941, at about 10 p.m., accused left the hospital without permission (R. 24).

4. While the evidence shows that accused was taken from the guardhouse and admitted to the hospital as a patient, it does not show that any explanation was made to him as to his status, or that there were posted in the hospital any written or printed instructions as to restrictions imposed upon patients who were under sentence of court-martial. Under a fair interpretation of the evidence it cannot be said that accused was "in confinement" within the meaning of Article of War 69, that he "escaped from confinement" at the time he left the hospital, or that he was guilty of violation of this Article of War. Confinement imports some physical restraint, and the definition of escape in violation of Article of War 69, as laid down in paragraph 139b, Manual for Courts-Martial, 1928, is intended to exclude the case of a prisoner "paroled to work in certain limits" who, when not under physical restraint, leaves his place of duty and the station where he is serving his sentence (sec. 1524, p. 754, Dig. Ops. J.A.G. 1912-1930).

The evidence that accused was absent without leave between the dates alleged in the Specification of Charge I is clear and conclusive and sustains the findings of the court.

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of Charge II and its Specification, is legally sufficient to support the findings of guilty of Charge I and its Specification as modified by the court; and legally sufficient to support only so much of the sentence as involves confinement at hard labor for twelve days and forfeiture of two-thirds pay for a like period.

L. M. Smith, Judge Advocate.

Charles C. Van Benschoten, Judge Advocate.

William A. Ignacio, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D.C.

Board of Review
CM 219844

MAR 20 1942

UNITED STATES	)	AIR CORPS TECHNICAL TRAINING COMMAND
v.	)	Trial by G.C.M., convened at Chanute Field, Illinois, January 29, 1942. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private EDMUND A. MILOSZEWSKI (15058988), 36th School Squadron.	)	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and McCLAIN, Judge Advocates.

1. The record of trial in the case of the soldier named above, which has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings in part and sentence in part, has been examined by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused pleaded not guilty to, and was found guilty of, all Specifications and Charges. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, ordered its execution but suspended the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement.

3. The only question requiring consideration is the sufficiency of the record to support the findings of guilty of the Additional Charge and its Specification.

The Specification, Additional Charge, alleges an offense committed on December 23, 1941. That Charge and Specification are typed on the charge sheet following the original Charge and its Specifications. The charge sheet, dated December 19,

1941, bears only one signature of an accuser and only one affidavit. The Charges and Specifications were sworn to on December 19, 1941. The accompanying papers contain an indorsement dated December 19, 1941, referring to the investigating officer, "the charges herewith dated December 19, 1941". It is apparent, therefore, that the Additional Charge and its Specification were placed on the charge sheet after the original Charge and its Specifications had been signed, sworn to, and referred for investigation, and that the Additional Charge and its Specification were neither signed by an accuser nor sworn to by him at any time.

Article of War 70 provides in part -

> "Charges and specifications must be signed by a person subject to military law, * * *."

This provision of law is mandatory and is a prerequisite to trial by a court-martial (see CM 198108, Casey). In the absence of compliance with that provision with respect to the Additional Charge and its Specification, the court was not vested by Congress with power to try the offense charged and the finding thereunder is absolutely void (see Deming v. M'Claughry, 113 Fed. 650).

The Board of Review is, therefore, of the opinion that the findings of guilty under the Additional Charge and its Specification are void and of no effect.

4. The maximum punishment for the offense alleged in Specification 1 of the Charge - failure to obey the order of a noncommissioned officer - is confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period, and for the offense alleged in Specification 2 of the Charge - failure to obey the order of a superior officer - confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period. Dishonorable discharge and total forfeitures are authorized where an accused is found guilty of two or more offenses for none of which dishonorable discharge is authorized, if the authorized confinement without substitution for such offenses is six months or more (par. 104 c, p. 101, M.C.M., 1928).

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of the Additional Charge and its Specification; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for nine months.

Since the conviction in this case is not of an offense involving moral turpitude or affecting the civil status of the accused, remedial action may be taken in the War Department in compliance with the policy directed by the Secretary of War in his approval of the opinion of The Judge Advocate General of April 13, 1923 (250.404 Review 4-13-23), relative to action under Article of War 50½.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

Board of Review
CM 219946

MAR 18 1942

UNITED STATES v. Privates BENJAMIN F. TRACZ (12008539), Company A, 5th Infantry; JOSEPH J. BARONE (6150277), Detachment Quartermaster Corps, Camp Paraiso, Canal Zone; JOHNNIE B. HARRISON (7083359), Company G, 5th Infantry.	PANAMA MOBILE FORCE Trial by G.C.M., convened at Camp Paraiso, Canal Zone, October 16, 1941. Tracz: Dishonorable discharge and confinement for two and one-half (2½) years. Barone and Harrison: Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and McCLAIN, Judge Advocates.

1. The record of trial in the cases of the soldiers named above has been examined by the Board of Review.

2. The cases of the three accused, with their consent, were consolidated and tried in one proceeding.

The accused were tried each respectively upon the following Charge and Specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Benjamin F. Tracz, Co. A. 5th Inf., a prisoner, having received a lawful command from Captain Dexter Lowry, 5th Infantry, his superior officer, to move from the large cell block to the small one, did, at Camp Paraiso, Canal Zone, on or about September 17, 1941, willfully disobey the same.

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Joseph J. Barone, Det. Q.M.C., Camp Paraiso, C.Z., a prisoner, having received a lawful command from Captain Dexter Lowry, 5th Infantry, his superior officer, to move from the large cell block to the small one, did, at Camp Paraiso, Canal Zone, on or about September 17, 1941, willfully disobey the same.

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Johnnie B. Harrison, Co. G, 5th Inf., a prisoner, having received a lawful command from Dexter Lowry, Captain, 5th Infantry, his superior officer, to move from the large cell block to the small one, did, at Camp Paraiso, Canal Zone, on or about September 17, 1941, willfully disobey the same.

Each pleaded not guilty to and was found guilty of the respective Charge and its Specification. Evidence was introduced of two previous convictions of Tracz: a. willful disobedience of the order of a noncommissioned officer, attempting to strike a noncommissioned officer, using threatening and insulting language toward a noncommissioned officer, and breach of restriction; b. acting with disrespect to a superior officer, wrongfully striking a noncommissioned officer, and drunk and disorderly in camp; and of one previous conviction of Harrison, carrying a concealed dangerous weapon. Each accused was sentenced to be dishonorably discharged, 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, in the case of Tracz, only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two and one-half years; in the case of Barone and of Harrison, only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, was designated as the place of confinement of each accused, and the record of trial was forwarded for action under Article of War 50½.

3. The evidence, so far as requires consideration here, shows

that the three accused were, on September 17, 1941, in confinement in the large cell block in the guardhouse, Post of Camp Paraiso, Canal Zone. The Police and Prison Officer, Captain Dexter Lowry, Infantry, directed his Provost Sergeant, Sergeant Stickan, to move the three accused from the large to the small cell block. Captain Lowry testified that shortly thereafter the Sergeant told him that those three men refused to move to the small cell block. Captain Lowry then entered the large cell block, went to each accused in turn, and gave each a direct order to move to the small cell block. Tracz and Harrison each stated his refusal to obey the order. Barone failed to obey the order until two members of the guard were called in and aligned themselves upon each side of him.

Upon cross-examination by the defense with respect to the order given Tracz, Captain Lowry stated:

"Q Why didn't you prefer charges against Tracz for disobeying Sergeant Stickan?

"A The reason I didn't prefer charges against Private Tracz —

"PROSECUTION: I object to that question; it is irrelevant and immaterial.

"DEFENSE: That question covers a pertinent point in the elements of the offense that must be established. What I am endeavoring to establish — I would rather have the question answered, and then, if the objection is sustained, I will answer the objection after the question has been answered. It can either stand in the record or be stricken from the record, according to the judgment of the court.

"LAW MEMBER: The question may be answered.

"A I didn't prefer charges against Private Tracz for disobeying Sergeant Stickan because it was then a minor offense, that is, the disobedience of the order of a noncommissioned officer, as compared with the major offense of direct disobedience of the order of a superior officer while in the performance of his duty. (R. 16-17.)

Upon cross-examination by the defense with respect to the order given Barone, Captain Lowry stated:

"Q Why didn't you prefer charges against Private Barone for failing to obey the orders of a noncommissioned officer?
"A I didn't prefer charges because I wanted to give him —
"PROSECUTION: If it please the court, I object to that question; it is immaterial.
"LAW MEMBER: The objection is not sustained.
"A — I wanted to give him an opportunity to think it over, for one thing; for another thing, after he had failed to obey my order to move from the large cell block to the small cell block, I remembered that the Manual for Courts-Martial is fairly specific that you don't clutter up the charge sheet with minor charges when there are major charges to prefer.
"Q Did you believe that this should be a major charge?
"A I thought, and still think, that any prisoner who directly and flatly refuses to obey the order of a Prison Officer, does commit a major breach of discipline.
"Q Then the reason for the order was to be sure that the maximum penalty was inflicted for disobedience — is that correct?
"A That is correct.
"PROSECUTION: I object to that question as being immaterial.
"LAW MEMBER: Captain Bernard, by that last question, what are you attempting to prove?
"DEFENSE: At the bottom of page 148 of the Manual — I didn't want to refer to this previously, because it would reveal the purpose of my questions — at the bottom of the page, it states: (reading to the court the last sentence on page 148 of the Manual.) It seems to me, therefore, that in the cases of Private Tracz and Private Barone, the answers of the witness, who is the accuser, have clearly indicated that that order was given merely to change the penalty for their disobedience, their recalcitrance, or their reluctance, to move into the cell block, from six months to five years, and that does not seem to be justice under that para-

graph. If they disobeyed the noncommissioned officer, they should have been tried for that, and not have some officer come in and give them some order to accomplish some end for the sole purpose of increasing the sentence. That is what I had in mind in putting those two questions, and therefore I move - - if such a motion is in order — that this charge be thrown out, in view of the testimony of the accuser, and that charges be preferred against them in the proper manner, and under the proper Article of War.

"LAW MEMBER: The motion is overruled at this time." (R. 24-25.)

4. The giving of the orders and the disobedience thereof, as alleged, are established. It positively appears, however, that the orders were given by Captain Lowry for the sole reason that he wished to subject accused to the maximum punishment imposable under the Articles of War for disobedience of orders and that when giving the orders he expected that accused would disobey them. The officer's testimony, as quoted above, related particularly to the order given to accused Barone, but upon the whole record it is clear that all of the orders were given for the same reason and with the same motive. The last sentence of the second subparagraph of paragraph 134 b, Manual for Courts-Martial, provides -

"* * * Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article."

It follows that the orders were unlawful under the circumstances and the disobediences involved were not punishable under Article of War 64 (CM 219176, Jordan).

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

Board of Review
CM 219972

MAR 16 1942

UNITED STATES	5th INFANTRY DIVISION
v.	Trial by G.C.M., convened at Fort Custer, Michigan, January 8 and 13, 1942. Dishonorable discharge and confinement for one and one-half ($1\frac{1}{2}$) years. Penitentiary.
Private EDWARD ROBERTSON (36101776), Company D, 1609 Corps Area Service Unit (RRC).	

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and McCLAIN, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Pvt. EDWARD ROBERTSON, Co. D, 1609 C.A.S.U., (RRC), Fort Custer, Michigan, did, at Barracks 920, Co. D, 1609 C.A.S.U., (RRC), Fort Custer, Michigan, on or about November 3, 1941, feloniously take, steal, and carry away one E Flat Alto Saxaphone (Buescher), value about $30.00, the property of Pvt. CARSBY DIXSON, Co. D, 1609 C.A.S.U., (RRC), Fort Custer, Michigan.

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

Specification: In that Pvt. EDWARD ROBERTSON, Co. D, 1609 C.A.S.U., (RRC), Fort Custer, Michigan, having been duly placed in arrest at quarters, on or about November 11, 1941, did, at Barracks 920, Co. D, 1609 C.A.S.U., (RRC), Fort Custer, Michigan, on or about November 12, 1941, break his said arrest before he was set at liberty by property authority.

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

Specification: In that Pvt. EDWARD ROBERTSON, Co. D, 1609th C.A.S.U., (RRC) Fort Custer, Michigan, having been restricted to the limits of Fort Custer, Michigan, did at Fort Custer, Michigan, on or about November 11, 1941, break said restriction by going to the Junction of Highways 78 and 12 at or near Battle Creek, Michigan.

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

Specification: In that Private Edward Robertson, Company D, Recruit Reception Center, Fort Custer, Michigan, having duly been placed in confinement in Ward 17 (Prison Ward) of the Station Hospital, Fort Custer, Michigan, did, on or about January 1, 1942, escape from the said confinement before he was set at liberty by proper authority.

He pleaded not guilty to Charge I and its Specification, Charge II and its Specification, Charge III and its Specification, and guilty to the Additional Charge and its Specification, and was found guilty of all Charges and Specifications. No evidence of previous conviction was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years. The reviewing authority approved the sentence, designated the United States Penitentiary, Terre Haute, Indiana, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence sustains the findings of guilty of Charge II and its Specification, Charge III and its Specification, and of the Additional Charge and its Specification.

4. With respect to the remaining Charge, Charge I and its Specification, alleging larceny of a saxophone, the evidence for the prosecution is substantially as follows:

Private Carsby Dixon (so shown in record (R. 14)), Company D, Recruit Reception Center, Fort Custer, Michigan, was the owner of an E-Flat Alto saxophone, No. 99594, of Buescher make, which he left on the shelf by his bed in building 920

(R. 14-21, 58) at the time he went to the hospital on October 20, 1941. The saxophone and case, together with his clothing, were turned in to the supply sergeant and stored in a large room in building 920 (R. 34). Later all of the property then in that room was moved to building 916 (R. 29, 35). Upon his return from the hospital, November 3, 1941, Dixon received his barracks bag from the place where it had last been stored, but the saxophone and case were missing (R. 57, 62-63). Accused was in and around building 920 on October 23rd when the move to building 916 took place and was one of several soldiers who moved into this room in building 920 in which the saxophone and case were originally stored (R. 62, 66, 72).

On November 11, 1941, the accused and two other soldiers (Norman and Walker (R. 87)) were waiting at the junction of highways 12 and 78 near the post, when Dixon and two other soldiers drove up in a car en route to Albion, Michigan. The car stopped and the accused and the other two men were offered a ride. One of the men with accused was carrying a saxophone case which Dixon then recognized as his property. The soldier who was carrying the case containing the saxophone said it belonged to accused (R. 22-23). Accused then stated that he had gotten it from "Jim" who worked in Battle Creek, Michigan, at the Club 76 (R. 23, 44, 66).

All of the men returned to Fort Custer and the matter was reported to First Sergeant Hammonds (R. 24). Accused, Dixon, Robinson, and Sergeant Hammonds then went to the Club 76 in Battle Creek to look for this man "Jim", but could not locate him (R. 11, 20, 67). They then went to a tavern and to a dance hall, The Casino Club, but could not find Jim (R. 67).

5. Defense:

The accused elected to be sworn and to answer any questions the court saw fit to ask. The defense counsel stated he did not desire to ask any questions. The court waived any questions at that time.

Upon examination by the prosecution, the accused identified his signature to a letter to Captain Peterson, Company D, R.R.C., dated November 18, 1941, which was received in evidence as Exhibit D (R. 85). In that letter accused stated that he left the post without permission to find the boy who gave him the horn to keep. He asked the help of Captain Peterson

at his trial and requested him to stop at the stockade so that accused might talk with him.

Upon identification of the signature by accused, the prosecution offered in evidence a statement dated November 17, 1941, which was received in evidence as Exhibit E (R. 85), reading as follows:

"STATEMENT

"The following synopsis of testimony can be expected in case of Private Edward Robertson, 36101776, in case of Private Edward Robertson, 36101776

"Private Edward Robertson, 36101776

"'While downtown Tuesday, November 11, 1941, a man I knew by the name of Jim called me; I went across the street and he told me that he wanted me to keep his horn until he called for it; that he was on his way to get a job at the Casino Bar. I took the case from him and gave it to one of the two soldiers that were with me and we started walking towards Highway No. 78. While standing at the junction of 78 and 12 a car came alongside of us carrying Private Robinson, Biggs and Dixon. They told us to get in the car that we could ride as far Albion. When we got in the car Private Dixon asked the soldier carrying the horn where he got it. The soldier replied, "Ask Robertson, it belongs to him". Dixon took the case and opened it and said that it was his horn. I told him that if the horn was his he could have it. We drove back to Fort Custer where Dixon reported the case to the first sergeant, Sergeant Hammonds. We returned to town to try and locate the man by the name of Jim but we could not find him'.

(Sgd.) Edward Robertson
Edward Robertson, 36101776,
Pvt. Co. 'D', 1609th CASU.,
Fort Custer, Michigan.

"Subscribed and sworn to before me on this

twenty-second day of November, Nineteen hundred and forty-one.

(Sgd.) Eldon M. Stenjem
ELDON M. STENJEM
Major, Infantry
Investigating Officer"

The accused then testified upon examination by the prosecution that on November 11, 1941, he had gone into Battle Creek to wire some money to his wife; that two soldiers, Norman and Walker, were with him when Jim, with whom accused had played five nights at the Club 76, told them he was looking for a job, and asked accused to keep the horn at the Fort until he called for it in a few days; that Norman said that he would carry the horn and had it when they got into the car, and that after Dixon "jumped" the man for carrying Dixon's horn, the accused said the one to blame was the fellow downtown who works at the Club. He tried to get Sergeant Hammonds to get the two soldiers in and take their testimony but the Sergeant refused and the soldiers were now in Virginia. When Lieutenant Hopkins came in, accused asked him to get the testimony of the two boys, but Lieutenant Hopkins said that he did not need it. Accused went to Battle Creek on November 11th (on which date he was charged with breach of restriction) and was informed that Jim was living in Kalamazoo. Accused went to Kalamazoo on November 12th, found Jim walking the street, called Captain Peterson and told him he had located Jim. Captain Peterson told him to have Jim arrested, but the police wouldn't arrest Jim because Jim told them that he had loaned this fellow money on the horn. Accused told counsel of the Kalamazoo incident and the names of the two soldiers who were with him when Jim gave him the saxophone (R. 86-90).

6. The only proof tending to connect the accused with the larceny alleged is the fact that accused admitted having the saxophone in his possession.

Proof that a person was in possession of recently stolen property, if not satisfactorily explained, may raise a presumption that such person stole it (par. 112, p. 110, M.C.M., 1928; Dig. Ops. JAG 1912-30, sec. 1575 (2)).

The only proof that the saxophone was in the possession of accused is found in his statement to the investigating officer and in his own testimony. The accused in his statement and testimony insisted that he had received the saxophone and case from Jim, who at a casual meeting asked accused, in the presence of two soldiers, Norman and Walker, to keep it for a few days. The proof that a person known as Jim actually existed, that accused asked Lieutenant Hopkins immediately after he was taken to his company to get the testimony of the two boys who were with him, that he breached his restriction, found Jim in Kalamazoo and, upon the advice of his company commander, tried to have the police arrest Jim, constitute, in the opinion of the Board of Review, a sufficient explanation of his possession of the saxophone as to negative the presumption of guilt arising solely from the fact of such possession.

It may be added that failure of the defense counsel, the trial judge advocate, and of the court, to take any steps to secure the attendance or the depositions of the soldiers Norman and Walker, in view of the testimony of accused of his repeated requests to secure the benefit of their testimony as to the manner in which he received possession of the saxophone, deprived accused of the opportunity of substantiating the truth of his statements with respect to the innocent receipt of the saxophone from Jim. While his statements did not amount to a formal demand that the two soldiers be summoned, as was true in the case of Swan, where the denial by the court of the demand of accused to have summoned a clearly material and important witness was held ground for disapproval of the sentence (Dig. Ops. JAG 1912, p. 559-560, sec. XIV E 9 a (1)), the failure to afford accused any assistance tends to add weight to the sufficiency of his explanation of his possession of the saxophone.

In the opinion of the Board of Review the record of trial is not legally sufficient to support the findings of guilty of Charge I and its Specification.

7. The maximum punishment authorized for breach of arrest (Spec., Chg. II) is confinement at hard labor for three months and forfeiture of two-thirds pay per month for a like period; for breach of restriction (Spec., Chg. III), confinement at hard labor for one month and forfeiture of two-thirds pay for a like period; and for escape from confinement (Spec., Add. Chg.), dishonorable discharge, forfeiture of all pay and allowances due or to become

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

8. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge I and its Specification, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year and four months.

_____, Judge Advocate.

Chas. L. Bresson, Judge Advocate.

Riley McGann, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 220061

MAR 19 1942

UNITED STATES	)	SOUTHEAST AIR CORPS TRAINING CENTER
v.	)	
Private ALBERT BARNES (39009089), Company E, 35th Quartermaster Regiment.	)	Trial by G.C.M., convened at Turner Field, Georgia, January 8, 1942. Dishonorable discharge (suspended) and confinement for two (2) years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and KOTRICH, Judge Advocates.

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

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

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

Specification: In that Private Albert Barnes, Company "E", 35th Quartermaster Regiment, did, without proper leave, absent himself from his Post and duties at Turner Field, Albany, Georgia, from about 6:00 P.M., December 6, 1941, to about 11:30 A.M., December 15, 1941.

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

Specification: In that Private Albert Barnes, Company "E", 35th Quartermaster Regiment, did, at Turner Field, Albany, Georgia, on or about December 6, 1941, feloniously embezzle by fraudulently converting to his own use the

> proceeds of a check of the value of Eight Dollars ($8.00), the property of William Jackson; the proceeds of a check of the value of Eight Dollars ($8.00), the property of Silas Smith; the proceeds of a check of the value of Ten Dollars ($10.00), the property of Willie R. Weeks; the proceeds of a check of the value of Six Dollars, Eighty-four cents ($6.84), the property of Samuel Drain; the proceeds of a check of the value of Ten Dollars ($10.00), the property of Willie Cooper; the proceeds of a check of the value of Eight Dollars ($8.00), the property of Armond Johnson; the proceeds of a check of the value of Eight Dollars ($8.00), the property of Samuel Seals; the proceeds of a check of the value of Eight Dollars ($8.00) the property of Judge Jones; all of said property having been entrusted to him by the said respective owners thereof.

He pleaded guilty to Charge I and its Specification, and not guilty to Charge II and its Specification. He was found guilty of Charge I and its Specification and of Charge II, and guilty of the Specification, Charge II, "except for the words, 'the proceeds of a check of the value of Six Dollars and Eighty-Four Cents ($6.84), the property of Samuel Drain'. Of the excepted words, Not Guilty, and of the remaining words, Guilty". No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years. The reviewing authority approved the sentence, remitted one year of the period of confinement, ordered execution of the sentence as thus modified but suspended the execution of that portion thereof adjudging dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 15, Headquarters Southeast Air Corps Training Center, February 21, 1942.

3. The evidence shows that at about 2 p.m., Saturday December 6, 1941, at Turner Field, Georgia, seven colored employees of the Officers' Mess at the field turned over to accused, individually but at about the same time, their seven pay checks drawn by the mess officer on the Albany Exchange National Bank, Albany, Georgia. The employees indorsed the checks and asked accused

to have them cashed. Accused was on duty as a truck driver for the mess. He accepted the checks for the purpose indicated and agreed to return to the field within a short time with the money proceeds (R. 14-23). The names of the employees and the amounts of their respective checks were as follows:

Name	Amount
Silas Smith	$ 8.00 (Ex. A)
William Jackson	8.00 (Ex. B)
Willie R. Weeks	10.00 (Ex. C)
Willie Cooper	10.00 (Ex. D)
Samuel Seals	8.00 (Ex. E)
Judge Jones	8.00 (Ex. F)
Armond Johnson	8.00 (Ex. G)

Six of these employees testified that accused did not return to them with the money (R. 14, 15, 18, 19, 21). Accused absented himself without leave at 6 p.m. on December 6 and remained absent until 11:30 a.m., December 15, 1941 (Ex. I). On December 8 the officer who made the checks attempted, without success, to stop payment on them (R. 11, 12). The checks were later returned to the officer, cancelled and paid (R. 12). Each of the checks bore perforations showing payment by the drawee bank, five of them on December 10, one on December 13 and two on December 15, 1941. Four of the checks paid by the bank on December 10 were indorsed with the name "Albert Barnes". All had been deposited in bank by commercial concerns (Exs. A-G). One of the employees testified that accused had "cashed" witness' check but this testimony was manifestly only a conclusion of the witness (R. 15).

Accused declined to testify or make an unsworn statement.

4. The evidence together with the pleas of guilty establishes absence without leave for nine days, as alleged in the Specification, Charge I.

The evidence also shows, with respect to Charge II and its Specification, that at the place and time alleged there were intrusted to accused seven checks of the ownership and values found by the court, and that accused did not, as he had agreed, return to the owners the money or other proceeds of such checks. It is not proved that accused cashed the checks. There is no competent evidence as to the manner in which they left his possession. The name of accused appears on four of the checks

but there is no evidence that this name was written by accused. The original receipt and possession by accused of the checks together with the fact of their subsequent negotiation does not establish an adequate basis for an inference that accused indorsed or cashed them. From all the circumstances it might be conjectured that accused received and converted to his own use the proceeds of the several checks, but conjectures will not suffice. It would be reasonable, on the evidence, to infer that accused embezzled the checks themselves rather than the proceeds. If he did so, his offense was wholly distinct from that charged and his conviction upon the present charges would involve a fatal variance (CM 217383, Nelson; CM 188571, Simmons; CM 185034, Pitt). In the opinion of the Board of Review there is no substantial evidence that accused received the proceeds of the checks or that he converted such proceeds to his own use, as found by the court under Charge II and its Specification.

5. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, but legally 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 involves confinement at hard labor for twenty-seven days and forfeiture of eighteen days pay.

Robert H. O'Farrell, Judge Advocate.

Charles M. Van Benschoten, Judge Advocate.

E. J. Patrick, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 220160

MAR 25 1942

UNITED STATES	)	CAMP WHEELER, GEORGIA
v.	)	Trial by G. C. M., convened at Camp Wheeler, Georgia, January 30 and 31, 1942. Dismissal.
First Lieutenant (Chaplain) MATTHEW C. FAULKNER (0-406252), 16th Training Battalion.	)	

OPINION of the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and KOTRICH, Judge Advocates.

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.

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

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

Specification: In that First Lieutenant (Chaplain) Matthew C. Faulkner, Sixteenth Training Battalion, Camp Wheeler, Georgia, did, at Macon, Georgia, on or about January 8, 1942, wrongfully and unlawfully make and utter to himself, a certain check, in words and figures as follows, to wit: Forty five and no/100 dollars ($45.00), and by means thereof, did fraudulently obtain from the Citizens and Southern National Bank of Macon, Georgia, forty five dollars ($45.00), he the said First Lieutenant Faulkner, then well knowing that he did not have and not intending that he should have sufficient funds in the Citizens and Southern National Bank for the payment of said check.

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

Specification 1: (Finding of not guilty)

Specification 2: (Stricken by court)

He pleaded not guilty to Charge I and its Specification and to Charge II and Specification 1 thereunder. On a special plea that Specification 2, Charge II, did not state an offense within the "province" of Article of War 96, the court ordered that Specification stricken. Accused did not plead to the general issue and the court did not make a finding as to this Specification. (R. 10) Accused was found guilty of Charge I and its Specification and not guilty of Charge II and Specification 1 thereunder. 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 50½, rather than for action under Article of War 48.

3. The evidence shows that on January 8, 1942, at Macon, Georgia, accused presented to a teller of the Citizens and Southern National Bank of that city his check on the bank for $45, payable to himself, and asked that it be cashed. Accused had a checking account with this bank. The teller stated that he did not know accused and suggested that accused secure approval of payment by an assistant cashier, a Mr. Walker. When accused went to Walker the latter asked him "if the money was in the bank". Accused replied in the affirmative and Walker, in reliance on this statement, initialed the check for payment. The teller then paid to accused the amount of the check. (R. 14, 15, 19-21, 38; Pros. Ex. 1) Accused had an arrangement whereby his pay checks were deposited in the bank to his credit. His pay in the amount of $263.87 had been thus deposited on December 31, 1941. His balance had been reduced, however, to $211.52 on this date through a previous overdraft as described below, and on January 2, 1942, it had been reduced by two debits to $36.52. On January 5 it had been reduced by two more debits to $5.52. No further deposits had been made prior to January 8. (R. 15, 19; Pros. Ex. 2) The cashing of the check resulted in an overdraft of $39.48 (R. 16; Pros. Ex. 2). The bank advised accused by mail of the overdraft and on January 13 a deposit of $40 was made to cover it (R. 21; Pros. Ex. 2). About December 7, 1941, at a time at which accused had on deposit a balance of $72.65, the bank had cashed for accused his check for $125 (R. 18, 19; Def. Exs. A, B), and had held the check "with the

cash items in the bank" and had charged it to the account of accused on December 31. The assistant cashier of the bank testified with respect to this transaction that he had "felt reasonably sure" the customary deposit of accused's pay check would be made at the end of the month (R. 18). A statement of the account, showing the overdraft transaction and showing the balance on December 31 of $211.52, was received by accused on December 31, 1941, or early in January, 1942 (R. 57).

Accused testified that some time prior to January 8, 1942, he had received for safekeeping $25 in money belonging to a Private Kennedy (R. 27), and had used the money (R. 45). On January 7 Kennedy asked for his money and accused cashed the check for $45 on the following day for the purpose of making reimbursement. He believed he had funds on deposit sufficient to meet the check (R. 37), and believed he was speaking truthfully when he told Walker that he had the necessary funds on deposit (R. 38). He also testified that prior to October, 1941, he had not had a checking account with any bank. He did not keep a written record of his checks and filled out the stubs in his check book on only one or two occasions. The bank in question loaned him $300 at one time (R. 48). He cashed the check for $125 in December, 1941, without speaking to anyone about it (R. 47, 48). His commanding officer had spoken to him two or three times subsequent to July, 1941, about his financial affairs. Accused may have lived somewhat beyond his income (R. 43).

4. It was proved without contradiction that at the place and time alleged accused made and presented for payment his check for $45, of the description set forth in the Specification, Charge I, and that by means of the check he obtained the sum mentioned from the Citizens and Southern National Bank of Macon, Georgia, the bank on which the check was drawn. It is admitted by accused that the check was cashed at a time at which he did not have sufficient funds in the bank to pay it, but he asserts that in presenting the check he did not know that his balance was insufficient.

Despite the assertion by accused of his ignorance as to the state of his account, the Board of Review is convinced from all the evidence that accused did in fact know that his balance was insufficient to pay his check. The amount on deposit was small. A

very short time elapsed after the deposit of the pay check, and no further deposit was made. Accused was advised of his balance. The withdrawals were prompt and few. The check of January 8 was a substantial one for an account of its kind. The money obtained was acutely needed by accused. Such being the facts, it would tax credulity to accept as true the declaration by accused of his ignorance. On the other hand the evidence falls short of establishing beyond reasonable doubt that accused did not intend to have sufficient funds on deposit to pay the check at a later date or that he intended finally to defraud the bank. The bank had previously loaned him money and had permitted him to make a substantial overdraft. An official of the bank approved payment of the check of January 8 without verifying the balance in the account. Under these circumstances accused had reason to believe that any small overdraft would be carried by the bank pending the bank's receipt for deposit of accused's monthly pay check. Although the wrongful making and negotiation of the check by accused, knowing the state of his account, was an act which must be deemed to have discredited him in the eyes of the bank and was therefore conduct discreditable to the military service within the meaning of Article of War 96 (CM 202027, McElroy; CM 208870, Moore), the transaction did not plainly involve any such degree of fraud as to demonstrate moral unfitness of accused to continue as an officer (CM 213442, Due), or to constitute a violation of Article of War 95. The sentence to dismissal is legally authorized for violation of Article of War 96 but may properly be commuted to lesser punishment.

5. The Specification is inaptly drawn in that it alleges that accused did "utter to himself" the check in question. From the entire Specification it fairly appears, however, that it was intended to charge accused with having uttered the check to the bank, that is, with having presented it to the bank for payment. The case was tried upon this theory and accused could not have been misled. His substantial rights were not injuriously affected.

6. At the time the defense was afforded an opportunity to challenge members of the court an inquiry was made as to whether any member would be prejudiced against accused on account of the fact that he was of the colored race. No member disqualified himself and no challenge was submitted. Following arraignment the defense referred to the previous inquiry and submitted what was in effect a plea to the jurisdiction of the court on the ground that the membership of the court did not include a colored officer. The law

member properly overruled the plea. (R. 4, 6) No specific allegation of bias or hostility on the part of any particular member was made and there is nothing in the record of trial indicative of such bias or hostility.

7. The War Department records show that accused was 26 years of age at the time of the commission of the offense. He was appointed a first lieutenant, Chaplains-Reserve, on March 4, 1941, and was placed on active duty April 16, 1941.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed at the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of Charge I and its Specification as involves findings that at the place and time alleged accused did wrongfully and unlawfully make and utter the check described in the Specification, and by means thereof did obtain $45 from the Citizens and Southern National Bank of Macon, Georgia, well knowing that he did not have sufficient funds in said bank for the payment of said check, in violation of Article of War 96, and legally sufficient to support the sentence. Dismissal is authorized for conviction of violation of Article of War 96.

Richard W. Harvey, Judge Advocate.

Charles W. VanDenburgh, Judge Advocate.

J. R. Kilcrease, Judge Advocate.

1st Ind.

War Department, SOS, J.A.G.O., MAR 31 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant (Chaplain) Matthew C. Faulkner (0-406252), 16th Training Battalion.

2. I concur in the opinion of the Board of Review and, for the reasons therein stated, recommend that only so much of the findings of guilty of Charge I and its Specification be confirmed as involves findings that at the place and time alleged accused did wrongfully and unlawfully make and utter the check described in the Specification, and by means thereof did obtain $45 from the Citizens and Southern National Bank of Macon, Georgia, well knowing that he did not have sufficient funds in said bank for the payment of said check, in violation of Article of War 96. I recommend that the sentence be confirmed but inasmuch as the conduct of accused, though discreditable, did not involve any substantial degree of fraud and did not demonstrate moral unfitness of accused to continue as an officer of the Army, I recommend that the dismissal be commuted to a reprimand.

3. Inclosed are the draft of letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to confirm so much of the findings of guilty as involves findings of guilty of violation of Article of War 96 and to confirm the sentence to dismissal but commute it to a reprimand, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of Executive action.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 220177

MAR 19 1942

UNITED STATES	)	SEVENTH CORPS AREA
v.	)	Trial by G. C. M., convened at Fort Omaha, Nebraska, February 9, 1942. Dismissal.
First Lieutenant LARRY C. NELSON (0-321942), Quartermaster Corps.	)	

OPINION of the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and KOTRICH, Judge Advocates.

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.

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

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

Specification: In that First Lieutenant Larry C. Nelson, Quartermaster Corps, did, at Camp Joseph T. Robinson, Arkansas, on or about October 7, 1941, attempt to cause a claim to be made against the United States for travel performed by the said Lieutenant Nelson from Camp Joseph T. Robinson, Arkansas, to Omaha, Nebraska, on or about September 26 and 27, 1941, and from Omaha, Nebraska, to Camp Joseph T. Robinson, Arkansas, on or about October 1 and 2, 1941, by signing in blank a travel voucher therefor and by requesting Master Sergeant Ozro Keeton, Finance Detachment, Camp Joseph T. Robinson, Arkansas, to prepare such voucher specifying that said travel had been performed by rail, and to present said completed voucher, for approval, allowance and payment, to Major Joseph Harris, Finance Department, finance officer at Camp Joseph T. Robinson, Arkansas, an officer of the United

States, duly authorized to approve, pay and allow such claims; the said First Lieutenant Larry C. Nelson well knowing that such claim, attempted as aforesaid to be caused to be made, would have been false and fraudulent, in that said travel was not performed by rail but by government automobile.

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

Specification 1: In that First Lieutenant Larry C. Nelson, Quartermaster Corps, for the purpose of obtaining the approval, allowance and payment of a claim against the United States, sought to be made and presented to Major Joseph Harris, Finance Department, finance officer at Camp Joseph T. Robinson, Arkansas, an officer authorized to approve, pay and allow said claims, and with intent to deceive the said Major Joseph Harris, did, at Camp Joseph T. Robinson, Arkansas, on or about October 7, 1941, officially make, sign and cause to be transmitted to the said Major Joseph Harris, a certain written letter, in the following words and figures, to-wit:

"OFFICE OF THE UTILITIES OFFICE
Camp Joseph T. Robinson, Arkansas

In reply refer to: LCN/bd
QM 241 October 7, 1941

SUBJECT: Travel Pay
TO : Finance Office , Camp Joseph T. Robinson, Arkansas.

1. Pursuant to paragraph 2 Special Orders #224, travel was performed by rail at my own expense. Left Camp Robinson, September 26, 1941 and arrived Omaha Nebraska, September 27, 1941. Left Omaha October 1, 1941 and arrived Camp Robinson October 2, 1941.

2. It is requested that mileage be paid in accordance with the attached Special Orders.

/sig/
LARRY C. NELSON
1st Lt., QMC
Utilities Officer"

which said letter was false and fraudulent in that the travel therein mentioned was not performed by rail and at the expense of the said First Lieutenant Larry C. Nelson, but by government automobile and at the expense, in whole or in part, of the government, and was then well known by the said First Lieutenant Larry C. Nelson to be false and fraudulent.

Specification 2: (Finding of not guilty)

Specification 3: (Finding of not guilty)

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and its Specification and of Charge II and Specification 1 thereunder, and not guilty of Specifications 2 and 3, Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The findings and sentence were not announced in open court. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence shows that during September and October, 1941, and for sometime prior thereto, accused, a reserve officer, was on active duty at Camp Joseph T. Robinson, Arkansas, as Camp Utilities Officer (R. 8, 32). On September 24, 1941, at the request of accused, a travel order was issued by the camp commander, directing accused to proceed to Omaha, Nebraska, in connection with Regular Army activities, and upon completion of temporary duty there to return to Camp Joseph T. Robinson (R. 8, Ex. C). He left the camp pursuant to this order on September 26, 1941, in a Government automobile. On October 1, 1941, he and a Miss Dull, a Government employee, were seen at Fort Leonard Wood, Missouri, in what appeared to be a Government automobile (Ex. J). Accused returned to Camp Joseph T. Robinson on October 2, 1941 (Ex. E). Accused stated to various witnesses prior to the trial that he made the entire journey by Government automobile (R. 11, Exs. F, G, J). Before his departure from Camp Joseph T. Robinson accused "cautioned" another officer, a subordinate in the Utilities Office, "not to make any statements outside of the office as to his method of travel because he did not want his wife to know that he was going to Omaha by government automobile as she would want to go with him" (Ex. G). Miss Dull was seen with accused at Omaha, Nebraska, as well as at Fort Leonard

Wood, Missouri, during the period of the journey (R. 23, 35, 36, 38-42). No record of a "trip ticket" was made at the camp covering the journey (Ex. G). On October 7, 1941, accused appeared in the office of Major Joseph Harris, Finance Department, the Finance Officer, Camp Joseph T. Robinson, an officer authorized to approve and pay claims for travel, and requested the chief clerk, Master Sergeant Ozro Keeton, Finance Detachment, Camp Joseph T. Robinson, to prepare a travel voucher for travel performed by rail at accused's own expense from Camp Joseph T. Robinson to Omaha, and return, and then to present it for payment to the Finance Officer mentioned. Accused signed a mileage voucher (Standard Form No. 1071) in blank and left it with Sergeant Keeton. In support of the voucher and for transmittal with it accused submitted to Sergeant Keeton (R. 9) a letter reading as follows:

"OFFICE OF THE UTILITIES OFFICE
Camp Joseph T. Robinson, Arkansas.

In reply refer to: LCN/bd
QM 241 October 7, 1941

SUBJECT: Travel Pay
TO : Finance Office, Camp Joseph T. Robinson, Arkansas.

1. Pursuant to paragraph 2 Special Orders #224, travel was performed by rail at my own expense. Left Camp Robinson, September 26, 1941 and arrived Omaha Nebraska, September 27, 1941. Left Omaha October 1, 1941 and arrived Camp Robinson October 2, 1941.

2. It is requested that mileage be paid in accordance with the attached Special Orders.

/sgd/ Larry C. Nelson
LARRY C. NELSON
1st Lt., QMC
Utilities Officer

Incl. 1
Special Orders #224." (Ex. E)

The voucher and letter were turned over to Major Harris by Sergeant Keeton pursuant to instructions the officer had previously given to let him see any such voucher presented by accused (R. 9, 10). The voucher and letter were received in evidence (Exs. D, E).

Major Harris turned the voucher and letter over to the camp commander for investigation (R. 11-14). Shortly thereafter accused, without being summoned, asked for permission to speak to the camp commander, and voluntarily stated that "he had put in the voucher knowingly, that he had done it on purpose to bring out certain facts which he thought should be brought out, because people were persecuting him" (R. 11). He also stated that he was subjected to a "whispering persecution by women at the post" (R. 16), that the voucher was not correct, and that he had gone to Omaha by Government conveyance (R. 11). The camp commander, believing that accused was "either somewhat off - or either off or very dumb" (R. 49), caused accused to be admitted to the post hospital for observation (R. 15, 44, 45). Accused was in the hospital from October 8 to October 17, 1941, under observation of medical officers, one of whom was a psychiatrist, but no mental disease or disorder was found (R. 50-62).

Accused did not testify or make an unsworn statement.

Medical officers testified for the defense that while under observation accused complained of being tired from overwork. They also testified that he suffered somewhat from insomnia and a gastric complaint which may have been due to mental strain (R. 56, 64, 65), and that accused stated that he submitted the voucher in question to the Finance Officer in order that he might determine who was responsible for creating embarrassment about his association with Miss Dull (R. 57). Other officers testified for the defense that during the latter part of September and the early part of October, 1941, accused worked hard and that he gave evidence of being nervous (Exs. M, N). One of these officers stated that accused showed signs of being under a strain and had a tendency to "blow up" (Ex. M). Three officers, including the camp commander, Camp Joseph T. Robinson, testified that accused was a very efficient officer and had performed his duties well (R. 32, 46, 62).

4. The uncontradicted evidence establishes that at the place and time alleged accused attempted to cause a claim against the United States to be made by signing and presenting for payment the mileage voucher described in the Specification, Charge I, covering rail travel from Camp Joseph T. Robinson, Arkansas, to Omaha, Nebraska, and return, and that in support of the voucher he presented the letter set forth in Specification 1, Charge II. The travel

in question had not been performed by rail, and the voucher and letter were, therefore, false and fraudulent to this extent. The difference between the amount falsely claimed for travel by rail and the amount to which accused was lawfully entitled for travel by Government conveyance, was about $44.36. The attempted fraud was manifestly deliberate and preconceived. The essential elements of the offenses charged under these Specifications were fully proved. The action of accused in connection with the making and presentation of the letter with its false statement in support of his fraudulent claim was clearly conduct unbecoming an officer and a gentleman within the meaning of Article of War 95. The explanation by accused of his presentation of the voucher and letter was patently illogical and forms no basis of excuse or extenuation.

5. War Department records show that accused was 33 years of age at the time of the commission of the offenses. He was appointed a second lieutenant, Quartermaster Corps Reserve, on September 6, 1934, and promoted to first lieutenant on October 21, 1938. He has been on extended active duty at Camp Joseph T. Robinson, Arkansas, since September 26, 1940.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of 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 of dismissal is mandatory upon conviction of violation of Article of War 95.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

SPJGH
CM 220179

APR 15 1942

UNITED STATES)	THIRD AIR FORCE
)	
v.)	Tried by G.C.M., convened at
)	Morrison Field, West Palm
Captain GEORGE S. OBEAR,)	Beach, Florida, January 19,
III (0-272213), Air Corps.)	20, 21 and 22, 1942. Dis-
	missal.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and HALE, Judge Advocates.

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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.

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

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

Specification: In that Captain George S. Obear III, Air Corps, did, at Lake Worth, Florida, on or about December 20, 1941, with intent to do him bodily harm, wrongfully and feloniously commit an assault and battery upon First Lieutenant Raymond H. Martin, Air Corps, by shooting him in the abdomen with a dangerous weapon, to wit, a pistol or gun.

CHARGE II: Violation of the 95th Article of War. (Finding of not guilty.)

Specification: (Finding of not guilty.)

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

Specification: In that Captain George S. Obear III, Air Corps, did, at Lake Worth, Florida, on or about December 20, 1941, render himself unfit for duty by excessive use of intoxicants.

CHARGE IV: Violation of the 95th Article of War.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of the Specification, Charge I, except the words "wrongfully feloniously", guilty of Charge I; guilty of Charge III and its Specification; not guilty of Charge II and its Specification, and not guilty of Charge IV and its Specification. He was sentenced to be dismissed the service. The findings and sentence were not announced. The reviewing authority approved the sentence, and forwarded the record of trial for action under the 48th Article of War.

3. The testimony for the prosecution shows that First Lieutenant Raymond H. Martin, Air Corps, at Morrison Field, West Palm Beach, Florida, shortly after noon, December 20, 1941, invited the accused to go fishing in Martin's boat. Lieutenant Martin picked up accused and took him to the boat. Accused introduced there Lieutenant Martin to a civilian, Lee LaBrot, who was working on his own boat. Martin took along a bottle of rum and accused a half bottle of rye. The accused gave Martin and LaBrot a drink from his bottle. At Martin's invitation, LaBrot joined the fishing party. While en route to South Inlet, accused and LaBrot consumed the balance in the two bottles, an amount stated by LaBrot (R. 26) as not to exceed a half pint. At the Inlet accused (R. 14) telephoned the Base to keep contact because they were on twenty-four hour duty, and each there had a bottle of beer. While returning to Lake Worth the boat grounded. Accused jumped overboard and cast for a time while the others released the boat and trolled in the lake. The accused was picked up and the trip back to Lake Worth was continued. After accused was taken aboard, he took out his .45 caliber automatic, put in a clip of shells, and fired at targets floating in the water (R. 6).

At about dark the boat was tied up at the dock at Lake Worth and the party went to the hotel where accused again telephoned the Base. At the hotel Martin had two jiggers of rye, accused had two drinks of a water glass half full of rye, and LaBrot two or three drinks. After a time Martin urged the party to start back and went to the dock and started the boat. Martin states that he next saw accused and LaBrot helping each other along the pier, that he took hold of the legs of accused and LaBrot

the arms and put him in the boat (R. 6). LaBrot testified that he did not remember if he and accused helped each other down the dock to the boat (R. 22). Martin was on the left-hand side steering the boat. LaBrot sat on the seat behind Martin and was not again seen by Martin until they reached shore. The accused stood up in front of the cabin on the right-hand side of the boat. As the boat passed through the bridge going north up the lake, accused took his gun out, put in a clip of cartridges, and pointed the gun at Martin saying, "Keep going, keep going" (R. 6). Upon an order of accused, Martin and LaBrot put their hands up. Thinking it a joke, LaBrot soon started to lower his hands, but accused ordered him to get them up and keep them up (R. 10, 20). When accused said, "Turn this boat round", Martin made a complete circle edging toward the shore to jump overboard if the accused took his eyes off of him. Martin kept arguing to accused to put the gun away but accused made no reply (R. 7). Accused seemed to be in a coma (meaning "sort of dazed" (R. 11)) and not to hear what Martin said (R. 9).

When they came closer to the shore, Martin heard an explosion, saw a flash of the gun in front, and about two feet to his right, and went overboard on the right side of the boat (R. 7). The bullet struck the upper right side of Martin's abdomen, went through his intestines and came out next to his spine a little lower down (R. 10). LaBrot saw what looked like a pistol in the hands of accused as they were coming from the bridge (R. 30), and heard a shot (R. 20), but did not see a flash of a gun (R. 31). When asked whether accused was drunk at the time, Martin testified that he was not competent to state whether a man is drunk or not (R. 10). LaBrot knew that they did not have enough on the trip to make a man drunk (R. 22). Martin and accused went overboard about together. LaBrot jumped in to help Martin, but had to swim ashore to save himself because he could not get his raincoat off. Soon after LaBrot climbed up over the sea wall, Martin came to the wall. LaBrot helped Martin ashore and then went to get a doctor. When LaBrot arrived with an ambulance, Martin, at the request of LaBrot, told the ambulance driver that LaBrot had nothing to do with "it" (R. 20-21).

After Martin had been placed in the ambulance, LaBrot saw accused leaning against the sea wall. LaBrot told accused to hold up his hands and a Mr. Ferguson took the leather jacket off from accused and handed it to LaBrot, who took it away because they thought the gun was in it. LaBrot then reported the circumstances to Mr. George F. Sanders, Chief of the Lake Worth Police (R. 22). Chief Sanders searched the golf course without success, and then found and arrested a man walking fast down a street, whom LaBrot recognized as the accused. Sanders stated that accused appeared to have been drinking for his breath smelled but did not appear drunk, that he walked down the street without staggering, and seemed to be dazed rather than intoxicated. After five or ten minutes in Headquarters, accused was turned over to Chief Deputy Baker (R. 32-33).

Major James G. Moore, M.C., Base Surgeon, Morrison Field, examined Lieutenant Martin at about 8:30 p.m., December 20th, in the operating room of St. Mary's Hospital and found a gunshot-bullet-wound through the abdomen, point of entrance in upper right abdominal quadrant, just below the costal margin, and point of exit about three inches to right of midline just about the crest of the ilium. Martin was suffering acutely from pain but Major Moore did not detect any odor of alcohol on his breath (R. 35).

Major Moore, at about nine o'clock, then examined the accused at the West Palm Beach Jail and was of the opinion that the accused was drunk. The speech of accused was rather thick and slurred, his gait rather staggering, the trend of his thought somewhat retracted, and he was not clearly oriented as to recent events. There were no facilities available in West Palm Beach for an alcohol test (R. 35-36).

4. As a witness for the court, Major Moore stated that it was nearer ten than nine o'clock when he saw accused. He considered accused intoxicated and not in condition to perform his duties, the duties normally required of a Captain in the Army of the United States (R. 37). The distance which accused walked from the car to the jail was sufficient to judge his gait. The accused did not present the appearance of being in an exhausted state, although his clothes showed that he had been in water and sand. The accused seemed to be quite confused and often answered a question by himself asking a question. Major Moore's observation of accused was for a period of thirty or forty-five minutes (R. 41-43).

5. The defense moved for findings of not guilty on the ground that the evidence was legally insufficient to support all the charges (R. 45).

At the direction of the court, the prosecution reopened its case and introduced in evidence a memorandum dated December 18, 1941, issued from Air Base Headquarters, Morrison Field (Ex. 1), which provided that all officers leave their phone numbers at the Base Guardhouse as to where they might be reached at all hours of the day and night when off duty, and be able to report to the Base within theirty minutes after contact was made (R. 48).

The motion of the defense was sustained as to Charge II and its Specification and denied as to all other Charges and Specifications (R. 48).

6. The testimony for the defense is substantially as follows:

John Pryor, wine steward, Gulf Stream Hotel, Lake Worth, Florida, on the night of December 20, 1941, after accused asked to use the telephone, served to accused two double headers of bourbon 86 proof. He served each of the two others with accused three one and one-quarter ounces drinks of rye. None of them were drunk while at the hotel (R. 82-83).

George L. LaBrot did not see the gun at the time the shot was fired, thought he could find the gun the next day at the place where the shooting took place but found that all places looked alike, and did not know where the gun is now (R. 79-80).

A little after eight o'clock, December 20, 1941, accused came to the door of the home of Mr. Howard Patterson, 315 North Lake Side Drive, Lake Worth, and wanted to come in and telephone Morrison Field. Mrs. Patterson replied that he could not and directed him to a telephone. Accused was very gentlemanly and not disorderly. Mr. Patterson saw him and heard him talk but could not say whether accused was drunk or under the influence of intoxicating liquor (R. 55-59).

G. S. Sanders, Chief of Police, Lake Worth, was on duty at police station when LaBrot reported a man had been shot on the golf course and that the man who did the shooting was on

the golf course with a .45 caliber revolver. He went there with Officer Pollack and LaBrot and found the boat about 8:25 p.m., at a point marked C on map of Lake Worth (Def. Ex. K). After they picked up accused, who was identified by LaBrot, he took accused to the City Jail (R. 141-149).

Henry Baker, Deputy Sheriff, Palm Beach County, received accused at the Lake Worth City Jail between nine-thirty and ten o'clock, December 20, 1941, and delivered him to the Sheriff at the County Jail. Accused both got in and out of the car on his own volition and walked like most every man walks. In his opinion, accused was not then drunk. Because he had a cold and asthma, it would have been impossible for him to tell from the breath whether accused had been drinking. He made no test to determine if accused was drunk (R. 49-50).

In the opinion of Major M. C. Moore, M.C., based upon looking at him, seeing him walk, and hearing him talk, the accused was under the influence of intoxicating liquors on the night of December 20, 1941. The eyes of accused were dilated and glassy. Major Moore found no evidence of any other cause for his condition at the time. On Sunday morning, December 21, 1941, Major Moore made a physical examination of both ears of accused. The left ear was normal. The right ear had a small perforation of the drum where an old perforation had been closed by scar tissue, the scar tissue had ruptured, and there was a small area of recent hemorrhage around the perforation. The most common of the numerous causes, other than infection, of perforations is a blow on the head. It is possible that perforation might have been the result of concussion due to explosion of a .45 caliber pistol, in which case the revolver would have to be fairly close to the ear. Major Moore had never seen a ruptured eardrum as the direct result of an explosion. The injury to the ear could have been caused by the impact of head of accused hitting the water. From a scientific point of view, the effect of an explosion or concussion on a paper tube would have no relation to its effect on the eardrum (R. 63-67).

First Lieutenant Clarence J. Inabinet, A.C., Provost Marshal, Morrison Field, saw accused at about 11:40 p.m., December 20, 1941, at the County Jail, West Palm Beach, and talked with him in the vehicle returning to Morrison Field. The accused recognized him, and addressed numerous remarks to him.

Accused said he was injured by an explosion, which he was certain was caused by a bomb, and that he felt certain that the boat was blown to bits. After five minutes driving time, accused became more lucid and asked to go by his house to change his clothes. Accused was taken to the hospital at Morrison Field and a sedative administered. The condition of accused seemed to Lieutenant Inabinet to be the result of some physical or mental shock, which left him in a dazed condition, "emotionally unstabled". Accused repeatedly jerked his head from side to side. In his opinion accused did not appear to be under the influence of any liquor and did not evidence any symptoms which he had seen evidenced by drunks (R. 73-78; Ex. E).

Staff Sergeant Ord went to the jail at West Palm Beach with Lieutenant Inabinet and brought accused back in a car to the Base Hospital at about one o'clock. Accused talked in a coherent manner. Accused got out of the car, walked into the hospital and three hundred feet back to his room, in an ordinary manner. He did not smell liquor on accused. In his opinion accused was not drunk. When a doctor came into the room with a hypodermic needle, accused objected to being given a sedative. Sergeant Ord remained at the hospital as a guard (R. 50-54).

First Lieutenant R. H. Martin, A.C., had no words with accused prior to the explosion, except that he pleaded with accused to put his gun away before the weapon went off or before an accident happened. His relation with accused had been one of friendship and has no feeling of animosity. "Well, I feel that he wouldn't have shot me if he was in his right mind and knew what he was doing." Martin identified the moccasins (Ex. H) as his and believed that Exhibits F and G are pictures of his boat (R. 118-122).

George S. Obear, Jr., father of accused, reached West Palm Beach on Monday, December 22, 1941, and saw accused about 5 or 6 p.m. Accused complained of suffering from a blow on the head, his ears then bothered him, he seemed to be dazed, and did not seem to have full control of his faculties. Mr. Obear noticed that condition until about Wednesday. The accused had shaken his head at times ever since he was young, but does not always do it (R. 89).

Mr. L. B. Turner, a mechanic employed at Morrison Field, who had twenty-six years of experience using and repairing firearms of every description, was presented as a ballistic expert, and reported the results of concussion on paper over ends of round cardboard tubes from the firing of a .45 caliber Government automatic pistol. When the pistol was fired six inches to rear, six inches to side, and at a right angle, the paper on both ends of tube 2 (Def. Ex. B) was broken; when the pistol was fired six inches in front of, six inches to the side, and at right angles to tube 3 (Def. Ex. C), the paper on one end was broken; when the pistol was fired one foot to rear and six inches to the side, and at right angles to tube 5 (Def. Ex. D), the paper on one end was broken. He stated that the concussion of a gun fired in target practice does not bother the eardrums of the person firing, and that the concussion has to be in back of the head to bother the eardrums (R. 61-62, 68-71).

Mrs. Jane A. Obear, wife of accused, was prepared on evening of December 20, 1941, upon any call from the airport, to drive down along the lake, blow her horn, pick up her husband and Lieutenant Martin, and take them to the airport. The accused telephoned her at six-twenty o'clock, a little after dark. When she next saw accused about 10:30 p.m., at the Palm Beach County Jail, his clothes were wet, his shirt and pants were torn, he was bewildered and mixed up, and did not understand the situation he was in. She stayed with him until about 12:30 a.m. When she saw him about 9:30 a.m., Sunday, he was not normal and that condition lasted until Tuesday morning. From then on he was all right except that his ears were hurting him and he had a slight temperature (R. 90-91).

The accused testified that he is thirty-four years old, had nine years military experience at time he was commissioned in the Reserve in 1930 upon graduation from Georgia Tech; he had been on Civilian Conservation Corps duty most of time since 1933; and a Captain, Air Corps, at Morrison Field since March 27, 1941. On December 20, 1941, Lieutenant Martin called at Military Police Headquarters - accused was Police and Prison Officer - and invited accused to go fishing. Martin came by house of accused and picked accused up at about 2:30 p.m. Accused stayed in the car while Martin changed clothes at home. Accused wore blue fatigue pants, tan sport shirt, and

took along a leather jacket and a raincoat. Accused took along about one-third pint of bourbon and Martin had about two inches of rum in a quart bottle, about one-half pint of liquor altogether. Accused gave Mr. Lee LaBrot a drink before LaBrot was invited to go along. All three of them drank on the boat the liquor contained in the two bottles, which was all the liquor accused drank while on the boat that afternoon. The only other liquor accused drank that afternoon was at the Gulf Stream Hotel bar at Lake Worth where he had two average drinks of two ounces each. He was accustomed to taking a drink occasionally and was not drunk or under the influence of intoxicating liquor, nor did he use intoxicating liquors to excess, that afternoon or that night. Before the explosion he considered himself at all times fit for duty at Morrison Field. After the explosion he knew what was going on, had command of himself, and did what he was told to do. As he was not called to duty, he did not know whether he could do duty.

Martin's boat had a speedboat hull, a cabin, and an old Buick-6 motor. Exhibit F is a picture of the boat and Exhibit G of the cockpit. The party trolled slowly down the lake to a point just below the Inlet. (Route is marked on Defense Exhibit A, map of Florida Intercoastal Waterways.) They turned back to the Inlet where Martin and LaBrot went ashore to use a telephone while accused stayed in the boat. Martin had steered the boat, except that accused steered while Martin reset the distributor points. After leaving there, the boat grounded. Accused got out to lighten the boat and cast for a while. Accused was then picked up and boat started north in the channel with LaBrot in bow, Martin steering, and accused trolling from rear of boat. Accused then quit fishing and shot his .45 caliber automatic pistol ten or fifteen times at different things in the water. The boat stopped at dock at Lake Worth and all three went to the Gulf Stream Hotel bar, where accused telephoned his wife to keep in touch so that if a call came from the Base, she would come and get him.

After an hour there, accused went out first, came back, and all three came out together. The accused left the hotel with his raincoat in his hand and the pistol in the raincoat. No one helped accused into the boat. Accused put his raincoat down by his fishing tackle box in the rear left-hand corner of the boat. When the boat started south, accused asked why "and he said he wanted to go back and catch a fish". Accused said he couldn't

because he had told his wife he would be back in an hour. "He" turned the boat north, said "he" wanted to fish, and for accused to steer the boat. At the time they went north under the bridge leading to the Lake Worth Casino, accused was standing on the port side directly behind the wheel, facing to right of forward, but did not know where Martin and LaBrot were on the boat, because it was too dark to see them. A few minutes after passing the bridge, there was a sudden terrible explosion right back of accused, and the boat seemed to dissolve. When he came up, with all his clothing and the jacket on, there was no sign of the boat, and he has not seen the boat since. "In the momentary flash of the gun", accused saw objects behind him, a dark object facing in over on the right-hand side of the boat. He went off the port - left-side of the boat.

Accused denied that he shot Martin. He had always been friendly with Martin. He did not at any time wave the gun around, nor tell Martin and LaBrot to hold up their hands. He had no words with Martin that afternoon, except some friendly discussion about going outside into ocean, but all agreed that it was too rough.

Accused started swimming toward lights on Lake Worth shore. He was in the water a long time, rested on a sand bar, and was rolled over by the tide on an oyster bed cutting his hands. Finally reached shore but did not see LaBrot. The second house, at which he stopped in order to telephone the Base, was Mr. Patterson's. He cut across the Patterson yard and turned the corner to go to the business district of Lake Worth. A policeman came along, told him to get in and that he was under arrest, and took him to the Lake Worth Jail. After a while a Mr. Baker took him to the Palm Beach Jail. Accused saw Colonel Monahan at the Palm Beach Jail and asked him what the trouble was. Colonel Monahan said that Lieutenant Martin had been shot. When asked if Martin was hurt, Colonel Monahan told him that Martin was dead. Accused remembers saying at the jail that he thought that a bomb blew up the boat. That was his idea and he did not connect it with the pistol shot at all. It affected his ears so that they hurt and were ringing and his head hurt, and was definitely not normal when Major Moore saw him. After the explosion his left ear hurt more than the right one, which was punctured. The lobe of the right ear was cut and there was soreness just back of the ear. The

whole staff of the hospital looked at that ear the next morning. Two weeks later a pain developed in his right ear for which he was given treatment (R. 92-103).

On cross-examination accused testified that he had three drinks of bourbon whiskey on the night of December 19th from supper until 10:30 p.m. His next drink was on December 20th of not over two ounces between 1:30 and 2:30 p.m., the next on the boat between 2:30 and 4 p.m., of probably one and one-half ounces, and the next his two drinks at the Lake Worth bar room. He had no food from the time he boarded the boat up to the explosion. He felt the explosion back of his head and to the right, about one and one-half feet away. At Lake Worth Martin entered boat first, then accused, and LaBrot last. Martin started to do the steering. Prior to the flash, he could not definitely state where each man was on the boat. Just prior to the explosion, accused was standing at point marked A on Exhibit G, facing 30° right of forward. When he saw the flash one, whom he assumed to be Martin, was sitting on the rail a little toward the rear at point B. He also saw a dark object in back of boat at point C (not so marked on Exhibit G). He had fired his pistol some that morning and fifteen or twenty times between 2:30 p.m., and dark. He did not know whether Martin or LaBrot handled the automatic during the day. Accused did not at any time while they were in the boat point the pistol at either of the two occupants and ask them to put their hands up. The fact that Martin had so testified would not make any difference in his answer (R. 103-110).

Upon cross-examination by the court, the accused testified that the explosion occurred about fifteen minutes after they left the hotel; the flash seemed to be about shoulder high; he would say that the person who fired the shot was in the rear of the boat; he is convinced now that the explosion was a gun flash, but at the time it happened he did not know what caused the explosion; he estimated that LaBrot was the object he saw in the rear of the boat during the flash; and that the cockpit was about seven feet, two inches long, including the seat, about four feet, nine inches wide at the front, and three feet, eight inches wide at the rear (R. 111-116).

Doctor E. C. Moore, as an expert in neurology and psychiatry, testified at length as to the effect of a blow on the head and of the concussion of a .45 caliber pistol fired

near the head, and the possible confusion of such effects with the effects of intoxication. In his opinion, a dazed or stuporous condition resulting from concussion could very closely simulate incoherence and irrational state of one under alcoholic stimulation; the effect of the rupture of an eardrum would ordinarily cause unsureness of gait for two or three hours; the fatigue of long distance swimming would accentuate unsteadiness; the statement that he had killed a man would be a seriously disturbing factor having varying effects; and it was hard under the circumstances here indicated to determine what factor produced the resulting condition (R. 122-131).

Major Frank A. Kopf, A.C., who had known accused as a high school student in Atlanta and ever since (R. 84); Captain Carl A. Addington, C.E., who had known accused ten months (R. 80); Second Lieutenant Jack C. Penland, who had known accused since 1936 (R. 85); C. C. Smith, former Solicitor General of Georgia, who had known accused since 1917 (R. 72-73); Mr. Harold L. Fill, who had met accused in a business way two or three times a week for about eight months (R. 81); Mr. Bill Leak and Mr. J. C. Blackwell, who had known accused since he arrived at Morrison Field, and who found him careful with firearms (R. 85-88), testified for the defense as character witnesses and all stated that the reputation of the accused for peacefulness and violence was good.

7. Witnesses recalled by the court:

First Lieutenant R. H. Martin, A.C., at the time the shot was fired was standing steering with his left hand, LaBrot, when Martin last saw him as they left the hotel dock, was sitting in the rear corner of the boat and the accused was standing with his elbow on the edge of the top of the cockpit. After leaving the dock, Martin saw and watched accused all of the time. Martin saw the flash come from the approximate position of the hand of accused, from the corner of the gunwhale and cockpit about eight or ten inches from the top of the cabin and perhaps two feet, nine inches from the floor of the boat. It was directed toward his abdomen. The bullet came out of his body about six or seven inches from the end of his spine, a little below the point of entry and a little more than two feet, nine inches from the floor. When LaBrot brought the ambulance, he said to Martin, "Tell the

ambulance driver that I did not shoot you". Martin had talked with LaBrot alone since the shooting (R. 117-118).

George LaBrot told Martin to tell the ambulance driver that he had nothing to do with the shooting because of fear that he might be connected with it. When they left the boat at the Patio (Lake Worth), accused handed to LaBrot an oilskin raincoat because it was chilly. LaBrot took off the raincoat at the bar, wore it back from the bar to the boat, and had it on when he jumped into the water. He took it off at the sea wall, put it in the boat later that night, and believes it was in the boat when he pumped the boat out the Sunday morning and brought it back to the dock on the canal. After they had gone up to the Patio, accused had on a leather jacket. Just prior to the shooting, LaBrot was sitting down in the center of the back of the boat, and accused was standing on the right side against the cabin. LaBrot heard an explosion but did not see any flash. Both figures looked dark to him. He does not remember whether Martin struck accused in going from wheel off the right side of the boat. LaBrot thought he heard the shot about five minutes after the last time accused told him to hold up his hands. It seemed to LaBrot that Martin held up one hand and steered with the other. "It looked like a pistol" in the hand of accused. LaBrot did not see accused take the gun to the Patio, and does not know whether it was left on the boat (R. 134-138).

Upon cross-examination by defense, LaBrot stated that he was sitting on the back of the boat looking forward when the gun went off, but does not remember seeing the flash. He himself was excited and did not know what was going to happen. He did not see a gun on or under his seat when they returned from the Patio (R. 138).

Captain Carl A. Addington on Sunday morning, December 21st, at request of Mrs. Obear, accompanied Mrs. Jekyll to Martin's boat to obtain fishing equipment and clothing left there by accused. LaBrot handed to him from the boat, two fishing rods, a cloth jacket and a fish tackle box (R. 137-139).

Upon cross-examination by defense, he testified that he could not identify a raincoat as one he obtained that morning. When handed to him by LaBrot, the raincoat had no sand or bits of oyster shell on it, nor any signs of having been in the lake. It was dry when he delivered it to Mrs. Obear (R. 139-140).

8. The evidence with respect to the Specification, Charge III, which alleges that the accused did at Lake Worth, Florida, render himself unfit for duty by excessive use of intoxicants, is conflicting.

a. The only witness who expressed the opinion that accused was drunk was Major James G. Moore, M.C., who examined the accused at about 10 p.m., December 20, 1941, at the West Palm Beach Jail. Major Moore stated that the speech of accused was rather thick and slurred, his gait was rather staggering, the trend of his thought was somewhat retracted and he was not clearly oriented as to recent events. Major Moore stated that there were no facilities in West Palm Beach for an alcohol test.

When recalled as a witness for the court Major Moore stated that he considered accused intoxicated and not in condition to perform his duties, the duties normally required of a Captain in the Army. He observed accused for a period of thirty or forty-five minutes. The accused did not present the appearance of being in an exhausted state, though his clothes showed he had been in the water and sand, but he did seem quite confused and often answered a question by himself asking a question.

As a witness for the defense Major Moore expressed the opinion that accused was under the influence of intoxicating liquors. His eyes were dilated and glassy. Major Moore based his opinion upon looking at accused, seeing him walk and hearing him talk. He found no evidence of any other cause for the condition of the accused at that time.

On December 20th the accused had one drink of about two ounces between 1:30 and 2:30 p.m., on the boat between 2:30 and 4 p.m., he shared with Martin and LaBrot an aggregate amount of about one-half pint of rum and bourbon, at the Inlet he had a bottle of beer, and at Lake Worth had two double headers of bourbon of about three ounces each.

The only other circumstances tending to indicate that accused was intoxicated was in the statement of Martin that accused and LaBrot helped each other along the pier at Lake Worth - LaBrot had no recollection of that circumstance, in Martin's statement that he and LaBrot then lowered accused into the boat -

the accused denied that anyone helped him into the boat, and in the actions of accused in pointing the pistol at Martin and requiring both Martin and LaBrot to hold up their hands shortly before the shooting.

b. On the other hand, Pryor, the bar tender at Lake Worth, stated that no one of the party of three was drunk; Martin testified that he was not competent to state whether accused was drunk; LaBrot stated that he knew that they did not have enough on the trip to make a man drunk; Mr. Patterson stated that he could not say whether accused was drunk or under the influence of intoxicating liquor; Mrs. Patterson stated that accused was very gentlemanly and not disorderly; Chief of Police Sanders, who arrested accused, stated that accused appeared to have been drinking but was not drunk, that he walked down the street without staggering, and that he seemed to be dazed rather than intoxicated; Deputy Sheriff Baker, who took accused to the County Jail, stated that accused entered and left the car of his own volition, walked like most every man walks, and was not drunk; First Lieutenant Clarence J. Inabinet, who returned accused to Morrison Field, stated that accused did not appear to be under the influence of any liquor and did not evidence any symptoms which he had seen evidenced by drunks, but seemed to be dazed; Staff Sergeant Ord, who accompanied Lieutenant Inabinet, stated that accused got out of the car and walked into the hospital and three hundred feet back to his room in an ordinary manner, and was not drunk; and the accused himself testified that he was not on that afternoon or night drunk, not under the influence of intoxicating liquor, and did not use intoxicating liquors to excess.

In the opinion of the Board of Review the record falls far short of establishing beyond a reasonable doubt that accused on December 20, 1941, rendered himself unfit for duty by excessive use of intoxicants.

9. The Specification, Charge I, alleges that accused did, at Lake Worth, Florida, on December 20, 1941, with intent to do bodily harm commit an assault upon First Lieutenant Raymond H. Martin, A.C., by shooting him in the abdomen with a dangerous weapon, a pistol or gun.

There were but three men, Martin, accused, and LaBrot on the boat at the time of the shooting. After leaving the Inlet

en route back to Morrison Field, the accused shot his .45 caliber automatic pistol ten or fifteen times at different targets floating in the water. When the boat was tied up at the dock at Lake Worth, the party went up to the hotel. LaBrot stated that he was chilly and that accused handed him an oil skin raincoat to wear when they left the boat for the hotel, and he had it on when he jumped overboard after the shooting.

Upon leaving the dock, both Martin and LaBrot stated that Martin was on the left-hand side steering the boat, LaBrot on the seat behind Martin, and accused standing up in front of the cabin on the right-hand side of the boat. Martin stated that as the boat passed through the bridge going north, accused took his gun out, put in a clip of cartridges and told Martin to keep going. Upon an order from accused, Martin and LaBrot put their hands up. As LaBrot started to lower his hands, accused ordered him to get them up and keep them up. Upon order of accused to "Turn this boat round", Martin made a complete circle edging to the shore to jump overboard if the accused took his eyes off of him. Martin kept arguing to accused to put the gun away. When closer to shore, Martin heard an explosion, saw the flash of a gun in front and about two feet to his right from the approximate position of accused's hand perhaps two feet and nine inches from the floor of the boat, and went overboard on the right side of the boat. The bullet struck the upper right side of his abdomen and came out next to his spine a little lower down. Martin and accused went overboard about together and LaBrot jumped in to help Martin. LaBrot saw what looked like a pistol in the hands of accused, heard a shot but did not see a flash of a gun.

The accused, to the contrary, testified that he left the hotel with his raincoat in his hand and the pistol in the raincoat, and put the raincoat down by his fishing tackle box in the rear left-hand corner of the boat; he had not given LaBrot a raincoat at any time; after they started out from the dock "he" wanted to fish and for the accused to steer the boat; as the boat went north through the bridge leading to the Lake Worth Casino, accused was standing on the port side directly behind the wheel but did not know where Martin and LaBrot were on the boat because it was too dark to see them; a few minutes after passing the bridge there was a sudden terrible explosion and the

boat seemed to dissolve and when he came up there was no sign of the boat; "in the momentary flash of the gun", he could see behind him a dark object over on the right-hand side of the boat, which he assumed to be Martin, and he estimated the object he saw in the back of the boat during the flash was LaBrot; and that he himself went off the port side of the boat. The accused denied that he shot Martin, and that he at any time pointed the pistol at either of the two occupants of the boat or askedthem to put their hands up. He would say that the person who fired the shot was in the rear of the boat.

The commission by the accused of an assault with a dangerous weapon, a .45 caliber pistol, with intent to do bodily harm at the time, place, and in the manner alleged, is sufficiently shown. Intent to do bodily harm is to be inferred from the nature of the weapon used, the character of the wound inflicted, and the other circumstances of the case. The acts of accused considered as a whole and interpreted in connection with all of the circumstances, support an inference of such an intent. In the opinion of the Board of Review, the accused was not so drunk as to negative the entertainment of the intent to be drawn from such circumstances.

10. The accused is thirty-three years of age. The records of the Office of The Adjutant General show his service as follows:

> Appointed Second Lieutenant, Coast Artillery, Officers' Reserve Corps, June 9, 1930; appointed First Lieutenant, June 16, 1933; active duty, Civilian Conservation Corps, June 24, 1933, to June 23, 1934; active duty, Civilian Conservation Corps, May 16, 1935, to May 15, 1936; active duty, Civilian Conservation Corps, July 7, 1936, to July 23, 1936; transferred to Inactive Reserve because of physical disqualification, August 24, 1936; transferred to Coast Artillery Corps Reserve, September 23, 1936; active duty, Civilian Conservation Corps, November 9, 1936, to April 30, 1937; active duty, Civilian Conservation Corps, February 14, 1938, to August 13, 1938; appointed Captain, April 5, 1938; ordered to extended active duty and assigned to duty with Air Force Troops, Municipal Airport, West Palm Beach, Florida, March 24, 1941.

11. The court was legally constituted. 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 not legally sufficient to support the findings of guilty of the Specification, Charge III, and of Charge III; legally sufficient to support the findings of guilty of the Specification, Charge I, and of Charge I; and legally sufficient to support the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 93rd Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

(On leave), Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

Board of Review
CM 220233

MAR 21 1942

UNITED STATES)	1st CAVALRY DIVISION
)	
v.)	Tried by G.C.M., convened at
)	Fort Bliss, Texas, January 28,
Private J. R. PRATT)	1942. Dishonorable discharge
(6955433), Troop B, 91st)	and confinement for nine (9)
Reconnaissance Squadron.)	months. Fort Bliss, Texas.

OPINION of the BOARD OF REVIEW
HILL, CRESSON and McCLAIN, Judge Advocates.

1. The record of trial in the case of the soldier named above, which has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.

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

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

Specification: In that Private J. R. (i.o.) Pratt, Troop "B", 91st Reconnaissance Squadron, having been duly assigned to duty as a member of platoon on wartime international patrol duty, did, at Fort Hancock, Texas, on or about 8:00 P.M., December 21, 1941 desert the service of the United States by quitting his organization with the intent to shirk important service, to wit; wartime international border patrol, and did remain absent in desertion until he was apprehended at El Paso, Texas, at about 11:00 P.M., December 21, 1941.

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

Specification: (Finding of not guilty.)

The accused pleaded not guilty to all the Charges and Specifications, and was found guilty of Charge I and its Specification, and not guilty of Charge II and its Specification. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one-half years. The reviewing authority approved the sentence, remitted nine months of the confinement at hard labor, and ordered the sentence, as modified, executed but suspended the dishonorable discharge. Fort Bliss, Texas, was designated as the place of confinement. The result of the trial was promulgated in General Court-Martial Orders No. 25, Headquarters 1st Cavalry Division, Fort Bliss, Texas, dated February 28, 1942.

3. The evidence shows that the platoon of which accused was a member was on border patrol duty at Fort Hancock, Texas, from December 17 to December 24, 1941 (R. 12), and that the patrol reliefs were twelve hours on and twelve hours off during that period (R. 20). Accused completed a relief on patrol at about five-thirty o'clock on the afternoon of December 21st, cleaned his rifle, put it up, and returned to his tent at about five forty-five o'clock (R. 22). The next patrol required of the accused was scheduled to leave at six o'clock on the morning of December 22nd (R. 23). He was not posted for evening patrol on December 21st (R. 54). Accused had permission from an officer of his platoon to leave the camp to go to Fort Hancock, which was approximately one mile away (R. 50), for a period of not longer than two hours during the evening of December 21st, and left camp at about six o'clock that evening (R. 23). The accused left Fort Hancock at approximately eight or eight-thirty that evening (R. 50) and went to El Paso (R. 51), where he was arrested by a member of the military police at ten forty-five at the Casa Blanca Bar, because he was not in proper uniform and was drinking beer while having a "loaded" pistol in his possession (R. 36, 37). The two soldiers who accompanied accused testified that the three of them intended to return to Fort Hancock (R. 46) and the camp after buying some Christmas presents and seeing a girl (R. 52).

4. The Specification, Charge I, alleges that the accused did, on or about 8 p.m., December 21, 1941, desert by quitting his organization with intent to shirk important service. There is no evidence in the record that accused quit his organization with intent to shirk any service, nor are there any circumstances in evidence from which such an inference may be drawn. On the contrary, it is clearly shown by uncontradicted testimony of the other two soldiers that the three, including accused, intended to return to camp after buying some Christmas presents and seeing a girl. The accused had gone from Fort Hancock, Texas, within one mile of his duty station, to the place where he was taken into custody in a little over two hours. It may reasonably be inferred that the return trip to camp would take no longer. The accused had no duty of any character to perform until six o'clock on the morning of December 22nd, when he again was to go on a twelve hour patrol. These circumstances are consistent with an intention on the part of accused to return to his organization in time to perform the next duty required of him, and entirely fail to show that the accused quit his organization with intent to shirk important service.

5. The Board of Review is, therefore, of the opinion that the record of trial is not legally sufficient to support the findings of guilty and not legally sufficient to support the sentence.

Victor S. Mick, Judge Advocate.

Chas. B. Larsson, Judge Advocate.

Filey M. Cfain, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 220237

MAR 27 1942

UNITED STATES	FORT BENNING, GEORGIA.
v.	Trial by G. C. M., convened at Fort Benning, Georgia, February 10, 1942. Dishonorable discharge (suspended) and confinement for one (1) year and three (3) months. Disciplinary Barracks.
Private THOMAS R. NEUSOM (6928452), Company G, 29th Infantry.	

OPINION of the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN, and KOTRICH, Judge Advocates.

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Thomas R. Neusom, Company G, 29th Infantry, did, at Fort Benning, Georgia, on or about November 12, 1941, desert the service of the United States and did remain absent in desertion until he was apprehended at Atlanta, Georgia, on or about November 18, 1941.

He pleaded guilty to the Specification except the words "desert the service of the United States and did remain absent in desertion", substituting therefor the words "absent himself from his organization at Fort Benning, Georgia and did remain absent without leave", of the excepted words, not guilty, and of the substituted words, guilty; and not guilty to the Charge but guilty to violation of Article of War 61. He was found guilty of the Charge and Specification. Evidence of five

previous convictions, two by general courts-martial for desertion, one by special court-martial for absence without leave, one by special court-martial for insubordination toward a sentinel, and one by summary court-martial for assault upon a noncommissioned officer, was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two and one-half years. The reviewing authority approved the sentence, remitted so much of the confinement as was in excess of one year and three months, directed execution of the sentence as thus modified but suspended the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The sentence was published in General Court-Martial Orders No. 46, Headquarters Fort Benning, Georgia, March 2, 1942.

3. The prosecution introduced the following: An extract copy of the morning report of Company G, 29th Infantry, showing the unauthorized absence of accused from Fort Benning, Georgia, on November 12, 1941 (Ex. A); a stipulation (R. 8) that a state highway patrolman would testify that on November 18, 1941, he stopped a car in which accused was a passenger, on charges of exceeding the speed limits, arrested accused and turned him over to the military authorities at Fort McPherson, Georgia, on November 19, 1941 (Ex. B); and a stipulation (R. 8) that a corporal of the military police at Fort McPherson, Georgia, would testify that when accused was turned over to him by a Georgia State highway patrolman accused stated that he had left Fort Benning on November 9, 1941, on a three day pass (Ex. C).

Accused testified that he left his post on November 9, 1941, on a three day pass, visited in Copper Hill, Tennessee, and started back in another soldier's car on November 11, 1941, but was delayed on the way for six days by a broken axle which the soldiers had to fix themselves because of lack of money. When apprehended, the two were traveling on the Atlanta Highway toward Columbus and Fort Benning. Accused never had any intention other than to return. He was in uniform when apprehended (R. 10-17).

4. The evidence, taken in its aspect most unfavorable to him, thus shows that accused left Fort Benning, Georgia, on November 9, 1941, on a three day pass, overstayed his leave, and was arrested

in uniform, for a motor vehicle traffic violation, on November 18, 1941, at or near Atlanta, Georgia, approximately 100 miles from Fort Benning. There is nothing in this evidence which reasonably justifies an inference that accused intended to desert the service of the United States. His absence was not prolonged and the distance between his station and the place at which he was arrested was relatively small.

The following, from a holding by the Board of Review in a case of alleged desertion in which accused had been absent without leave for twenty-two days, is pertinent:

> "*** The Manual for Courts-Martial states that -
>
> > 'If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent. ***.' (Par. 130 a, M.C.M.)
>
> Determination of the question as to whether an absence is 'much prolonged' or satisfactorily explained, within the meaning of the quoted clause, must depend upon the circumstances of the absence. An arbitrary yardstick of time may not be applied. The absence must be so prolonged that, considered in the light of proved causes and motives or in the light of a lack of rational explanation, it leads in sound reason to a conclusion that the soldier did not intend to return. The absence in the instant case, so considered, is not of such duration as to justify an inference of intent not to return." (CM 213817, Fairchild)

See also numerous cases cited in CM 213817, Fairchild, in which it has been held that mere absence without leave for a relatively short period does not establish desertion.

It has long been held, further, that the mere circumstance of arrest, or apprehension, at a point relatively close to the soldier's place of duty is not a proper basis for an inference of an intent not

to return. The Judge Advocate General has stated, in CM 123404, Standlea:

> "The facts that the accused was apprehended and had been absent a month and six days are not sufficient to show that he went absent with intent not to return or that he afterwards entertained such intent."

See also, to the same effect, expressions by the Board of Review and The Judge Advocate General in CM 213817, Fairchild; CM 196776, Maialoha; CM 196187, Roath; CM 195988, Parr; CM 189658, Hawkins; CM 125904, Moore.

The evidence is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of absence without leave between the dates alleged in the Specification, in violation of Article of War 61. The maximum punishment listed by paragraph 104c, Manual for Courts-Martial, for the offense of which accused was properly found guilty is confinement at hard labor for eighteen days and forfeiture of twelve days' pay.

5. Evidence of five previous convictions was introduced (Ex. D-1). The evidence of previous convictions shows, however, that two of the convictions related to offenses committed more than one year next preceding the commission of the offense involved in the present charges, periods of unauthorized absences as shown by the findings in this case and by the evidence of previous convictions being excluded (par. 79c, M.C.M.). Punishment in excess of the maximum listed by paragraph 104c of the Manual for Courts-Martial for the offense of absence without leave is not therefore legally authorized.

6. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of absence without leave from November 12, 1941, to November 18, 1941, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for eighteen days and forfeiture of twelve days' pay.

Richard W. Young, Judge Advocate.

Charles M. Vandenhoff, Judge Advocate.

E. J. Kotrick, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

Board of Review
CM 220269

APR 7 1942

UNITED STATES	)	3RD ARMORED DIVISION
v.	)	Trial by G. C. M., convened at Camp Polk, Louisiana, February 18, 1942. Dismissal.
First Lieutenant GAYLORD H. COX (0-280285), Infantry, 32nd Armored Regiment.	)	

OPINION of the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and KOTRICH, Judge Advocates.

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.

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

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

Specification: In that First Lieutenant Gaylord H. Cox, 32nd Armored Regiment, did, at Camp Polk, Louisiana, on or about December 31, 1941, with intent to deceive the Commanding Officer, 32nd Armored Regiment, officially certify as follows:

"I certify that I have made a physical inventory of the peroperty pertaining to my company and all charged to the company on Memorandum Receipt to the Supply Officer, 32nd Armored Regiment is on hand with following exceptions:

Item	No. Over	No. Shortages
Plates, Dinner	———	10

Last consolidated memorandum receipt dated Oct 22, 1941, supplemented by credit receipts dated 12-19-41, and debit receipts dated 12-22-41, establish the number of each item in possession of the company.

Signed: G H Cox
Rank 1st Lt
Org. D C o 32 AR
Comdg. Co. yes"

which certificate was known by the said Lieutenant Cox to be untrue.

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

Specification: (Finding of not guilty)

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

3. The evidence shows that from April 15, 1941, to January 7, 1942, accused was in command of Company D, 32nd Armored Regiment (R. 7). On December 29, 1941, at Camp Polk, Louisiana, the Executive Officer of the regiment issued to the company commanders, including accused, an administrative memorandum containing directions for an inventory of company property to be submitted by 4 p.m., December 31, 1941. Reports were to be made in a form of certificate incorporated in the memorandum. Accused submitted to the regimental supply officer his signed certificate on December 31. (R. 6-8; Ex. A) The memorandum and certificate, as submitted, were as follows:

"HEADQUARTERS 32ND ARMORED REGIMENT (LIGHT)
Office of the Regimental Commander

Camp Polk, Louisiana,
December 29, 1941.

ADMINISTRATIVE MEMORANDUM
NUMBER 32

An actual physical inventory of all property held on Memorandum Receipt to the Regimental Supply Officer, 32nd A.R. (L), will be made by the senior officer on duty with each company or detachment as of December 31, 1941.

A report in the following form will be submitted at 4:00 P.M., December 31, 1941, to the Regimental Supply Officer:

'I certify that I have made a physical inventory of the peroperty pertaining to my company and all charged to the company on Memorandum Receipt to the Supply Officer, 32nd Armored Regiment is on hand with the following exceptions:

Item	No. Over	No. Shortages
Plates, Dinner	———	10

Last consolidated memorandum receipt dated Oct 22, 1941, supplemented by credit receipts dated 12-19-41, and debit receipts dated 12-22-41, establish the number of each item in possession of the company.'

Signed: G H Cox
Rank 1st Lt
Org. D Co 32 AR
Comdg. Co. yes." (Ex. A)

On December 29 accused had directed his supply sergeant to begin a check of property in the company supply room and kitchen. The supply sergeant commenced his check at about 9 p.m., and continued until about noon of December 30, at which time, with the permission of the first sergeant, he stopped checking. He went on furlough the following day and did not complete his check. (R. 33-35) Before going on furlough he reported to accused that "there were some flashlights short, and some plates and tables", but that he had not made a complete check (R. 40). Early on December 31 accused had also directed a second lieutenant of his company to begin a check of company property in the motor park and gun room, and to continue with the work until about noon. In compliance the lieutenant checked property from about 8 a.m., until about noon of that day, whereupon he stopped. (R. 18-20) At about 10:30 a.m., accused discussed the checking of the property with the lieutenant and the latter told accused that "things seemed to be in pretty fair shape, but that there were some things missing so far". He made no further report to accused. At the time the lieutenant stopped checking he had completed about 75% of the task allotted to him (R. 20).

On January 24, 1942, after his relief as company commander, accused submitted a series of five reports of survey covering numerous items of Quartermaster, Ordnance and Signal property, of cost aggregating about $498.23. The property listed included, among other

things, 16 dinner plates, 34 flashlights and 46 mattresses. Accused made affidavits on the face of the reports of survey with respect to all the property listed that it had been lost or worn out in the military service. (Exs. B-F) He stated on one report of survey, covering Quartermaster property of the cost of $243.16, including the mattresses ($195.50) and the 16 dinner plates ($1.52), that he believed the mattresses had been returned to the Quartermaster, and stated that other items had been discovered to be missing on about January 12, 1942 (Ex. B). On a second report, covering Ordnance property of the cost of $26.28, he stated that the articles had been lost on field problems during November and December, 1941, and that their loss had been discovered about January 12, 1942 (Ex. C). On a third report, covering Quartermaster property (clothing and individual equipment) of the cost of $183.23, he stated that the articles had "evidently been lost" through issue to former members of the company and failure to make proper charges on individual clothing records (Ex. D). On a fourth report, covering Signal property of the cost of $23.81, including the 34 flashlights ($17), he stated that the property had been lost or misplaced while installing radios in tanks and other vehicles (Ex. E). On the remaining report, covering Quartermaster property of the cost of $12.75 (tools), he stated that the articles had been lost or broken in the military service while in use at the regimental tank park or in the field (Ex. F).

The officer who relieved accused as company commander, Captain Dale E. Brown, commenced checking the company property soon after he assumed command and continued the checking for about two weeks, at the end of which period he was "ordered *** to sign for the items" (R. 22, 31). After checking for four or five days he became satisfied that

> "there were all classes of shortages of property in the gun room where a number of expendible parts which could be requested, in the tool room there were a number of tools missing, and in the supply room there was a general shortage of clothing for the organization and so on." (R. 22)

46 mattresses (R. 32) and a prismatic compass were also discovered to be missing (R. 27, 28). Few, if any, of the individual clothing records of men of the company were complete and it was found that most of the men had property not charged to them. Accused assisted in checking the property (R. 23, 30) and from time to time brought articles into

the supply room to be accounted for, including some clothing and small non-Government issue tools which he said he had purchased (R. 24, 25). Captain Brown testified that a complete check of the property had not been completed at the time of trial (R. 31, 32) and that

> "we were over some gas cans and short some water cans. I think we can switch them, turning in some of the gas cans for water cans. There are still a lot of articles laying around; gloves, one hundred and three pair, and I haven't found out as to where they went, so they were dropped as not being in the clear. There were also some overshoes and plates from the officer's mess. I haven't checked all the items on the three surveys but I have found some of the items." (R. 32)

Witnesses for the defense testified that a physical check of the company property was made in June, 1941, that no shortages were found (R. 60-62) and that at about that time approximately 50 of a large issue of mattresses were "picked up" and taken away by a quartermaster (R. 55-57).

In the course of the investigation of the charges, after accused had been warned that anything he said might be used against him (R. 52), he stated, among other things:

> "Due to the short amount of time alloted, December 30 and 31st, 1941, it was impossible for a Company Commander to physically check every item of property. I alloted the preliminary check of certain types of property to Sgt. Ellerbee and Lt. Brown.
>
> I investigated all shortages reported by the above mentioned persons and completed any checks necessary. I also checked counts in many instances.
>
> I listed plates, dinner, as short. At that time no other shortages were known to me.
>
> In time alloted, I was forced to sub-divide the preliminary check of property or submit an incomplete report." (Ex. G)

At the trial he made an unsworn statement as follows:

"The only statement that I wanted to make is that I did not knowingly make a false official statement, and that I had continued to check my property after the other men had made their preliminary check until I was satisfied with the available records I had on hand. I had all of the shortages listed as I saw them and if any others were there, they were unknown to me." (R. 63)

The regimental executive officer testified that during December, 1941, not more than two officers were on duty at any one time with Company D, 32nd Armored Regiment, and that during part of the time only one officer was on duty. He also testified that there was more difficulty "keeping up the property" in a tank company than in an infantry company. The ratings given to accused on his efficiency reports had been "generally excellent". (R. 9, 10)

4. The making of the official certificate as alleged in the Specification, Charge I, is proved. The certificate embodied three distinct but related statements, first, that accused had made a physical inventory of the property pertaining to his company, second, that all property charged to the company on memorandum receipt to the regimental supply officer (that is, all property issued to the company except possibly that chargeable to enlisted men on their individual clothing records - par. 5d (1), AR 35-6520, Feb. 8, 1936) was on hand except 10 dinner plates, and third, that there were no articles "over", that is, no articles on hand in excess of those covered by memorandum receipt. Proof of the falsity of the first of these statements rests to a large extent in the proof with respect to the other statements, that is, in the proof that shortages and overages in the company property other than as reported by accused did, in fact, exist.

There is no direct evidence that shortages or overages other than as reported existed on the day the certificate was submitted, that is, on December 31, 1941, but a strong inference of that fact arises from the circumstance that very substantial shortages and overages were discovered on an inventory of company property taken soon after December 31. Moreover, by the reports of survey, accused admitted shortages and admitted that some of them, shortages of mattresses and tools, existed prior to December 31, 1941. He admitted, and the other evidence shows, that some of the shortages were discovered as early as January 12, 1942. The overages were not disputed. Captain Brown testified that he had found some of the items listed by accused on

three of his reports of survey, but this witness' testimony, taken as a whole, is to the effect that substantial shortages did in fact exist. The Board of Review has no real doubt that the bulk of the shortages and overages disclosed by the January inventory existed at the time the certificate was submitted.

Beyond the fact of the existence of shortages and overages, it appears that the only checks of the company property proved to have been made on December 29, 30 and 31, were incomplete, and that they disclosed shortages not reported by accused. The inventory finally taken by Captain Brown, with the assistance of accused, consumed a very considerable period, much in excess of the time shown to have been taken by accused and his assistants in his December inventory. Accused stated to the investigating officer that it was impossible for a company commander properly to check his property in the time allotted to him by the regimental directive. Although the investigation and the charges assuredly raised the basic issue as to whether a complete physical inventory was taken pursuant to the directive, accused's statement to the investigating officer, as well as his statement before the court, omitted any categorical assertion that a complete inventory was in reality taken.

Upon all the evidence the Board of Review is forced to the conclusion that had accused taken a complete inventory, as he officially certified he had done, he would have discovered substantial shortages and overages in his company property. It cannot escape the inference that accused made the certificate after only a partial inventory had been taken and before he had verified all the apparent shortages reported to him or had ascertained whether other shortages or overages existed in fact. His certification that he had made a physical inventory of the property pertaining to his company must therefore be deemed to have been deliberately false and to have been made with intent to deceive his commanding officer and others concerned. In certifying that there were no shortages in the company property held on memorandum receipt to the regimental supply officer and that there were no overages in the property, accused certified as true things which he did not know to be true. As with the analogous offense of perjury, this was legally equivalent to making the certificate knowing it to be untrue (par. 149i, M.C.M.). The certificate was deceitful in these respects also.

The essential elements of the offense charged are established. The making of the false official certificate was a dishonest act. It may have been prompted by pressure of time and by the burden of other responsibilities, but because of the dishonesty involved it was nevertheless conduct unbecoming an officer and a gentleman within the meaning of Article of War 95.

5. Seven of the nine members of the court joined in a recommendation that clemency (kind not specified) be extended. The individual defense counsel submitted a recommendation for clemency based on the previous creditable service of the accused.

6. War Department records show that accused was 34 years of age at the time of his offense. He was appointed a second lieutenant, Infantry Reserve, on March 19, 1931, and was promoted to first lieutenant on November 11, 1935. He has been on extended active duty since August 29, 1940.

7. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of violation of Article of War 95.

Robert W. Harris, Judge Advocate.

Charles H. Van Buskirk, Judge Advocate.

E. J. Kotrich, Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 7 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Gaylord H. Cox (O-280285), Infantry, 32nd Armored Regiment.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The false official certificate involved in the charges was made by accused while pressed for time to accomplish what had been required of him. He is an experienced tank officer whose previous service has been creditable. Seven of the nine members of the court recommend clemency. I recommend that the sentence be confirmed but in view of all the circumstances and the court's recommendation for clemency, recommend that execution of the sentence be suspended.

3. Inclosed are the draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to confirm the sentence but suspend the execution thereof.

Myron C. Cramer.

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of Executive action.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

Board of Review
CM 220290

APR 9 1942

UNITED STATES	PANAMA COAST ARTILLERY COMMAND
v.	Tried by G.C.M., convened at Fort Amador, Canal Zone, February 7, 1942. Dismissal.
First Lieutenant JOHN L. CLARK (0-415809), 73rd Coast Artillery (AA).	

OPINION of the BOARD OF REVIEW
HILL, CRESSON and HALE, Judge Advocates.

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.

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

CHARGE: Violation of the 85th Article of War.

Specification: In that First Lieutenant John L. Clark, Seventy Third Coast Artillery (AA), was, at Battery #56, AA Position, Canal Zone, on or about January 19, 1942, found drunk while on duty as acting Battery Commander.

The accused pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that Battery S, 73rd Coast Artillery (AA), was stationed at Antiaircraft Artillery Position No. 56, Canal Zone. The officers of the battery were Captain Verne N. Osmundson, C.A.C., the accused, and First

Lieutenant Anton Lattal, Jr. On January 15, 1941, when Captain Osmundson left the battery for the day to attend the first session of a camouflage school at Corozal, he informed accused that accused was in charge of the battery during his absence (R. 11-12).

At breakfast about 6:30 a.m., January 19, 1942, there was not a trace of any evidence of alcoholism on accused (R. 12). Captain Osmundson discussed the method of doing officers' guard duty at the top of the hill, directed accused, the senior lieutenant in the battery, to take the first shift from 7 a.m., to 11:30 a.m., when he would be relieved on the officers' guard by First Lieutenant Lattal, Jr., and when he left the battery about 7 a.m., for Corozal to attend the school, directed accused to take command of the battery (R. 11-12, 14-15). The battery went on an alert status at 7 a.m., and was still on that status at about 12:15 noon (R. 8-9, 15). During an alert status, all available officers were required to be present at the battery position, at least one to be on or adjacent to "director hill", the men to be within a few feet of the guns and instruments, and the battery able to go into action within one minute (R. 10).

The accused, at about 7 a.m., in the battery office, gave instructions to Staff Sergeant Frank R. Navratil, First Sergeant of the battery, as to what was to be carried out to the guns (R. 18). Between 8 and 8:30 a.m., he came down from the direction of range section hill, went upstairs into his quarters, remained there about fifteen minutes and then passed the battery office in the direction of range section hill (R. 16-17). At about 10:30 a.m., Private First Class Leonard C. Pemberton, Jr., Battery Clerk, saw accused pass by the battery day room going toward No. 1 barracks "walking from side to side" (R. 20). At about 10:45 a.m., Lieutenant Lattal, sitting on his bunk getting ready to eat at "first chow" from 10:45 to 11:15, saw accused in the doorway of the officers' quarters, holding to the door frame. The face of accused was rather flushed and he yelled to Lattal, "Hi ya". Upon Lattal's invitation accused came in and then staggered past Lattal in a drunken manner to the latrine. The clothes of accused were very dusty, and had rather large spots of clay on them. Although Lieutenant Lattal was not close enough to detect the presence of alcohol on the accused, from what he observed he would say that the accused was drunk. Lieutenant Lattal called Captain Hackman, explained the situation to him, and requested that Colonel Chapin or Major Phillips come out to the battery position (R. 15-16). Accused was in full uniform when Major Phillips arrived (R. 18).

Private Gordon S. Oates, just before "first chow", at about 11 or 11:20 a.m., glanced out of the mess hall and saw accused walking by up to his quarters. The accused was staggering and fell twice. After the second fall, Oates went out and helped accused to the foot of the steps of the quarters of accused, where he stood in case the accused could not get up the steps. He could smell liquor on person of accused, but not very well, and "guessed" that the accused was drunk. Accused was staggering when Oates saw him leave his quarters earlier (R. 19, 22-25).

At about 12:15 noon, Private First Class Pemberton saw accused come down from the officers' quarters and met accused on the path. The accused asked him what they had for chow. Accused was staggering and weaving from side to side, smelled of liquor like whiskey, his clothes were soiled, and he acted a little bit like a "drunk" man. Pemberton tried to assist accused, who leaned heavily on him, in walking about fifteen feet to the mess hall. Major Phillips appeared in about five minutes (R. 21-22).

Major Paul M. Phillips, in command of the 3rd Battalion, 73rd Coast Artillery, as directed in a phone call, arrived at Battery S at about 12:15 noon. As he was met by Acting First Sergeant Navratil, he saw accused over in the direction of the mess hall being assisted in walking by Private Pemberton. In spite of that assistance the accused fell down. The accused turned round in an attempt to salute him but did not get around. The accused had the unmistakable appearance of being drunk, smelled of liquor, and his clothing was badly soiled. In Major Phillips' opinion, accused was drunk and there was no question of it. Major Phillips told accused that he was in arrest in quarters, directed Private Pemberton to assist accused to his quarters, then found Lieutenant Lattal, and ordered him to assume command of the battery. Battery S was still in an alert status at that time (R. 8-10).

Major Edward J. Carroll, Jr., M.C., examined accused at about four o'clock at Antiaircraft Position No. 56 and found accused drunk. The specimen of urine which he then secured showed upon analysis at Gorgas Hospital a .39 content of alcohol. He stated that the accepted standard of American medical authorities is that a man with a .15 content of alcohol is drunk (R. 25-26).

When Captain Osmundson returned from school to the battery, he walked through the room of accused and found him sleeping with his face to the wall. Just before supper accused walked into

the battery office. Accused looked "awfully sleepy" and was asked to go upstairs again. Captain Osmundson saw no circumstance other than the sleeping, which lead him to believe that the accused had been drinking that day (R. 13).

4. The accused alone testified for the defense. He stated that on January 19, 1942, he took what he considered two normal size drinks and that it was the first time it ever affected him like it did that day. He enlisted as a private in the 121st Infantry in 1935, served as private first class, corporal, line sergeant, and was discharged as first sergeant about September in 1940. He was later commissioned First Lieutenant in the 101st Coast Artillery (R. 28-29).

Upon cross-examination accused stated that he took the two drinks of liquor in his quarters during the morning but could not state exactly when. He considered a normal drink about one inch in an ordinary drinking glass. He drank about two inches in a half pint bottle that morning and that was all that he drank that day. The examination by the medical officer was at about four o'clock that afternoon (R. 30-31).

5. The record shows that accused was on duty as acting battery commander from the departure of Captain Osmundson at about 7 a.m., until accused was placed in arrest in quarters at about 12:15 noon and Lieutenant Lattal directed to take over command of the battery, during a period of war and when his battery had in fact been placed on an alert status which required all available officers to be present and the battery able to go into action within one minute.

The circumstances shown in the testimony of Major Phillips, Lieutenant Lattal, Staff Sergeant Navratil, and Privates Pemberton and Oates, are conclusive proof that accused was drunk prior to about 12:15 noon when he was placed in arrest. The testimony of Major Carroll, M.C., and, in effect, the testimony of accused himself corroborate that conclusion.

6. The accused is thirty-nine years old. The records of the Office of The Adjutant General show his service as follows:

Federally recognized as First Lieutenant, Coast Artillery, Georgia National Guard, to date from December 18, 1940; appointed First Lieutenant, Coast Artillery Corps, National Guard of the United States, February 10, 1941; extended active duty, February 10, 1941, pursuant to the order of the President dated January 14, 1941.

7. The court was legally constituted. 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. Dismissal of an officer is mandatory upon conviction of a violation of the 85th Article of War committed in time of war.

Cortlo S. Hill Jr., Judge Advocate.

Charles Gibson, Judge Advocate.

(On leave), Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

(389)

Board of Review
CM 220359

MAR 26 1942

UNITED STATES v. Corporal JOHN E. ARCHIBALD (6694700), Headquarters Battery, 20th Coast Artillery (HD).	THIRD ARMY Trial by G.C.M., convened at Fort Crockett, Texas, February 20, 1942. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and KOTRICH, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Corporal John E. Archibald, Headquarters Battery, 20th C.A. (HD), did, at Galveston, Texas, on or about February 11, 1942, willfully and unlawfully take indecent liberties with the person of Bradford W. Voss, a boy of tender years.

Specification 2: In that Corporal John E. Archibald, Headquarters Battery, 20th C.A. (HD), did, at Galveston, Texas, on or about February 11, 1942, willfully and unlawfully take indecent liberties with the person of Nancy Louise Voss, a female child of tender years.

He pleaded not guilty to, and was found guilty of, the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay

and allowances due or to become due, and to be confined at hard labor for ten years. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The only substantial proof in support of the findings of guilty consists of the unsworn and unaffirmed statements in court of three children of the ages of 5, 8 and 11 years, respectively. Bradford W. Voss, age 5, named in the first Specification, made statements in support of both Specifications (R. 36-44). His older brother, Barry Voss, age 8, stated that he saw parts of the incidents involved in the two Specifications (R. 10-25). William Decker, age 11, made statements corroborative of some of the other statements as to the first Specification (R. 26-36). The child named in Specification 2, being 2½ years of age, was not produced as a witness. Accused testified and denied all of the matters pertaining to the alleged offenses (R. 45-51). There was other testimony directed solely at whether or not accused was drunk (R. 5, 52). The statements were received in evidence without objection, but the defense did not expressly consent to introduction of the statements or expressly waive objection thereto (R. 10, 26, 36).

4. The reception by the court of the unsworn and unaffirmed statements was plainly erroneous in view of the provision of Article of War 19 which requires that evidence be given on oath or affirmation. Inasmuch as these statements comprised the sole proof of guilt, there is no alternative to holding the error fatal. What was said in a prior holding by the Board of Review (CM 186545, Phillips), in a case in which sodomy with a child was alleged, and in which the unsworn statement of another child was received by the court, is applicable here. The Board said:

> "*** Victor Taylor, a child five years of age, appeared as a witness for the prosecution and was permitted to state to the court without being sworn or affirmed that he saw accused ***. This statement, not having been made under oath or affirmation, was not competent evidence and its admission was error. Article of War 19 provides that all persons who give evidence before a court-martial shall be examined on

> oath or affirmation in the form prescribed. The Manual for Courts-Martial (page 264) requires each witness before a court-martial to be sworn.
>
> * * * * *
>
> "*** there was no consent or waiver of objection by the defense, express or implied. The mere failure to object was not under all the facts in the case, a waiver.
>
> * * * * *
>
> "*** the admission of the incompetent statement of Victor Taylor constituted an error of law which injuriously affected the substantial rights of the accused."

5. Careful consideration has been given to the views expressed by the Staff Judge Advocate in his review of the record of trial to the effect that the failure of the defense to object to the omissions of the oath or affirmation constituted a waiver of the requirement. Paragraph 126c, Manual for Courts-Martial, provides as follows:

> "Waiver of objections. - The prosecution or the defense may in open court either orally or in writing waive an objection to the admissibility of offered evidence. Such a waiver adds nothing to the weight of the evidence nor to the credibility of its source. The court in its discretion may refuse to accept, and may permit the withdrawal of, any such waiver. There is no prescribed form for making a waiver. Thus, if it clearly appears that the defense or prosecution understood its right to object, any clear indication on its part that it did not desire to assert that right may be regarded as a waiver of such objection. However, a waiver of an objection does not operate as a consent where consent is required, and a mere failure to object does not amount to a waiver except as otherwise stated or indicated in this manual."

It may be assumed that the defense was aware of its right to object in the premises, but the record of trial is devoid of any expression or other affirmative indication of a desire to forego the basic right of accused to have his accusers put upon their oath or affirmation. As stated in the rule quoted above, "mere failure to object" does not

amount to a waiver before a court-martial unless it is expressly so provided in the Manual for Courts-Martial. There is no statement or indication in the Manual that a mere failure to object to the omission of the oath or affirmation of a witness operates as a waiver. Article of War 37 cannot, of course, avail to furnish lacking evidence or to make competent that which is incompetent.

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

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General.
Washington, D. C.

Board of Review
CM 220396

MAR 31 1942

UNITED STATES)	2nd CAVALRY DIVISION
)	
v.)	Trial by G.C.M., convened at
)	Fort Riley, Kansas, February
Private First Class SAM)	9 and 10, 1942. Dishonorable
SHEPHERD (37063720),)	discharge and confinement for
Headquarters & Service)	three (3) years. Disciplinary
Troop, 9th Cavalry.)	Barracks.

HOLDING by the BOARD OF REVIEW
HILL, CRESSON and McCLAIN, Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: (Finding of not guilty.)

Specification 2: In that Private 1cl Sam Shepherd Headquarters & Service Troop, 9th Cavalry, did, at Junction City, Kansas, on or about January 9, 1942, with intent to commit a felony, viz, robbery, commit an assault upon Private Ellis Sanders, Machine Gun Troop, 9th Cavalry, by willfully and feloniously cutting the said Pvt. Ellis Sanders in and upon the trunk of the body with a knife.

The accused pleaded not guilty to the Charge and its Specifications and was found not guilty of Specification 1, guilty, with exception and substitution, of Specification 2, and guilty of the Charge. The accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years. The reviewing authority approved the sentence,

designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The only question requiring consideration is the legal sufficiency of the record of trial to support the findings of guilty of Specification 2 of the Charge, and of the Charge.

a. The evidence with respect to that Specification shows that accused came into contact with Privates Sanders and Liggins at a "beer Joint" on 9th Street in Junction City, Kansas, on the evening of January 9, 1942 (R. 7, 18, 30), where accused requested a loan from Liggins, which Liggins refused to grant (R. 8, 22, 23). Somewhat later in the evening these men came together again in another establishment on 9th Street where Sanders was handed $11 by Liggins (R. 8, 23). As Sanders and accused left this establishment, an altercation arose between them during which accused drew a knife and cut Sanders in the side (R. 9, 30).

b. The Specification alleges that accused did, with intent to commit a felony, viz, robbery, commit an assault upon Sanders by willfully and feloniously cutting Sanders in and upon the trunk of the body with a knife. By exception and substitution, the court found accused not guilty of assault with intent to commit robbery, but guilty of assault "with intent to do bodily harm with a dangerous weapon" (R. 68).

Assault with intent to do bodily harm with a dangerous weapon is not included in an assault with intent to commit robbery (Dig. Ops. JAG 1912-30, sec. 1555(2), CM 123163), but assault and battery is a lesser included offense where the allegation, as in this case, charges a battery (see Dig. Ops. JAG 1912-30, sec. 1450, CM 126998).

It is, accordingly, the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the finding of guilty of the Specification and of the Charge as involve findings of guilty of assault and battery, aggravated by cutting with a knife, in violation of Article of War 96.

4. The assault and battery proven in this case is an aggravated assault with a knife. The limitation of the maximum punishment for a simple assault and battery to confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period (par. 104c, M.C.M., 1928) is not applicable. The most closely related offense to the assault and battery aggravated under the circumstances here shown is assault with intent to do bodily harm, for which the maximum authorized punishment is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of Specification 2 and of the Charge as involve findings of guilty of assault and battery, aggravated by cutting with a knife, in violation of Article of War 96; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year.

Curtis S. Hill Jr., Judge Advocate.

Chas. L. Bresson, Judge Advocate.

(On leave.), Judge Advocate.

WAR DEPARTMENT
Services of Supply
In the Office of The Judge Advocate General
Washington, D. C.

SPJGK
CM 220398

APR 8 1942

UNITED STATES v. Captain CLIFFORD J. YEAGER (0-218544), Medical Administrative Corps.	5TH INFANTRY DIVISION Trial by G. C. M., convened at Fort Custer, Michigan, March 7, 1942. Dismissal.

OPINION of the BOARD OF REVIEW
HOOVER, VAN BENSCHOTEN and KOTRICH, Judge Advocates.

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.

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

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

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

Specification 3: In that Captain Clifford J. Yeager, Medical Administrative Corps, 1605th CASU, Station Complement, Fort Custer, Mich., did, at Fort Custer, Michigan, on or about January 6, 1942, feloniously take, steal and carry away, approximately eighteen cans of tuna fish of the value of about $3.24, property of the United States, furnished and intended for the military service thereof.

Specification 4: (Finding of not guilty)

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

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

Specification 3: In that Captain Clifford J. Yeager, Medical Administrative Corps, 1605th CASU, Station Complement, Fort Custer, Mich., did, at Fort Custer, Michigan, on or about January 6, 1942, feloniously take, steal and carry away, approximately eighteen cans of tuna fish of the value of about $3.24, property of the United States, furnished and intended for the military service thereof, the aforesaid being conduct unbecoming an officer and a gentleman.

Specification 4: (Finding of not guilty)

He pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and Specification 3 thereunder, and of Charge II and Specification 3 thereunder, and not guilty of the remaining 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 "Articles of War 48 and 50½".

3. The evidence shows that accused became mess officer at the Station Hospital, Fort Custer, Michigan, on October 29, 1941, and continued in that position until about January 31, 1942 (R. 9, 48). There were five kitchens in the hospital which were supplied by one warehouse (R. 36, 37). Each kitchen had its own storeroom but supplies were occasionally borrowed from the other kitchens (R. 37, 65, 66). The "mess office" was located in the warehouse (R. 30). Sometime "after Christmas" accused asked the dietitian in charge of one of the kitchens, a Mrs. Hoover, to send twelve cans of tuna fish to his office, that is, to the mess office. Mrs. Hoover took the twelve cans to the mess office and turned them over to a Miss Hoag, the acting head dietitian, whose desk was next that of accused (R. 30, 37). Miss Hoag and a Corporal Meszaros, the "mess supply corporal", testified that about January 6, 1942, accused asked Meszaros "what had happened to the tuna fish he had on the shelf" (R. 23) or "if he had any tuna fish". Meszaros stated that there were only six cans in stock. Miss Hoag, who was present, stated that she had the twelve cans of tuna fish on a shelf by her desk (R. 29). Accused then told Meszaros to return the twelve cans to the warehouse stock (R. 30), but shortly thereafter instructed him to place the tuna fish, a can

of peas, and a can of corn in a handbag belonging to accused, and to put the handbag in accused's car. Meszaros accordingly placed eighteen cans of tuna fish, including the twelve cans which had been received by Miss Hoag, the can of peas, and the can of corn in paper sacks, placed the sacks and contents in the handbag belonging to accused, and carried the handbag out of the office and put it in accused's car (R. 23, 24, 31, 36). The tuna fish was Government property intended for the hospital mess (R. 24). It was not returned to the mess office or to the warehouse (R. 24, 30). A sales commissary price list showing the price of canned tuna fish to be $.18 per can was introduced in evidence (R. 21; Ex. A).

About January 4, 1942, accused had asked for and had placed in his car a dozen eggs, eight bottles of milk, six oranges, a box of nutmeg and some apples (R. 10, 11). About January 5 he had asked for and had removed from the mess kitchen some meat loaf and tenderloin steak sandwiches, six bottles of milk, and some pie or cake (R. 39, 41). All of this food belonged to the mess (R. 19, 42). On January 5 he had given instructions to his mess sergeant to keep stock records of food handled in the various kitchens (R. 15, 45).

Accused testified that soon after he went on active duty the hospital adjutant told him to take his meals, free of charge, at the hospital mess in order that he might ascertain the quality of the food served. Accused was overweight and accordingly asked permission, which was granted, to eat his breakfast only in the mess hall and to take sandwiches, milk and other articles from the mess to eat later (R. 52, 53). He did not instruct Meszaros to put the tuna fish in his handbag or in his car. He asked Meszaros to put his handbag in his car but did not open the bag, did not find tuna fish in it, and did not know what became of the bag thereafter (R. 61). Accused testified that when he took over the mess he found many evidences of inefficiency in its operation (R. 49, 50, 54), and found that salesmen were entertaining some of the noncommissioned officers, including Corporal Meszaros, "on the outside". As a result accused removed Meszaros from certain of his duties and assigned him to other work (R. 54). Miss Hoag was inexperienced and inefficient. Accused suggested replacing her as head dietitian and she became "quite unruly" (R. 50). Accused inaugurated a system of adequate inventories and separate accounts between the five kitchens and made other changes which seemed to cause animosity among the personnel toward him (R. 52, 64-66). There was no reason for him to take any

of the tuna fish. He had plenty of money, having an outside income approximately equal to his Army pay, and did not currently spend the whole of his pay (R. 55). He had a number of unpaid judgments against him, but these judgments were the results of disputed indebtednesses remaining after a series of businesses in which he had been interested had been closed out (R. 56-59, 67, 68).

4. There is direct evidence that at the place and time alleged in the Specifications of which he was found guilty, accused caused to be removed from the hospital mess of which he was mess officer the eighteen cans of tuna fish described in the Specifications, of the value alleged, property of the United States furnished and intended for the military service thereof. Accused denied taking the tuna fish and charged hostility on the part of Corporal Meszaros and Miss Hoag, the witnesses who testified that he took it. The testimony of these witnesses was circumstantial and positive and the court, after observing them, accepted their testimony as essentially true. Upon all the evidence the Board of Review is convinced beyond reasonable doubt that accused took and carried away the property with larcenous intent.

Although accused was mess officer and as such had charge of the property issued to the mess, his removal of the cans of tuna fish was a trespass within the law of larceny. His powers as mess officer with respect to the property were limited to care thereof for the single purpose of operating the mess as an agency of the Government and for the benefit of the military personnel of the hospital. His control over the property was subject to the control of his superior officers. Such being the case, he had "custody" only of the property as distinguished from "possession". Possession, the "present right and power absolutely to control" (par. 149g, M.C.M.) the property, remained in the United States. As stated in paragraph 149g, Manual for Courts-Martial:

> "*** Where a servant receives goods or property from his master to use, care for, or employ for a specific purpose in his service, the master retains possession, and the servant has the custody only and may commit larceny of them. A person, then, has the 'custody' of property, as distinguished from the 'possession', where, as

> in the case of a servant's custody of his employer's property, he merely has the care and charge of it for one who still retains the right to control it, and who, therefore, is in possession (i.e., constructive possession as distinguished from actual possession) of the property."

5. The two Specifications of which accused was found guilty, Specification 3, Charge I, and Specification 3, Charge II, are similar. Both are related to the same transaction. The charges are duplications except that violations of both Article of War 94 and Article of War 95 are found. Larceny is, of course, conduct unbecoming an officer and a gentleman within the meaning of Article of War 95. The sentence is authorized and the duplication is harmless.

6. War Department records show that accused was 48 years of age at the time of the commission of the offense. He was appointed a first lieutenant, Medical Administrative Corps Reserve, on April 17, 1925, and promoted to captain on May 14, 1930. He has been on extended active duty since October 27, 1941.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of 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 of dismissal is authorized upon conviction of violation of Article of War 94 and is mandatory upon conviction of violation of Article of War 95.

Richard O. Lawrence, Judge Advocate.

Charles W. Vandenhoff, Judge Advocate.

E. J. Kotrich, Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 14 1942 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Clifford J. Yeager (0-218544), Medical Administrative Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. Although the value of the stolen property was small, the record of trial demonstrates dishonesty and strongly indicates that the transaction involved in the charges was but one of a series of similar acts. Accordingly I recommend that the sentence be confirmed and carried into execution.

3. 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 it meet with approval.

Myron C. Cramer.

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl. 3-Form of action.

vol 12 Army JAG Bd. Rev.

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TITLE

DATE	BORROWER'S NAME	EXT.